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search and seizure

powers of private security personnel

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STUDY PAPER

search and seizure

POWERS OF PRIVATE SECURITY PERSONNEL

A study paper prepared for the
Law Reform Commission of Canada

by

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and

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Preface

In preparing this study paper for the Law Reform Commission of Canada, we have placed much reliance on research undertaken over a period of approximately five years at the University of Toronto's Centre of Criminology, much of which was carried out under contract with the ministries of the Solicitor General of Canada and Ontario. In addition to the authors of this study, Mary Cornish, Margaret Farnell, David Freedman, Fern Jeffries and Patty Parker have all at various times been involved in this research effort.

Chapters 2 and 5 of this study, in particular, draw heavily on the findings of this on-going research at the University of Toronto. Chapters 3 and 4 of the study were prepared exclusively by Philip Stenning.

The authors wish to acknowledge gratefully the contribution of colleagues at the Centre of Criminology, as well as the assistance and insights of those members of the private security fraternity and the union movement who kindly agreed to be interviewed on the subject of this study during its preparation. Finally, we wish to acknowledge with thanks the permission given by the ministry of the Solicitor General of Canada to cite various findings from the as yet unpublished report entitled *Policing for Profit,* prepared by Shearing and Farnell. That report reflects the views of its authors and does not necessarily reflect the views of the ministry of the Solicitor General of Canada.

CHAPTER 1

Introduction

The post-war years in Canada have witnessed what can fairly be described as a quiet revolution[1] in our country's policing and social control systems. To the general public, the major manifestation of this change has been the transformation of the public police through more sophisticated management techniques and the introduction of elaborate technology. But at the forefront of the changes which are taking place in the arrangements for policing in our society is a phenomenon whose growth has only occasionally received public attention, and has only recently become the subject of serious study by criminologists and others traditionally concerned with developments in policing and social control. This is the phenomenon of private security.

While it is often referred to conveniently as "the private security industry", this label, as we shall try to illustrate throughout this report, does not do justice to the phenomenon. This is so for two reasons. In the first place, while it is true that there is a thriving private security industry — comprised of all manner of businesses providing various security services to clients for hire — this contract security industry represents only one side of the many-sided phenomenon of private security. Equally important is the development of the so-called "in-house" side of private security, which has resulted in sometimes very substantial investments by large corporations and institutions in developing their own internal security systems. The personnel and equipment which are increasingly being deployed in this "in-house" sector of private security, are engaged not so much in the business of security as in the security of the business.[2]

The second reason why the term "private security industry" is not adequate to comprehend the phenomenon of private security involves an appreciation of the wider social and political ramifications of the phenomenon. For just as one would not dream of trying to describe the nature of public policing solely by reference to the institution of the public police, but rather by reference to the whole framework of public criminal justice of which the public police represent one critical part, so in understanding private security it is necessary to consider the wider context of private justice systems of which private security is merely the most visible and easily identifiable manifestation.

In understanding the exercise of police powers by the public police, it is essential to take full account of the criminal justice system in the context of which those powers are exercised. Furthermore, what is needed is not only to comprehend the institutional structures within the criminal justice system, which more or less constrain and control the exercise of their powers by the police, but also to give recognition to the essential social and political underpinnings of that system. Thus it can be said, for instance, that the notions we hold as to the acceptable exercise of police powers are determined as much, if not more, by our concepts of private property and privacy as by any manpower or technological constraints which may be recognized.

This report proceeds on the assumption that the same level of understanding is required in an analysis of the exercise of powers by private security personnel, as would be needed in an analysis of the exercise of similar powers by the public police. To the traditional legal mind, steeped in long-established and accepted legal and constitutional concepts, such an understanding of private security poses a substantial challenge. This is because the law has traditionally used the *form of the process adopted* as the basis for applying legal categories to disputes with which it becomes concerned[3], with little regard for the social and political forces which influence the choice of one form of process over another. It is for this reason that discretion, which is at the heart of all such choices, has until very recently been the subject of so little attention by legal scholars.

Such disinterest in the phenomenon of discretion, however, can have no place in a serious study of private security powers. For the very institution of private security, and the private justice systems which it so often represents, are more often than not no more nor less than the product of a calculated exercise of discretion against invoking the formal criminal justice process to

deal with matters, such as theft, arson, vandalism, assault, fraud, etc., which, if the formal criminal justice process had been invoked, would quite clearly be regarded as criminal matters.

As will be made clear in this report, our law currently demonstrates little recognition of the phenomenon of private security, whose recent development has been so rapid and relatively unexpected. This is especially true of the criminal law and other federal laws concerned with civil rights. With very few exceptions, police and security powers in Canada, such as arrest, search and seizure, the right to use force, to interrogate, lay charges, etc., have been developed with no explicit recognition of the modern development of private security, or the specific needs of those who are served by it. Instead, the law maintains a simple distinction between the powers of "peace officers" (including, of course, the public police) on the one hand, and private citizens on the other, assuming apparently that because the former have the virtual monopoly of public order maintenance and law enforcement responsibilities in our society, they need and must be granted greater powers than everyone else.

Yet, this legal framework must be seriously questioned in the light of certain realities surrounding the modern phenomenon of private security. It is not intended here to describe these developments in great detail; that task has already been undertaken in a number of recent publications which are readily available.[4] In order to place this study of private security search and seizure powers in its proper context, however, it will be necessary to summarize the most significant features of the quiet revolution which the development of private security in this country is bringing about, and draw out some of the important implications these changes have for our legal system and its response to problems of order maintenance and social control. This description and analysis will be found in the ensuing chapter of this study.

In Chapter 3 of the Study we consider briefly the problems posed by the constitutional division of legislative powers in dealing adequately with the question of private security powers. We shall note here that the constitutional division of legislative powers predates not only the existence of modern private security but also the establishment of modern public police forces as we know them today. But more importantly, our constitution arguably reflects a categorisation of law into public law and private law which is seriously challenged by the phenomenon of private security and the social changes it reflects.

In Chapter 4 we begin a detailed analysis of the current law governing the powers of search and seizure of private security personnel. Necessarily included in this analysis is an examination of the law governing the legal status of private security personnel.

Finally, in Chapter 5 we examine the current policies and practices of private security personnel with respect to search and seizure, and review problems posed by these practices. In this chapter we also consider the overall context of private justice within which these practices prevail, and the relationship of such private justice systems to the more formal public criminal justice system.

CHAPTER 2

Modern Private Security — Its Principal Characteristics and Role: Some General Legal Implications[5]

Documentation of the growth and characteristics of modern private security has only recently begun in Canada, with the result that many of the profiles which have been developed are somewhat tentative in nature. The size ascribed to the private security sector varies substantially according to one's definition of the phenomenon, so it is perhaps wise to begin with some description of what private security is.

What is Private Security?

Most descriptions of private security start with a general distinction between manned private security and the hardware sector. Manned private security includes the provision of personnel to perform security work of various kinds. Such personnel include guards, watchmen, patrol persons, floor detectives, investigators, escorts, couriers, alarm respondents, auditors, and security consultants. What distinguishes such persons as private security personnel is the fact that they are (a) privately employed and (b) employed in jobs whose principal component is some security function. These criteria allow private security personnel to be distinguished from public security personnel (e.g., government guards and investigators, and public police), and from other members of the public who may perform security functions as an incident to, rather than as a central component of, their regular occupation.[6]

A further important distinction within manned private security, is the distinction between contract manned security and "in-house" manned security. As the names imply, the former com-

prises an industry which provides manned security services to clients for hire, while the latter refers to the establishment, by a corporation or institution, of its own internal manned security service. From the point of view of private security powers, this distinction between contract manned security and in-house manned security has some important ramifications. In the first place, whether a security person is working on contract or as an in-house security officer may have significant consequences in terms of the legal liability for his actions of the person or corporation for whom he is acting. Quite apart from the somewhat confused law governing liability for the actions of independent contractors, as opposed to employees, there is also a likelihood that the contract under which a contract security person's services are provided to a client will have some legal effect in allocating responsibility for the person's actions between the man's immediate employer (e.g., a security guard agency) and the client for whom he is working.[7]

The distinction between contract manned security and in-house manned security is also of importance, however, because it forms the basis for a further important distinction — namely, that between licensed and unlicensed private security. As will be discussed further in the following chapter, the direct regulation and control of private security through licensing has in practice been viewed as a matter within the constitutional jurisdiction of the Provinces. Nine of the ten Provinces have enacted such legislation requiring certain sectors of private security to be licensed by Provincial authorities, and imposing some standards on these enterprises.[8] In each of these jurisdictions, it is currently only parts of the manned contract security industry — specifically security guard agencies, private investigation agencies, and their employees — which are required to be licensed, although in three Provinces proposals to include other parts of the contract security industry, and even in-house personnel, are in varying stages of official consideration or implementation.[9] Again, from the point of view of a consideration of private security powers, the extent to which private security personnel are subject to such direct governmental regulation and control is obviously of some considerable importance. While the actual extent of this type of control will be the subject of further consideration elsewhere in this report, it is sufficient to mention here that none of these existing Provincial statutes confers any additional law enforcement powers on their licensees. Indeed, in some cases the statutes provide that licensees shall not be permitted additional powers.[10]

By contrast to manned private security, the hardware sector of private security is concerned almost exclusively with the manufacture, distribution and servicing of a wide variety of security hardware and equipment, ranging from alarm systems to weapons, from electronic monitoring equipment to lie-detectors, and from armoured vehicles to guard dogs. While there is undoubtedly some overlap between the security hardware industry and the contract manned security industry — usually in the provision of security consultant services by security hardware firms, or of alarm response services by alarm system manufacturers, etc. — it is not thought to be very great. Very little research has been undertaken into the hardware sector of private security in Canada, so few generalizations about it can safely be made. The significance of the security hardware industry for a study of private security search and seizure powers, however, lies in the transformation which has been effected in search procedures as a result of technological developments in the production of various types of search equipment (e.g., metal detectors, electronic anti-theft devices which can be attached to merchandise, library books, etc.). Beyond a consideration of these technical aids to the exercise of search powers, the security hardware industry will not be the subject of further consideration in this study.

Manned Private Security — Its Size and Growth

It is now well recognized that the manned security sector of private security has experienced a quite phenomenal growth rate during the past two decades in Canada. Because recording procedures have been poor in many provinces with respect to licensed contract manned security, and non-existent anywhere in Canada with respect to the unlicensed contract and in-house manned security sectors, accurate estimates of the growth and current size of manned private security in Canada are scarcely available. In 1973, the Deputy Solicitor General of Ontario had this to say about the size and growth of manned private security in the Province:

> "Let's look for a moment at the extent of this growth. Certainly it has been exceptional by any standards. Between 1966 and 1973 the number of registered agencies increased from 113 to 201. They almost doubled in number.
>
> The number of registered agents increased even more dramatically in this same period — a three-fold increase from 5,000 in 1966 to nearly 15,000 in 1973. It is interesting to note that during this same seven year period our public law enforcement agencies grew at only one-tenth of this rate.

But this is just the recorded growth of the agencies and agents registered under the Act. We can assume a similar growth to have occurred with unregistered security personnel, such as "in-house" security guards employed by commercial organizations. Estimates place this number at a level which at least matches the number of registered agents with contract agencies. Thus we may now have between 25,000 and 30,000 private security personnel employed in this province.

The dimensions of the private security industry are placed in even sharper focus when one compares these figures with the overall number of uniformed public police personnel in Ontario which this year totals less than 14,000 — two private security personnel for every policeman."[11]

Commenting on these observations five years later, Shearing and Stenning had this to say about the present size of manned private security nationally in 1978:

"More recently, working with census material, Farnell and Shearing (1977) have confirmed a high rate of growth for contract security, on a national level. A conservative estimate of the growth of contract security personnel in Canada over the period 1961-71 would be over 200 percent. They note that because of difficulties in equating 1961 and 1971 census data, an accurate estimate is difficult to obtain, but that the growth rate may well be as high as 750 percent. Unfortunately, because of difficulty with the data, they were not able to provide an estimate of growth for in-house security or for private security as a whole.

They were, however, able to provide estimates of the number of persons employed as contract or in-house security personnel both on a national basis and by Province, within the private sector. (They excluded government personnel because of difficulties encountered in isolating private security agents from other occupational categories such as prison guards.) The results of their analysis are provided in the following table (Farnell and Shearing, 1977: 45):

TABLE 1

COMPARISON, PUBLIC AND PRIVATE SECURITY FORCES BY PROVINCE, 1971

Province	Public Police	Private Security (in-house, contract)*
Newfoundland	627	870
Prince Edward Island	137	105
Nova Scotia	1,082	1,450
New Brunswick	856	1,280
Quebec	12,928	12,465
Ontario	14,169	13,105
Manitoba	1,785	1,260
Saskatchewan	1,472	855
Alberta	2,819	1,960
British Columbia	3,678	3,325
Yukon Northwest Territories	176	55
TOTAL	39,724	36,720

*Excluding government security personnel.

SOURCE: Police Administration Statistics, Statistics Canada cat. no. 85-204; Census Occupations Data, 1971, Data Dissemination Service.

As the preceding table indicates, the figures for Ontario cited by Warren appear to over-estimate considerably the number of private security persons in Ontario. For 1961, licensing data in Ontario indicate the number of contract security guards at 7,895 while our estimate based on census data is only 4,780. Farnell and Shearing suggest that this discrepancy is probably explained, in large measure, by a tendency for Ontario licensing statistics to over-estimate numbers of private security agents. They point out, however, that this difficulty should not seriously affect the usefulness of Ontario license statistics as an estimate of growth.

Notwithstanding the difficulties encountered in estimating growth rates in private security there seems little doubt that, today, private security persons outnumber the public police. Indeed, we might well be approaching the two to one figure mentioned by Mr. Warren."[12]

In a recent study of licensed manned contract security in Ontario, Shearing and Farnell report that:

"Figures supplied by the Registrar for agency and agents licensed in the years 1967 through 1975...reveal an increase of 97.5 percent in the number of agencies over this eight-year period. The number of agents' licenses issued during the same period increased even more dramatically by 187.5 percent.[13]

The growth of contract security in Ontario has not only out-stripped population growth, but has been more than double the rate of growth of the public police at a time when the public police themselves were growing almost three times faster than the population."[14]

They also report that "in 1976 there were 231 licensed contract security agencies and 12,979 agents located in 38 cities and towns in all regions of Ontario."[15] By comparison, Statistics Canada reports a total uniformed police strength in Ontario in 1976 of 19,709.[16] When it is considered that Shearing and Farnell's figures include only licensed manned contract security personnel, and do not include unlicensed manned contract security personnel[17] or the very substantial "in-house" sector of manned private security, it is readily apparent that in Ontario manned private security now probably substantially outnumbers uniformed public police strength in the Province.

From all of this it is apparent that, numerically, manned private security represents not only an extremely large and rapidly expanding phenomenon, but that in some areas it is becoming a serious competitor with the public police as the single most important instrument of social control and law enforcement.[18] A telling example of the extent to which this can be so can be found in a report which appeared in a Toronto newspaper in 1975. The news item, which was headed "Company 'forgot to call' Police

Chief", told of a major landslide which occurred on the property of a large mining company in the little town of Asbestos, Quebec. As a result of this disaster, several of the town's residents saw their houses disappear into a gaping hole in the ground. The news item described the resentment of the local Chief of Police on learning that the mining company, instead of calling in his men to set up appropriate road-blocks and generally assume control in the emergency, had deployed its own security force in the streets of Asbestos to take care of the situation. Presumably a not insignificant factor in the company's decision on this occasion was the fact, as reported in the article, that the company's "plant protection service" outnumbered the town's police force by two to one.[19]

Manned Private Security — Its Pervasiveness

Of equal, if not greater importance, than the numerical significance of manned private security, is its sheer pervasiveness. For manned private security is to be found in almost every conceivable type of place. It is to be found in places of work (plants, factories, office buildings, construction sites, mines, etc.), in residential areas (condominium estates, housing projects, apartment buildings, student residences, hotels, etc.), in commercial areas (shopping plazas and malls, warehouses, parking garages, etc.), in places of recreation (stadiums, arenas, parks, swimming pools, bowling alleys, etc.), in places of learning (schools, universities, libraries, etc.), and in major transportation centres (airports, bus and train stations, etc.). Manned private security thus has a pervasive presence which touches almost every aspect of our daily lives; and it is arguably this very pervasiveness of the phenomenon of private security which is a more important factor to be considered in examining the powers of private security personnel than its mere numerical strength. Both its numerical strength and its pervasiveness, however, indicate the strong probability that if a member of the public is going to be searched by anyone in our society, it will be by a private security person rather than by a public policeman. For, as we shall indicate below, search powers are as critical and indispensable a "tool of the trade" to many private security personnel as they are to public policemen.

The Impact of Changing Property Relations — "Mass Private Property"

It is important to emphasize here that the growth and pervasiveness of private security which we have described is no chance phenomenon. Rather, it finds its origins in some very major changes in the economic and social structures of our society. Most significant of these changes has been the development of property ownership away from small, separate free-holdings to what Shearing and Stenning have termed "mass private property".[20]

The evidence of this change can be seen all around us, especially in the larger urban areas where private security (and, of course, people) are most concentrated. The row of single or double family dwellings is pulled down and replaced by a massive high-rise apartment building, or a multiple condominium town-house complex. In the process, a single public street, which was previously patrolled by the public police, is developed into a mass of private "streets" (the corridors in an apartment building, or the walkways in a town-house project) which in all probability will become the domain of private security.

In the same way, a row of small commercial stores frequently will give place to a massive commercial complex which may include shops, restaurants, a hotel, a cinema, an apartment complex, recreational areas, etc. Again, whereas previously the individual shops fronted onto public streets patrolled by the public police, the new facilities will likely front onto private "streets", often underground, and be patrolled by private security personnel hired by the corporate owner of the new complex. While the public police will in all probability not be barred from such places, the very nature and design of such places ensure that they will no longer form part of the regular patrol beat of the public policeman. It thus becomes possible in certain areas of some of our larger urban environments to traverse several city blocks without once setting foot on a public street. In doing so one may pass by countless commercial units containing millions of dollars' worth of private property, in the form of merchandise, office equipment, etc., all of which is felt to be in need of protection by its corporate owners, but most of which will rarely if ever fall under the regular surveillance of the public police. Rather, the new private town becomes the domain of private security, administering private justice at the behest of its private corporate employer. In some cases, the exterior of such a complex is, for security as well as for

other economic reasons, no more than a solid blank concrete wall, replacing the previous row of small shop fronts. Under such circumstances, the transformation from public policing to private security is virtually complete: the public police beat has effectively shrunk or disappeared entirely, and the new private security beat has been established in its place.

The economic and social explanations for these developments in modern property ownership appear to have received very little attention from researchers anywhere. Even the extent and rate of these significant changes does not appear to have been the subject of systematic study. The important fact about them, however, for an examination of the role and powers of private security, is that they appear to represent an ongoing trend which is unlikely to be reversed within the foreseeable future. If this prediction is correct, it must be apparent that the modern development of private security, and its relentless annexation of what was previously the domain of the public police, seem equally unlikely to be reversed within the foreseeable future. This forecast represents a critical reference point from which the role and powers of private security in public order maintenance, social control and law enforcement must be examined. In this context the words of a recent government Task Force Report on Policing in Ontario perhaps bear repeating: "(N)o prescription for policing in modern Ontario", wrote the Task Force, "is fully comprehensive unless private security personnel and private quasi-police are covered." Furthermore, they concluded that "a full and comprehensive review of private security services in the province is a matter of urgency."[21]

Private Security as an Alternative to the Public Police

Structural changes within society such as we have described above are not the sole explanation for the modern development and growth of private security. For there are other important factors which influence the choice of private security as an alternative to the public police as the instrument for protection and social control. These other factors are equally important to an understanding of the developing private security role and the exercise of private security powers, and will be briefly summarized here.

The first of these factors which must be mentioned is the current trend towards public fiscal restraint, and its impact on the public police. This trend has resulted in what the Ontario Task Force on Policing has characterized as "a very real potential crisis in financing municipal policing services."[22] There is no evidence, however, of any decrease in the demand for policing services, and under these circumstances it seems inevitable that increasing resort will be made to private security to fill these needs. As Shearing and Stenning have noted:

> "If the police cannot provide these services, then corporations and other organizations are likely to provide them for themselves, as the phenomenal growth of private security testifies. This has occurred, and will continue to do so, whether or not it receives official sanction."[23]

Associated with this trend towards fiscal restraint in public police funding, and of great importance to an understanding of the development of private security, has been a growing disillusionment with the public police — and indeed with the entire criminal justice system — as an effective mechanism of crime prevention and social control. Nowhere is this concern more evident than in the Law Reform Commission of Canada's own attempts in recent years to search for and develop more credible alternatives to our existing criminal justice responses to social problems.[24] Within private security, and among those who hire private security rather than looking to the public police for protection, such disillusionment with the public criminal justice system may fairly be said to be endemic, although by no means universally subscribed to. It has led, however, to some remarkable innovations in an attempt to develop ways of dealing with what are generally considered to be criminal behaviours, which will be more credible to the "victim", and less disruptive of the social environment in which such behaviours occur.

The Move Toward Preventative Policing

This shift away from more traditional criminal justice approaches can best be summed up as a conscious move toward preventative rather than curative policing. As we shall note in later parts of this study, private security not only vigorously espouses a preventative philosophy, but expresses this philosophy in practice. An appreciation of this philosophical orientation of private security is essential to an understanding of the exercise by private security of the more traditional law enforcement powers such as those of search and seizure.

Preventative policing is, of course, not the monopoly of private security, and it must be acknowledged that the philosophy of "prevention rather than apprehension" increasingly pervades the policies and strategies of public law enforcement agencies. As Shearing and Stenning have pointed out, however, private security has two important advantages over the public police in this respect:

> "The preventative approach to security, epitomized in this example, appears to be more accessible to private security, than it is to the public police, for two different but mutually reinforcing reasons. On the one hand, private security's unique access to private places and their ultimate relationship to the persons who control activities in these spaces, places them in a much better position to prevent crime than their public counterparts who must, by definition, remain outsiders looking in. On the other hand, private security, unlike the police, are not part of a system of social control dominated by principles of justice, retribution, deterrence and the like. They are, in contrast, relatively unhampered by these traditional concepts, and so are in a far better position to utilize a wider range of options than the public police in preventing crime. The very fact that private security prefers to talk of "loss prevention" rather than "crime prevention" is itself a testimony to their ability to move outside the traditional justice framework."[25]

Freedman and Stenning have pointed out one further consideration to be borne in mind in this connection. They note that preventative policing tends to rely more heavily on technological aids (such as alarm systems, electronic anti-theft tagging systems, closed circuit television systems, computerized stock control and auditing systems, etc.) to be effective. They add:

> "It is arguable that the exigencies of a privately-controlled capitalist economy demand that the provision of such equipment and insurance services must emanate primarily from private industry. The public sector may be prepared to take responsibility for the financial security of individuals, and to provide a police service which offers them some protection. But given technological advances in the security field, the increasing requirements for insurance coverage, and a growing paranoia (for which both the public police and the private security industry bear some responsibility) about crime and violence, without nationalisation of insurance and manufacturing companies, additional demands for security can only be met from within the private sector, and the private security industry will inevitably continue to expand."[26]

Public and Private Places

The reference, in the quote from Shearing and Stenning, above, to private security's "unique access to private places" leads us conveniently to a consideration of a key issue in understanding

the role of private security — namely, the social and legal definitions of places as "public" or "private". Inextricably bound up with these definitions are our legal institutions of private ownership and possession (occupancy), and privacy.

The significance of these concepts to private security lies in the fact that, historically, the notion of "private place" has evolved out of the recognition of private ownership of places. More important, however, is the fact that police and law enforcement powers, because they developed originally from the peace-keeping powers of ordinary citizens, have also evolved closely constrained by the legal recognition of the rights of private ownership. The legal concept through which this evolution was accomplished was the concept of "the peace". Essentially, the "King's Peace" extended to the King's highway and other common lands not the subject of private ownership. In places which were the subject of private ownership, it was originally not the King's Peace which prevailed, but the "private peace" of the owner/occupier.[27] These concepts, which lie at the very foundations of our modern-day distinctions between public criminal law and private civil law, were elevated by the courts to a status of virtual sanctity. They are reflected in the now famous dictum of the judges in *Semayne's Case* in England, to the effect that:

> "The house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose."[28]

Three centuries later, in 1904, they were expressed equally forcefully by Weaver, J. in the oft-quoted United States case of *McClurg v. Brenton:*[29]

> "The right of the citizen to occupy and enjoy his home, however mean or humble, free from arbitrary invasion and search, has for centuries been protected with the most solicitous care by every Court in the English speaking world from Magna Charta down to the present, and is embodied in every bill of rights defining the limits of governmental power in our own republic. The mere fact that a man is an officer, whether of high or low degree, gives him no more right than is possessed by an ordinary private citizen to break in on the privacy of a home and subject its occupants to the indignity of a search for the evidences of a crime, without a legal warrant procured for that purpose. No amount of incriminating evidence whatever its source, will supply the place of such a warrant."[30]

For a long time the two "peaces" were almost mutually exclusive, the King's peace (which gradually became known as the public peace) being defined and enforced by public authorities, with the assistance of the citizenry, and at the behest of the Sovereign, and the private peace of property owners being defined and enforced by private authorities (the property owners and their agents). With the gradual breakdown of order which accompanied the industrial revolution in England, and which stimulated the establishment of the "new police" (the forerunners of our modern public police), the distinction between the public peace and the private peace became blurred, but was never eradicated. In modern times, the distinction is still to be found reflected in both our civil and our criminal law. In our civil law, it is reflected in the still largely unfettered rights of private property owners to control their property and to control access to it by the general public. In criminal law, it is reflected in the right of the private property owner to bar even the public police from entering private property except under very exceptional circumstances.[31]

The access of the public police to private places is thus still carefully circumscribed by law, and under most circumstances subject to the invitation of the owner/occupier. In addition, barring actual obstruction of justice or complicity in criminal acts, there is still no legally enforceable duty on citizens to report crimes observed being committed on private property.[32] Hence the great importance, from the point of view of their role in law enforcement and order maintenance, of the "unique access to private places" which private security enjoy. On the one hand they are in a unique position to observe and detect criminal activity on private property. On the other hand, the rights of private property ownership, which they enjoy by virtue of the fact that they act as agents of the owner, leave them with a virtually unfettered discretion as to whether they will invoke the criminal justice process in dealing with such activity, or attempt to deal with it in some more private fashion.

The crux of this issue, however, lies in the legal definitions of private and public places, and the extent to which these definitions remain tied to the legal concepts of private property ownership and possession. As has been noted, the concepts of private and public places were originally defined almost exclusively by the concepts of private ownership and possession, "private places" being places which were privately owned and where the private peace prevailed, and "public places" being those which were not

privately owned, and where the King's or public peace prevailed. Even in the earliest days of the development of the common law, however, it was recognized that there could not be an absolute congruence between private ownership and private places. The earliest exceptions to be established under the common law were so-called "public houses", inns, taverns, hostelries and other places of rest which lay along the King's highway. It was recognized very early on that if the King's peace was to have any meaning on the King's highway, such places, even though privately owned, must be placed within its protection. Indeed, the law relating to inn-keepers represents one of the very first applications of public law in England to privately owned places.[33] Even though privately owned, these places were recognized as "public places", thus beginning the gradual trend towards a divergence between "private ownership" and "private places."

Under our law today, there is no single legal definition of a "public place". Public places are defined as such by common law, applicable in Canada, as well as by numerous statutes, both Federal and Provincial. Under the *Criminal Code,* a "public place" is defined as including[34] "any place to which the public have access as of right or by invitation, express or implied".[35] By comparison, "public place" is defined in the Saskatchewan *Liquor Act* as including "...in relation to a person who enters occupied land or an occupied building without the consent of the occupant, the land or building so entered".[36] Whether or not a place is considered a "public place" by the courts, therefore, would appear to depend upon what issue is in dispute and what particular law (common law or statute) governs the resolution of that issue.

It is only quite recently that the courts have had to confront the issue as to which parts of mass private property are "public places", and which are not, and it seems likely that many more cases will have to be heard before applicable principles are clearly established. In a line of cases[37] culminating in the important decision of the Supreme Court of Canada in *Harrison v. Carswell*[38], the courts have considered the legal status of the common areas (sidewalks, parking areas, etc.) of shopping plazas, and the respective rights of tenants, plaza owners, tenants' employees and other members of the general public in these areas. All of these cases appear to have been decided on the basis that such areas are public places. The governing decision in *Harrison v. Carswell* is particularly noteworthy, however, for the fact that a majority (5:2) of the Supreme Court approved its earlier decision in *R. v Peters*[39] in which it held that the owner of a shopping plaza has a right to

withdraw permission to be in such a place from any member of the public at any time, and that anyone who refuses to leave under these circumstances, whatever may be the reason for his being asked to leave, commits a trespass. In supporting this conclusion, the majority in *Harrison v. Carswell* observed (per Dickson, J.):

> "Anglo-Canadian jurisprudence has transitionally (sic) recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by the due process of law."[40]

In the recent case of *R. v. Spencer*[41], Berger, J., of the British Columbia Supreme Court, had to consider the rights of tenants in an apartment building with respect to members of the public using the common hallways of such a building. During the course of his judgment, Berger, J., observed that: "No argument that the common hallway was a public place can be advanced here."[42] This observation, however, may be regarded as *obiter,* since it was not necessary to the decision in the case, which was concerned with whether or not a tenant in the apartment building had a right to eject such a person as a trespasser. The court held that a tenant has no such right since he is not in "peaceable possession" of the common hallways, but merely has a right to use them himself as a right appurtenant to his occupation. "Thus the removal of trespassers", concluded Berger, J., "is a matter for the landlord or the police."[43]

In giving judgment in this case Berger, J. also referred by analogy to the situation in a condominium apartment building, noting that an owner of such an apartment is in joint legal possession of the common hallways, and therefore would have a right to eject a trespasser.

Berger, J.'s comment that such hallways could not be considered public places, however, appears to have been prompted by the fact that the stated case upon which he was deciding indicated that the person who had been ejected was "a trespasser" and had no right to be there. The cases which have considered the meaning of "public place"[44], however, suggest that this cannot be considered an adequate test of whether a place is a "public place" or not. Of particular relevance in this connection is the decision of Maher, D.C.J., of the Saskatchewan District Court, in *Tegstrom v. The Queen,* in which he noted that:

> "To constitute a "public place" does not, in my view, require that all segments of the public have a right of access thereto. The word "public" is capable of being broken down into groups or divisions, some examples of which immediately come to mind, being the "buying public", the "book-reading public", the "travelling public" and, without attempting to be facetious, the "drinking public". Many groups that can be identified by habits or pursuits, or other things that distinguish them, are often described as "public", *the only qualifications appearing to be that the number constituting the group is substantial and that all possessing the same common interests are included.* It follows that a segment of the public interested in partaking of alcoholic beverages may logically be described as "public", even though certain portions of the public at large may be excluded either by choice or otherwise."[45] (emphasis added)

Perhaps on this reasoning we could conclude that the common areas of apartment buildings and condominium complexes are to be considered "public places", on the grounds that they are regularly frequented by the "visiting public", some of whom are there by express invitation, but many of whom (including tradespeople of various kinds) are there by implied invitation. At any rate, *Harrison v. Carswell*[46] seems to make it clear that if such an invitation, whether it be an express invitation or an implied invitation, is withdrawn by the owner or someone lawfully in peaceable possession of the place, anyone who declines to leave on request will become a trespasser subject to forcible ejection, whether the place is a public place or not. Thus the right of the owner to control his property, and access to it, appears to be recognized by our law as paramount.

The importance of all of this to a consideration of private security powers lies in the fact that, unlike the public police, who derive their powers independently from statute and common law, private security for the most part derive their powers from the rights of the private owners of the property which they are protecting. Thus, the public policeman must nowadays look to statutes or the common law prescribing police powers for his authority to search someone. The private security guard, on the other hand, is likely to seek his authority to search someone not only from the *Criminal Code* or other law prescribing law enforcement powers, but also from the panoply of legal rights of the private property owner (whose agent he is) to control the property and access to it. Because such powers have evolved out of concepts of private ownership, rather than out of our notions of private or public places, however, his right to exercise such powers appears to be legally unaffected by whether or not the private property he is guarding is a public place or a private place.

So long as private places roughly coincided with private ownership, and public places roughly coincided with public ownership, and so long as the "policing" of private places was primarily the responsibility of private persons, and the policing of public places was primarily the responsibility of public police authorities, the definition of powers and authority, such as the power to search, by reference to the ownership of the property on which they were to be exercised posed few problems. As we have noted above, however, this situation no longer pertains, and in fact with the increasing tendency towards the development of "mass private property", the divergence between "private property" and "private places" would appear to be widening at a significant rate in our society. It seems likely that more and more of these areas of "mass private property" will come to be recognized by the courts and the law as "public places". Yet as we have noted, primary responsibility for "policing" them is rarely borne or accepted by the public police, but falls instead to private security. Thus, more and more public places are located on private property, and are under the effective control of persons who are exercising not only public law enforcement powers but also powers derived from the rights of private property ownership.

This continuing trend raises the important question of whether a person's right to privacy, freedom from arrest, search, etc., should continue to be defined primarily according to whether the place he is in is privately owned or not. Given that more and more areas of private property are being recognized as "public places", should we perhaps consider the possibility that a person's rights should no longer be defined by whether he is on private or public property, but by whether he is in a private or a public place?

Such a possibility presents quite a challenge to some of our more fundamental notions of the constitutional division of legislative powers between the Federal Parliament and the Provincial Legislatures, and with our traditional attempts to maintain rigid divisions between civil and criminal law.[47] Such problems are by no means new to Canadian legal scholars, however. Modern concepts of diversion, the incorporation of restitution and compensation into the criminal process, etc., pose similar problems which, in some cases, have even been successfully grappled with by the courts without apparently undue difficulty.[48] They are problems, however, which, as we shall attempt to illustrate in the remainder of this study, are placed squarely before us by the modern development of private security and by the approach it takes to the exercise of law enforcement powers such as search.

Control of Property as a Basis for "Policing" and Social Control

One final comment on the matter of the appropriateness of property ownership as the basis for the definition of the scope of law enforcement powers must be made at this point. A study of the law's evolution makes it quite clear that one of the guiding concerns in the development of laws prescribing police powers in the common law world has been the concern to protect the individual from undue interference by the state and by other individuals. Through this concern, our notions of personal freedom and privacy have been established. As we have noted, a cornerstone in defining the limits of personal freedom and privacy has been the recognition of rights of property ownership.

It can be said that a citizen's rights to personal freedom and privacy have been recognized as being greatest when he is within the confines of his own privately-owned home. As he moves out into publicly-owned public places, his rights to freedom and privacy are commensurately reduced, being subject to all manner of laws (including police powers) designed to protect the public access to, and integrity of, such public places. His privacy and freedom become curtailed still further — or rather, are liable to become curtailed still further — as he moves onto the privately-owned property of others. For in doing so, he must submit himself to the possible exercise of the powers of that other property owner to control the property, and to control access to it.

In developing this legal regime, the courts have concentrated on the importance of *individual*[49] freedom, and have drawn from this the conclusion that it is best protected by ensuring the individual's right to control what goes on, on his own private property. In an era in which most property was individually owned, or owned by small family groupings (the single family dwelling, the small family business, etc.), such a legal regime would seem natural and perfectly justifiable. While important exceptions to it have always been recognized (e.g., the homeowner is not allowed to obstruct public justice in exercising his rights to privacy)[50], these are noteworthy precisely because they are exceptions to the general principles.

The development of large corporate ownership, and in particular the modern developments of corporately-owned mass private property, however, have raised serious questions as to the appro-

priateness of applying to such ownership a legal regime which has historically been so closely aligned to small individual freeholdings. As Flavel has pointed out, the simple analogy between individual property ownership and corporate property ownership is open to question. Criticizing the law's tendency to treat individual and corporate ownership on equal terms, Flavel notes:

> "An important element in this approach is the realisation that there are significant differences between the ownership, control and security of personalised property, and of industrial and commercial property. The legal institution of property creates an impression of similarity but does not reflect the social and economic reality. The ownership and control of property in industry and commerce involves more than the right to control physical assets. It also extends to the control of people, as workers. Security in this situation is therefore particularly important. In immediate terms, security of personal property merely ensures continued enjoyment of property objects. But in industry and commerce the function of security in maintaining owner/management control of physical assets constitutes one element in the process through which the power relationships between groups in the work situation are preserved."[51]

The fact that more and more areas of privately-owned property are, through the development of mass private property, becoming public places, merely exacerbates this issue, and provokes the question as to whether we can continue adequately to protect individual rights by legally treating corporate ownership of mass private property as if it is socially no different from individual ownership of one's own home or small business. Because, as we shall note, private security powers are based precisely on this legal analogy, this is a question which should be at the forefront of any serious examination of them.

Serious consideration of this issue was given by the minority (Laskin, C.J.C. and Spence, J.) in the case of *Harrison v. Carswell.* Indeed, it may well be that in time the case will become famous because of the innovative judicial thinking of the minority, rather than because of the more traditional judicial thinking of the majority. The minority judgment, delivered by Laskin, C.J.C., is a gem of judicial creativity which deserves to be read in its entirety. Some passages from it, however, will serve to illustrate its general tenor. Summarizing what he saw as the principal issue in the case, Laskin, C.J.C., observed:

> "An ancient legal concept, trespass, is urged here in all its pristine force by a shopping centre owner in respect of areas of the shopping centre which have been opened by him to public use, and necessarily so because of the commercial character of the enterprise based on tenancies by operators of a

variety of businesses. To say in such circumstances that the shopping centre owner may, at his whim, order any member of the public out of the shopping centre on penalty or liability for trespass if he refuses to leave, does not make sense if there is no proper reason in that member's conduct or activity to justify the order to leave."[52]

He then went on to note that:

"The considerations which underlie the protection of private residences cannot apply to the same degree to a shopping centre in respect of its parking areas, roads and sidewalks. Those amenities are closer in character to public roads and sidewalks than to a private dwelling. All that can be urged from a theoretical point of view to assimilate them to private dwellings is to urge that if property is privately owned, no matter the use to which it is put, trespass is as appropriate in the one case as in the other and it does not matter that possession, the invasion of which is basic to trespass, is recognizable in the one case but not in the other. There is here, on this assimilation, a legal injury albeit no actual injury. This is a use of theory which does not square with economic or social fact under the circumstances of the present case.

What does a shopping centre owner protect, for what invaded interest of his does he seek vindication in ousting members of the public from sidewalks or roadways and parking areas in the shopping centre? There is no challenge to his title and none to his possession nor to his privacy when members of the public use those amenities. Should he be allowed to choose what members of the public come into those areas when they have been opened to all without discrimination? Human rights legislation would prevent him from discriminating on account of race, colour or creed or national origin, but counsel for the appellant would have it that members of the public can otherwise be excluded or ordered to leave by mere whim."[53]

Laskin, C.J.C., then asked rhetorically: "Can the common law be so devoid of reason as to tolerate this kind of whimsy where public areas of a shopping centre are concerned?"[54] From here he began to spell out a compromise position, in his attempt to reconcile the public nature of such places with their private ownership.

"If it was necessary to categorize the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of the members of the public doing violence to neither and recognizing the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based."[55]

Summing up his views in the case, he said: "It seems to me that the present case involves a search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation."[56] Finally, he concluded:

> "I would agree that it does not follow that because unrestricted access is given to members of the public to certain areas of the shopping centre during business hours, those areas are available at all times during those hours and in all circumstances to any kind of peaceful activity by members of the public, regardless of the numbers of members of the public who are involved. The Court will draw lines here as it does in other branches of the law as may be appropriate in the light of the legal principle and particular facts."[57]

We have quoted from Laskin, C.J.C.'s, dissent in this case at considerable length because we believe it contains the seeds of an innovative approach to dealing with conflicting rights which may prove highly fruitful in coming to grips with the important issues which are posed by the modern development of private security, its role in law enforcement and order maintenance, and its exercise of powers such as that of search and seizure. The majority of the Supreme Court in *Harrison v. Carswell* rejected this approach, principally on the ground that "if A is to be given the right to enter and remain on the land of B against the will of B, it would seem to me that such a change must be made by the enacting institution, the Legislature, which is representative of the people and designed to manifest the political will, and not by this Court."[58] Fortunately, this concern with the limits of the judicial role is not one which need unduly constrain a body such as the Law Reform Commission of Canada in coming to grips with the problems posed by the modern development of private security.

Summary

In this Chapter we have attempted to summarize the principal characteristics of private security and its role, and some of their more significant legal implications. We have done so in order to provide the necessary context which we believe is indispensable to a serious examination of the exercise of powers such as search and seizure by private security personnel.

The size of the manned private security sector in Canada is extremely large, equalling, if not surpassing, that of the public police in this country. A considerable portion (probably at least half) of it is not currently subject to any direct governmental

regulation through licensing or other legislative controls. It maintains a pervasive presence in our society which touches almost every aspect of our daily lives. As a result of the modern development of "mass private property", increasingly more public places are coming to be "policed" almost exclusively by manned private security rather than by the public police. In some such areas, manned private security represents a serious competitor with the public police as the single most important instrument of social control and law enforcement.

These developments are not a chance phenomenon, but find their origins in deep-rooted social and economic trends which are unlikely to be reversed within the foreseeable future in Canada. They are also reinforced by fiscal restraints on public police financing, widespread and growing disillusionment with the formal criminal justice system as an effective vehicle for crime control and order maintenance, and a general trend towards a search for alternative forms of policing which espouse a preventative rather than a curative philosophy.

Private security personnel derive their authority and powers as much, if not more, from the private rights of property ownership of the property owners for whom they act as agents, as from the general criminal law concerning law enforcement. In this respect they are quite unlike the public police. Yet because of the changing nature of our society, private security personnel are increasingly finding themselves called upon to exercise these powers in public rather than private places. This is because their powers are historically derived from the institutions of private property ownership, rather than being linked to our more modern concepts of private and public places. Yet there is cause to question the analogy which our law has tended to draw between individual ownership and control of private property in the form of small freeholdings, and corporate ownership of mass private property which comprehends substantial portions of property which are public places but which are not regularly policed by the public police.

The problems posed to the law by the modern development of private security challenge some of our most fundamental legal and constitutional concepts. Such problems are not entirely new, however, either to legal scholars or to our courts. Similar problems arise out of many other areas, such as diversion, restitution and compensation, which have been the subject of study by the Law

Reform Commission of Canada in its attempts to re-shape our criminal law and criminal process. They are problems, most importantly, which no serious examination and review of the exercise of private security powers can afford to ignore.

CHAPTER 3

Private Security and the Constitution[59]

Under the constitution of Canada, the *British North America Act*[60], legislative powers are distributed between the Federal Parliament and the Provincial Legislatures by Sections 91 and 92.

Federal Jurisdiction

The Federal Parliament is empowered by Section 91 to legislate for the "Peace, Order and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" (by Section 92). For greater certainty, but notwithstanding the generality of this grant of Federal legislative authority, Section 91 enumerates a list of classes of subjects over which the Federal Parliament has exclusive legislative jurisdiction. These itemized classes of subjects are deemed not to come within "the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Among these itemized heads of Federal Parliamentary jurisdiction are three which might be considered of some relevance to a consideration of private security:

Item 1A: The Public Debt and Property

Item 27: The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Item 29: Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Item 1A; The Public Debt and Property, is of some relevance because the Federal Government is a major consumer of contract manned security services, hired to assist in the protection of public property. Shearing and Farnell report that in their study of licensed manned contract security in Ontario, "the data indicate that 26 per cent of respondents had contracts with the Federal Government."[61] Of agencies located in Ottawa, almost 30 per cent reported that more than 50 per cent of their business was with the Federal Government, while two-thirds of these agencies reported doing some business with the Federal Government. The Federal Government, however, has never attempted to introduce legislation directly relating to private security, although it has administratively adopted standards which must be met by contract security firms seeking Federal Government contracts.[62] The possibility remains, however, that this head of Federal Parliamentary jurisdiction could justify some Federal legislation affecting private security.

Under Item 27: Criminal law and procedure, the Federal Parliament has, of course, enacted a substantial body of legislation, including criminal law enforcement powers and protections under the *Criminal Code,* which directly affects private security. Again, however, private security has never been explicitly recognized as an identifiable entity of such legislation. Instead, it has fallen within more general categorizations of the population as "peace officers", owners or persons in lawful possession of property, and "any one"[63], or "a private person".[64] Whether or not Parliament could constitutionally identify private security as a separate constituency having different law enforcement powers remains an open question, which will be discussed further below.

Item 29, which concerns express exceptions within Provincial heads of legislative jurisdiction enumerated in Section 92 of the Act, is of relevance principally because of the exceptions listed in Item 10 of Section 92. This Item enumerates a head of Provincial legislative jurisdiction with these express exceptions, as follows:

"10. Local Works and Undertakings other than such as are of the following Classes: -

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

By virtue of these exceptions, the Federal Parliament has constitutional authority to enact legislation affecting a variety of aspects of private security. The "in-house" security operations of a number of private transportation and communications corporations (e.g., Canadian Pacific, Bell Canada) could presumably fall under Federal legislative jurisdiction by virtue of the exception in Section 92, Item 10, paragraph (a). Indeed, it is by virtue of this head of jurisdiction, for instance, that the Federal *Railway Act*[65] has been enacted, Section 400 of which permits the appointment of railway security personnel (including the personnel of private corporations such as Canadian Pacific) as railway constables with full "peace officer" status.[66] A number of industries have been declared to be under Federal jurisdiction by virtue of the exception in Section 92, Item 10, paragraph (c). An example of such an industry is the uranium mining industry.[67] The result of this would seem to be that the in-house security forces of such mining companies fall under the direct legislative jurisdiction of the Federal Parliament. Indeed at one such mine which we visited during the course of preparing this study, the entire in-house security force had been certified as part of a collective bargaining unit under the *Canada Labour Code*[68], rather than under the relevant Provincial labour relations legislation.[69]

With respect to the overall authority granted to the Federal Parliament by Section 91 of the *B.N.A. Act,* to legislate for the "Peace, Order and Good Government of Canada", Shearing and Stenning have noted:

"...it would seem that such Federal legislative power could only be invoked if the existence of the private security industry, or its conduct, could be shown to pose problems of national urgency, transcending Provincial interests. While this, of course, is not an unthinkable scenario (particularly in the context of the role of private security in, for instance, labour disputes), it seems to us that such a situation, if it should arise, would be likely to be of a temporary nature, which would not give rise to any permanent Federal legislative competency in this area."[70]

Apart from the possibility that private security could become a subject of general legislative authority under the emergency aspect of the "peace, order and good government" power, however, it may also incidentally become the subject of legislation in relation to other areas of general legislative authority which have been held to fall within this head of Federal jurisdiction. An example of such a general subject of federal legislation would be aeronautics. The Federal Parliament has legislative authority over aeronautics by virtue of its "peace, order and good government" power[71], and as a result it may, in regulating aeronautics, enact provisions which incidentally regulate the activities of private security within the field of aeronautics. The actual provisions which have been enacted pursuant to this power are discussed further below.

Provincial Jurisdiction

Among the itemized heads of legislative jurisdiction reserved exclusively to the Provincial legislatures by S.92 of the *B.N.A. Act,* there are several items which could be seen as relevant to private security:

Item 5: The Management... of the Public Lands belonging to the Province...

Item 9: Shop, Saloon, Tavern and Other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

Item 10: Local Works and Undertakings (other than those which are excepted — see above).

Item 11: The Incorporation of Companies with Provincial Objects.

Item 13: Property and Civil Rights in the Province.

Item 14: The Administration of Justice in the Province, including the Constitution, etc. of Provincial Courts, and including Procedure in Civil Matters in those Courts.

Item 16: Generally all Matters of a merely local or private Nature in the Province.

It is not intended here to examine each of these heads of Provincial jurisdiction in detail to establish which aspects of private security may be comprehended by them. It is sufficient to point out that between them they provide for a wide array of possible constitutional justifications for Provincial legislation in relation to private security. As was noted in the previous chapter, Provincial legislatures in nine out of ten Provinces have in fact enacted legislation, in the form of licensing statutes, directly relating to certain parts of the private contract security industry. None of this legislation appears to have been challenged before the courts as to its constitutionality.

Some further comment with respect to Item 14: The Administration of Justice in the Province, is called for at this point, however, in the light of the profile of private security which has been drawn in the preceding chapter of this study. On the subject of this item, Shearing and Stenning have observed:

> "The astonishingly rapid development of the private security industry in recent years, and its modern manifestations, however, raise the possibility that it may be viewed not simply as an adjunct of business (or, in the case of private investigators, perhaps as an adjunct of the legal profession), but also as an adjunct to the administration of justice and, more particularly, to public policing. The close relationships which have developed over the years between the private security industry and the public police lends credence to this view of the industry, as does the similarity of functions, objectives, and methods shared by these two institutions."[72]

Constitutional Ambiguities

In considering possible areas of overlap between Federal and Provincial legislative authority with respect to private security, an important distinction must be made at the outset between the authority to enact legislation affecting private security generally, and the authority to enact legislation in relation to specific fields of legislative competence, which may incidentally affect private security as it operates within that field of legislative competence. Thus, while the Federal Government undoubtedly has power to legislate provisions to regulate private security as it operates in the aeronautics field (by virtue of its power to legislate in relation to aeronautics generally), this does not necessarily imply any authority to enact legislation affecting private security generally, as a field of legislative competence in its own right. This important distinction must be constantly borne in mind in the discussion which follows, in which we examine constitutional ambiguities in

relation to the power to enact legislation which generally affects private security, as a possible field of legislative competence in its own right.

As we have noted in the previous section on Federal jurisdiction, the issue of the distribution of constitutional authority to legislate in relation to criminal justice is an extremely thorny one which currently remains very unsettled. It is an issue which has come before the Supreme Court of Canada no less than four times for consideration within the last two years[73], yet it cannot be said that clear definitive principles have been established. Only one of these four cases, *Attorney General of Quebec and Keable v. Attorney General of Canada et al.,* has specifically concerned the power to legislate in relation to policing and the establishment of police forces, and how this power fits into the Federal jurisdiction over "criminal law and procedure" (S.91.27 of the *B.N.A. Act*) on the one hand, and the Provincial jurisdiction over "the administration of justice in the Province" (S.92.14) on the other. Neither Federal nor Provincial legislation establishing police forces was specifically challenged in this case, however, with the result that the nearest the Supreme Court of Canada came to even discussing this important issue, was Pigeon, J.'s observation (speaking for the majority of the Court) to the effect that:

> "Parliament's authority for the establishment of this force (i.e., the R.C.M.P.) and its management as part of the Government of Canada is unquestioned."[74]

The issue, then, of how legislative responsibility for policing is constitutionally divided between the Federal Parliament and the Provincial legislatures, is one which remains very much a matter of debate. Although the Supreme Court of Canada has on several occasions made *obiter dicta* on the question[75], it is one which has never been presented squarely before the Court for consideration, and consequently has never been the subject of a definitive ruling. Yet if private security, because of its modern characteristics and role, could truly be regarded as an adjunct to public policing and law enforcement, clearly this is a question the answer to which may be of great significance in determining which level of legislative authority has the power to enact general legislation relating to private security, and to what extent.

The principal constitutional problem in this area, of course, lies in the fact that at the time the *B.N.A. Act* was drafted, neither the public police as we know them today, nor modern private

security, existed in Canada. It is, then, a situation in which what is needed (to borrow the words of Laskin, C.J.C., uttered in another context) is "a search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation."[76] Barring constitutional reform touching this matter in the near future (which does not appear to be particularly likely judging by current constitutional debate), it seems likely that any such "appropriate legal framework" is going to have to be fashioned out of the current, somewhat obscure, words of Sections 91 and 92 of the *B.N.A. Act.*

Private Security and Law Enforcement Powers

The question of the constitutional distribution of general legislative authority in relation to private security may be initially analogized to that of the problem surrounding such authority in relation to the public police, although in the final analysis it can be seen to involve a good many more complications. Setting aside for one moment Federal legislation establishing Federal police forces, it can be seen that in relation to Municipal and Provincial police forces, the current actual distribution of legislation appears to involve a distinction between the institution (the police force itself) and criminal law enforcement powers[77] (such as arrest, search, etc.). Thus, the Provinces (through *Police Acts,* etc.) have enacted legislation governing the establishment, maintenance, regulation and control of the institution, while the Federal Parliament has enacted legislation (through such statutes as the *Criminal Code,* etc.) conferring criminal law enforcement powers on, amongst others, various members of the institution ("peace officers", "public officers", etc.).

While, in the context of this limited example, this appears to be a straightforward and practical solution to reconciling the Federal criminal law power and the Provincial power in relation to the administration of justice, its simplicity is in fact superficial. For it leaves open the all-important question as to which legislative authority has the power to decide which members of the institution shall be recognized as entitled to exercise the prescribed powers; i.e., in this context, which legislative authority has power to enact as to who shall and who shall not be recognized, for instance, as "peace officers" for the purposes of the *Criminal Code* provisions granting "peace officers" certain criminal law enforcement powers not granted to ordinary citizens. Is this authority to designate

persons as "peace officers" for the purposes of enforcing criminal law a matter which falls within the Federal Parliament's authority to legislate in relation to criminal law and procedure, or is it a matter of substantive criminal law enforcement falling within the Provincial legislature's power to enact laws relating to the administration of justice (including criminal justice)?

Even this relatively simple question is one to which our law currently does not appear to give any clear answer. Indeed, a substantially similar question — relating to the constitutional legislative power to designate a person as a "prosecutor" for the purposes of the *Criminal Code* — is currently being decided by the Supreme Court of Canada in the case of *R. v. Hauser*[78], and it can be hoped that the Court's decision, when it is handed down, will be of some assistance in resolving the legal question with respect to "peace officer" status.

It is noteworthy that the courts, up to now, seem to have decided cases on the assumption that it is the Federal Parliament which has the authority to designate who shall be recognized as a "peace officer" for the purposes of the *Criminal Code.* This is because the definition of "peace officer", under Section 2 of the *Code,* does not appear ever to have been challenged as to its constitutionality, as for instance the definition of "Attorney General" and "prosecutor" have in the *Hauser* case. There is no particular reason to believe, however, that the one definition is any less open to constitutional challenge than the other.

In reviewing the case law relating to the status of "peace officer" under the *Criminal Code,* Freedman and Stenning summarized their conclusions in five legal propositions, which are set out below, following the relevant part of the *Criminal Code* definition of "peace officer", to be found in Section 2 of the *Code:*

> "peace officer" includes
>
> . . .
>
> (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process, . . . "[79]

Freedman and Stenning summarize the law governing this status, as follows:

> "(1) There is a presumption that someone who acts as a peace officer, or who testifies that he is a peace officer, is one. It is only a prima facie presumption, however, which may be displaced by other evidence to the contrary: *R. v Laramee* (1972) 9 C.C.C. (2d.) 433, *R. v. Seward* (1964) 4 C.C.C. (2d.) 166, *R. v. Wallace, R. v. Hall, R. v. Leach* (1959) 125 C.C.C. 72.
>
> (2) A person may be found to be a peace officer for the purposes of the *Criminal Code,* even though the legislation under which he is appointed does not specifically designate him as having the status or authority of a "peace officer" or "constable", if the actual powers vested in him by the statute are sufficient to bring him within the definition of "peace officer" under s.2 of the *Criminal Code: R. v. Renz* (1973) 10 C.C.C. (2d.) 250.
>
> (3) The fact that a person is designated, by the statute under which he is appointed, as having the powers of a "peace officer" or "constable", does not necessarily mean that he is a "peace officer" for the purposes of all the sections of the *Criminal Code* which relate to "peace officers"; the extent of his powers, particularly, under the *Code* will depend upon the purposes for which he was appointed and the extent of his responsibilities: *R. v. Beaman* (1963) 2 C.C.C. 97, *R. v. Laramee* (1972) 9 C.C.C. (2d.) 433, *Wright v. The Queen* (1973) 6 W.W.R. 687.
>
> (4) The definition of "peace officer" under s.2 of the *Criminal Code* is an exhaustive definition, and no-one who is not specifically included in that definition is a peace officer for any purpose under the *Code: R. v. Laramee* (1972) 9 C.C.C. (2d.) 433.
>
> "(5) The term "peace officer", where it appears in sections other than s.2 of the *Code,* does not necessarily refer to all those people who are included within the definition of "peace officer" under s.2 of the *Code;* who is included in any specific instance will be a matter to be determined by a proper construction of the particular provision in question: *R. v. Laramee* (1972) 9 C.C.C. (2d.) 433."[80]

This case law seems to recognize implicitly that it is within the competence of the Federal Parliament to enact legislation defining who shall be recognized as "peace officers" for the purposes of the exercise of criminal law enforcement powers under such Federal statutes as the *Criminal Code.*[81] This Federal legislative authority of designation would seem, thus, to be justified at least as a power incidental to the Federal criminal law power, although the subject may also be a matter falling within the Provincial authority to legislate in relation to the administration of justice. The doctrine of paramountcy establishes that in such cases, in which a Federal ancillary legislative power co-exists with an exclusive Provincial head of legislative competence over the same subject matter, any Federal legislation which exists will "occupy the field" and prevail over any conflicting Provincial legislation in the area. So long as

Federal legislation continues to occupy the field, conflicting Provincial legislation will remain inoperative, but not constitutionally invalid. Should the Federal legislation be repealed, and the field become open once again, then Provincial legislation may once again become operative.[82]

Pursuing the analogy into the area of private security, it can be seen that, currently, Federal legislation appears to have been enacted on much the same constitutional basis. Thus, in the case of arrest, for instance, the *Criminal Code,* in Section 449(2), gives special powers of arrest to:

> "(2) Any one who is
> *(a)* the owner or a person in lawful possession of property, or
> *(b)* a person authorized by the owner or by a person in lawful possession of property."

These categories, of course, especially those persons contemplated in sub-paragraph *(b),* include most private security personnel. Furthermore, as with the designation of "peace officers", the *Code* contains specific provisions designating what kinds of persons shall be recognized as "property" owners and possessors for the purposes of such sections as Section 449 (2), by specifying in Section 2 a detailed definition of "property" for this purpose. And this designation, which does not appear to have been challenged constitutionally in the courts, is effected despite the fact that "property and civil rights in the Province" is clearly enumerated as a head of exclusive Provincial legislative jurisdiction under Section 92.13 of the *B.N.A. Act.* It would thus seem that the designation of who shall be recognized as "property" owners for the purposes of the arrest power under Section 449 (2) of the *Code* must, as with the designation of "peace officers", be constitutionally justified as a legislative power incidental to the Federal criminal law power, although it may also be a matter falling under exclusive Provincial legislative authority with respect to "property and civil rights".

On this reasoning, there would seem to be no constitutional bar to the enactment by the Federal Parliament, if it chose, of legislation granting special law enforcement powers to private security personnel as such, and defining "private security personnel" in such a way as to designate who shall be recognized as falling within that category for the purposes of the exercise of such powers. Such legislation would only interfere with, or detract from the apparently well-recognized authority of Provincial legislatures to enact general legislation directly relating to private security, to the extent that such provisions conflict with it, in which case such provisions would be inoperative and the Federal legislation would be paramount.

One example of the exercise of Federal legislative power with specific reference to private security does exist, and has apparently not met with any constitutional challenge. This is Section 5.1 of the Federal *Aeronautics Act*[83], as enacted by an amendment to the Act in 1973.[84] The new Section 5.1 provides for the establishment and implementation of security measures at airports and on aircraft, and specifically grants extensive powers of random personal search to "security officers" for this purpose. Subsection 5.1 (9) provides for the designation of who shall be recognized as "security officers" for the purposes of this Section, as follows:

> "(9) The Minister may designate as security officers for the purposes of this section any persons or classes of persons who, in his opinion, are qualified to be so designated."

Furthermore, Subsection 5.1 (10) authorizes the making of regulations which "may authorize the Minister to make orders or directions with respect to such matters coming within this Section as the regulations may proscribe". Clearly this Section represents the purported exercise of Federal legislative authority to enact provisions substantially affecting private security, and in particular to grant private security personnel significant powers of random personal search not accorded to ordinary citizens, or even to "peace officers", by the *Criminal Code.* Such legislation is clearly justified as being necessarily incidental to Federal legislative competence in relation to a specific field of activity (aeronautics), rather than as an example of any Federal competence to enact general legislation in relation to private security.

Civil and Criminal Law Distinctions and their Limits

Determining the existence of a Federal competence to legislate specific law enforcement powers for private security personnel, however, is only a beginning. Assuming such legislative authority exists, and given the reality of private security which has been described in the previous chapter of this study, there remains the question of how far Federal legislation could go in recognizing and controlling the kinds of preventative policing methods which are so commonly practised by private security personnel. As has been noted in the previous chapter, and will be examined in more detail later in this study, private security personnel, in exercising their functions, rely as much, if not more, on the civil rights of the owners of the property they are protecting as on any formally recognized criminal law enforcement powers which they currently enjoy. Search procedures provide an instructive example of this.

Our criminal law does not currently grant to anyone, even peace officers, the power to conduct random personal searches or searches of personal property as a crime prevention technique. Yet, as we shall illustrate in subsequent chapters of this study, such random searches are a technique of preventative policing commonly resorted to by private security personnel in protecting the property they are assigned to guard. They accomplish this by a number of means, including the exercise, as agents of the property owner, of the rights of the private property owner to control access to and exit from the property. Obviously, the determination of which legislative authority has authority to enact general legislation[85] to control and regulate this kind of preventative policing activity will depend on whether it is viewed essentially as an exercise of civil rights pertaining to property (in which case it would seem to fall clearly within Provincial legislative jurisdiction), or as an exercise of criminal law enforcement or crime prevention powers (in which case it might be constitutionally justified as falling within Federal legislative competence).

To maintain that because such rights are entirely associated with private property ownership, they must always be regarded as falling within Provincial jurisdiction, is clearly not an adequate resolution of this question because those aspects of property and civil rights which fall under the heads of Federal legislative power enumerated in Section 91 of the *B.N.A. Act* are withdrawn from Provincial competence. This is illustrated by the fact that already, under the *Criminal Code,* special criminal law powers have been accorded to private property owners by Federal legislation (e.g., by Section 449 (2)), apparently without constitutional challenge. Such an approach to the distribution of constitutional legislative authority, which posits a rigid distinction and exclusivity between civil and criminal matters, is one, furthermore, which has not found universal favour with the courts in recent years. Rather, the courts appear to have attempted to develop a more flexible approach which recognizes the changing social conditions not only of criminal behaviour, but also of its control.

A recent illustration of this kind of flexibility in interpreting the scope of Sections 91 and 92 of the *B.N.A. Act* with respect to crime and its control, can be found in the majority judgment of the Supreme Court of Canada in the important case of *R. v. Zelensky et al.*[86] The case is one which is of very considerable significance to an examination of private security powers, because it deals with the constitutionality of restitution and compensation provisions of the *Criminal Code.* Specifically, the question before

the court was whether the enactment of Section 653 of the *Code,* authorising the making of compensation orders by criminal courts as part of the sentencing process, which can be enforced as if they were civil judgments in provincial superior courts, was a valid exercise of Federal legislative authority, or an invalid intrusion on Provincial legislative authority over "property and civil rights". In upholding the Section as a valid exercise of the Federal criminal law power, Laskin, C.J.C., delivering the opinion of the majority of the full court (6:3), had this to say about the approach which should be taken by the courts in interpreting such constitutional powers:

> "We have long abandoned the notion expressed in the judgment of the Privy Council in *Re Bd. of Commerce Act, 1919* (1922) 1 A.C. 191, (1922) 1 W.W.R. 20 at 25, 60 D.L.R. 513, that there is some fixed "domain of criminal jurisprudence". The Privy Council itself had a different view in *A.G. Ont. v. Hamilton Street Ry.,* (1903) A.C. 524 at 529, 2 O.W.R. 672, 7 C.C.C. 326, where it noted that it was "the criminal law in its widest sense" that fell within exclusive federal competence. If that was true of the substantive criminal law, it was equally true of "procedure in criminal matters", which is likewise confided exclusively to Parliament. Indeed, Duff C.J.C. said in *Prov. Sec. of P.E.I. v. Egan* (1941) S.C.R. 396 at 401, 76 C.C.C. 227 (1941) 3 D.L.R. 305, that "the subject of criminal law entrusted to the Parliament of Canada is necessarily an expanding field by reason of the authority of the Parliament to create crimes, impose punishment for such crimes, and to deal with criminal procedure." We cannot, therefore, approach the validity of s. 653 as if the fields of criminal law and criminal procedure and the models of sentencing have been frozen as of some particular time. New appreciations thrown up by new social conditions, or re-assessments of old appreciations which new or altered social conditions induce, make it appropriate for this court to re-examine courses of decision on the scope of legislative power when fresh issues are presented to it, always remembering, of course, that is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the *B.N.A. Act.*"[87]

The modern development of private security, its increasing virtual monopoly of policing and order maintenance in more and more public places, and its resort to many non-traditional policing methods, can all be viewed as "new social conditions" which might justify a re-examination of the scope and limits of criminal law and procedure as it applies to these phenomena.

Summary

It would appear that, as with public policing, constitutional legislative jurisdiction over private security is divided between Parliament and the Provincial legislatures. Since the provisions of

the *British North America Act* establishing these jurisdictions were enacted well before the modern phenomenon of private security existed, however, there is little certainty as to exactly how the courts will interpret those provisions to apply to private security today. A review of the provisions shows that there are at least three specific heads of Federal legislative competence under which legislation affecting private security might be validly enacted, as well as the authority of the residual "peace, order and good government" power.

Legislation directly regulating private security has generally been considered to fall within the exclusive jurisdiction of the Provinces, although this assumption has never been challenged in the courts. There is a wide array of possible constitutional justifications for such legislation, particularly in the absence of any comparable competing Federal legislation.

Of particular concern, in the light of the modern realities of private security, is the approach which will be taken by the courts in reconciling the Federal criminal law power with the Provincial authority to legislate in relation to the administration of justice, and how this might be applied to private security. A study of analogous case law in relation to the law enforcement powers of "peace officers" and "property" owners suggests that there may be a strong constitutional justification for legislation which not only defines specific private security powers, but also designates who shall be recognized as falling within the category of private security personnel for the purposes of exercising such powers. The forthcoming decision of the Supreme Court of Canada in the case of *R. v. Hauser*[88], may lead to some re-assessment of this question. There does, however, appear to be one instance of such Federal legislation, defining specific private security search powers, with Ministerial authority to designate persons as having the authority to exercise such powers, already in existence in Section 5.1 of the Federal *Aeronautics Act.*[89] This one example, however, can be justified as legislation necessarily incidental to the exercise of Federal legislative authority in relation to the field of aeronautics, and does not imply any Federal authority to enact legislation in relation to private security generally.

More challenging is the problem of how far the criminal law power can be interpreted to comprehend many of the non-traditional preventative policing methods commonly resorted to by private security, and which hitherto have been thought of as falling exclusively within Provincial legislative competence. The

modern reality of private security, because it has been and still is so closely associated with private property, challenges some of our fundamental notions about the divisions between civil and criminal law. The courts, however, and particularly the Supreme Court of Canada, have demonstrated a willingness to take a flexible approach to such issues in the light of such changing social conditions, which call old interpretations into question.

CHAPTER 4

The Law Governing Private Security Search and Seizure

There is no identifiable body of law governing the powers of search and seizure of private security personnel as such. This is because, with one possible exception noted in the previous chapter[90], such personnel are nowhere recognized by our law as having specific powers which are different from those of other persons. This absence of explicit legal recognition of the modern phenomenon of private security means that the law governing search and seizure by private security must be discovered through an analysis of the general law governing this topic, which applies to all persons regardless of their occupational training or environment.

The Legal Status of Private Security Personnel

A critical starting point in describing the search powers of private security personnel, is an examination of the legal status of such personnel. This is because the general law relating to search involves important distinctions based upon the legal status of the person who may wish to exercise search powers. Specifically, three different status categories can be identified which are of relevance to search powers: (1) persons who are "peace officers"; (2) persons who are owners of "property" or in lawful possession of it, and their authorized agents; and (3) "any one", or "private persons". Private security personnel may be found in each of these categories.

(1) *"Peace Officers"*

An unknown, but not insignificant, number of private security personnel hold "peace officer" status in one form or another. Such status may be acquired by private security personnel in a number of different ways. The most common form of peace officer status held by such personnel is that of "special constable", which is normally acquired through appointment as such under Provincial police statutes. For instance, Section 67 of the Ontario *Police Act*[91] provides that "a county court judge, a district court judge or a provincial judge may, by written authority, appoint any person to act as special constable for such period, area and purpose as he considers expedient". The Section also gives similar appointment powers to the Commissioner of the Ontario Provincial Police. All such appointments are subject to the approval of the Ontario Police Commission. The appointing authority also has power to "suspend or terminate the service of such constable", and is required to notify the Commission of such action. Special constables, on appointment, are required to take an oath similar to the oath of office sworn by regular constables under the Act.

The police statutes of nine out of the ten Provinces[92] contain similar provisions permitting such special constable appointments. The inadequate maintenance of records of special constable appointments, however, makes it impossible to discover how many persons hold special constable appointments in Canada, for what areas, and for what purposes, and how many of these are private security personnel. The great majority of persons in the private security field, however, do not have special constable status. In a recently completed study of the contract guard and investigative industry in Ontario, Shearing and Farnell found that in their sample, which included several hundred employees, only two per cent of guards and two per cent of investigators had special constable status.[93] In a similar study of the in-house sector of private security in Ontario, Jeffries observed twenty-one security forces from different companies and institutions (including manufacturing companies, retail outlets, hotels, hospitals, oil companies). She found that out of those twenty-one forces, only two currently included persons with peace officer status by virtue of special constable appointments. Another four had in the past had such persons on their staff, but had voluntarily given up special constable appointments and no longer had officers on their forces with this authority.[94]

Freedman and Stenning have noted that special constable appointments have certain characteristics which make them particularly adaptable to private security needs:

> "The essential features of those appointments in many jurisdictions are theoretically that special constables are appointed (1) for a specific purpose, (2) for a specific area, and (3) for a specific period of time, and it is these three essential elements of the appointment which have made special constable status so adaptable and relatively accessible to private security needs.
>
> In reality, however, the versatility of special constable appointments is enormous, and in many cases their "specific" characteristics (as to purpose, place and time) are rather more theoretical than real."[95]

The "specifics" of a special constable appointment may vary from the power to enforce parking by-laws on property being guarded by the holder of the appointment, while he is assigned to guard that property, to powers which are almost equal to those of a public policeman and which may be exercised throughout the Province in which the person is appointed. In some instances, almost an entire in-house security force will consist of persons with special constable status.[96] Also, special constable status will sometimes be granted to security personnel to augment more limited peace officer powers derived from other sources. This is normally only the case with public security employees[97], although examples are to be found of such powers being granted to security employees of private corporations.[98]

As will be apparent from the foregoing description, special constable status is the subject of little theoretical knowledge in Canada, and still less empirical knowledge.[99] Its prevalence within private security is almost certainly quite small, but will not be more precisely known until further research into this phenomenon, and better controls over special constable appointments, have been implemented.

Private security personnel may also derive "peace officer" status from other sources of statutory authority. A comprehensive inventory of such statutory provisions which permit the conferment of more or less limited peace officer status on various persons, who may or may not include private security personnel, would necessitate a complete review of Federal and Provincial statutes and municipal by-laws throughout Canada, which is beyond the purview of this study. Some examples, however, will serve to illustrate the extent and variety of such provisions.

An example of a Federal statute which provides for the appointment of "peace officers" who may also be private security personnel, is the Federal *Railway Act.*[100] Section 400 of this Act provides that:

> "400. (1) A superior or county judge, two justices of the peace, or a stipendiary or police magistrate, in any part of Canada, a clerk of the peace, clerk of the Crown or judge of the sessions of the peace in the Province of Quebec, within whose jurisdiction the railway runs, may, on the application of the company, appoint any persons who are British subjects to act as constables on and along such railway."

Section 401 provides for the jurisdiction and powers of such constables as follows:

> "401. (1) Every constable so appointed, who has taken such oath or made such declaration, may act as a constable for the preservation of the peace, and for the security of persons and property against unlawful acts
>
> (a) on such railway, and on any of the works belonging thereto;
> (b) on and about any trains, roads, wharfs, quays, landing places, warehouses, lands and premises belonging to such company, whether the same are in the county, city, town, parish, district or other local jurisdiction within which he was appointed or in any other place through which such railway passes, or in which the same terminates, or through or to which any railway passes which is worked or leased by such company; and
> (c) in all places not more than a quarter of a mile distant from such railway.
>
> (2) Every such constable has all such powers, protection and privilege for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery and prosecution of offences, and for keeping the peace, as any constable duly appointed has within his constablewick."

Persons may be, and are, appointed as constables under these provisions even though they are not public employees and are employed full-time in security positions by private corporations. Furthermore, the broad terminology used in paragraph *(b)* of subsection 401(1), including the phrase "and premises belonging to such company", appears to have been interpreted to mean that railway constables may also exercise their authority on company premises which have only a tenuous connection with the company's railway operations. Thus, one railway company employs some of its railway constables as security officers in its substantial chain of large hotels. Whether such an interpretation of these provisions would withstand legal challenge, however, remains a matter of some doubt, especially in the light of the wording of Section 400(1) of the Act which specifies that such persons may be appointed "to act as constables on and along such railway".[101]

Similar provisions to those in the Federal *Railway Act* are to be found in the *Railway Acts* of British Columbia[102], Ontario[103], Quebec[104] and Saskatchewan[105], as well as in the Federal *National Harbours Board Act*[106], under which harbour police may be appointed. This last Act is unusually specific as to the legal status and powers of constables appointed under it. Subsection 5(1) of the Act provides that persons appointed as constables under the Act shall be appointed

> "as a police constable for the enforcement of this Act and the by-laws and for the enforcement of the laws of Canada or any province insofar as the enforcement of such laws relates to the protection of property under the administration of the Board or to the protection of persons present upon, or property situated upon, premises under administration of the Board."

The subsection concludes with the provision that:

> "for that purpose every such police constable is deemed to be a peace officer within the meaning of the *Criminal Code* and to possess jurisdiction as such upon property under the administration of the Board and in any place not more then twenty-five miles distant from property under the administration of the Board."

A variety of other statutes at the Provincial level allow for the appointment of persons as "constables" or "peace officers" for specific purposes. In Ontario, the *Public Works Protection Act*[107] provides in Section 2, for the appointment of security guards for the purpose of protecting public works in the Province. Subsection 2(2) of the Act provides that such guards have, "for the purposes of this Act, the powers of a peace officer".

Another example of such Provincial legislation may be found in the *Provincial Parks Act*[108] of Newfoundland, which provides for the appointment of "officers" who have "and may exercise within Provincial parks the powers and authority of a member of the Constabulary Force of Newfoundland".

Another important source of limited "peace officer" status for private security personnel is Provincial legislation permitting municipalities to appoint by-law enforcement officers for the enforcement of their by-laws. Section 68 of the Ontario *Police Act*[109], for instance, provides that:

> "68. The council of any municipality or the trustees of any police village may appoint one or more municipal law enforcement officers who shall be peace officers for the purpose of enforcing the by-laws of the municipality or police village."

As one might expect, the type of by-laws under which private security personnel are most commonly appointed as by-law enforcement officers are parking and traffic by-laws.

The significance of all of these statutory provisions, from the point of view of an examination of private security powers, is that they do not specify that persons who may be appointed as "peace officers", etc. must be public employees. Indeed, as will be apparent from some of the provisions cited above, in many cases exactly the opposite intention is apparent. This means that they are all potential sources of peace officer status for private security personnel.

With the gradual evolution of more sophisticated regulatory Provincial legislation dealing with private security personnel, has come a concern as to the appropriateness of such persons holding "peace officer" status at all. Initially, this concern found expression in some rather vague provisions in Provincial licensing statutes, prohibiting any licensed guard or investigator from holding "himself out in any manner as performing or providing services or duties connected with the police."[110] A similar provision in Ontario[111] was the subject of disagreement between the Provincial Registrar of Private Investigators and Security Guards and the Chairman of the Metropolitan Toronto Police Commission in 1971. The Registrar issued a warning to licensees that the provision in the Ontario statute meant that they could not issue parking tickets, even though they may have special constable or by-law enforcement appointments for this purpose. The Police Commission Chairman, who had made the appointments specifically for this purpose, understandably felt otherwise. The dispute was apparently buried by the subsequently issued opinion of the Ontario Attorney General to the effect that the provision was not sufficiently clearly worded to support a prosecution of licensed security guards, who were special constables, for ticketing activities.[112]

In Alberta, more specific prohibitory legislation was introduced to limit the holding of peace officer status by licensed private investigators and security guards, by an amendment to the Province's *Private Investigators and Security Guards Act* in 1973.[113] Section 19 of the Act now provides that:

> "19. A person holding a licence under this Act shall not
> (a) hold himself out in any manner as performing or providing services or duties ordinarily performed or provided by police or,

(b) at any time, whether by agreement with a municipality or municipal police commission or otherwise, act as a member of the police force or perform the duties of a peace officer, including a special constable or by-law enforcement officer, unless
  (i) such duties or services are restricted to the enforcement of municipal by-laws pertaining to the parking of vehicles, and
  (ii) he is acting as a security guard and possesses an appointment as a by-law enforcement officer."

The adoption of a substantially similar provision in Ontario is currently proposed in a Bill before the Provincial legislature to completely overhaul the Province's *Private Investigators and Security Guards Act.*[114] If enacted, however, this Bill will go further than the Alberta provision, since the proposed new legislation will cover in-house security personnel as well as contract security personnel with respect to some of its provisions, including the one under consideration here. It may well be, therefore, that in the future no private security personnel in Ontario will be permitted to hold peace officer status except under the limited conditions of an appointment to enforce municipal parking by-laws. This would presumably not affect those few private security personnel, such as certain railway security personnel, who already fall under Federal rather than Provincial jurisdiction. The exact implications of such a provision, however, are not yet clear.

As we noted in the preceding chapter of this study, a further complication surrounds the legal status of "peace officer", due to the fact that each legislative authority appears to have legislated on the assumption that it can designate who will be recognized as a "peace officer" for the purposes of its own legislation. The fact that a person is appointed as a "peace officer" under a Provincial statute, therefore, does not guarantee, for instance, that the courts will recognize him as a peace officer for the purposes of all of the provisions of the *Criminal Code* which refer to "peace officer": see e.g., *R. v. Beaman*[115], *R. v. Laramee*[116], and *Wright v. The Queen.*[117] This is because, in deciding whether or not to so recognize him, the courts will be guided first by the definition of "peace officer" in Section 2 of the *Criminal Code,* and only secondarily by the terms of the statute under which he derives his appointment. Conversely, a person whose appointment does not specifically indicate that he is a "peace officer" may nevertheless be regarded as a "peace officer" for the purposes of *Criminal Code* provisions if the courts feel that he is the kind of person contemplated by the *Code's* definition of "peace officer": see e.g., *R. v. Renz.*[118] Finally, the fact that a person is recognized as a "peace officer" for the purpose of one provision of the *Criminal Code* referring to "peace officers", does not necessarily mean that that person will be recognized as a "peace officer" for the purposes of other provisions of the *Criminal Code* referring to "peace officers": see *R. v. Laramee.*[119]

The complexity of this law governing the status of "peace officer" must be of serious concern to those who wish to see the allocation of law enforcement powers in our society clearly and rationally legislated. This concern should be particularly acute when it is considered that the law currently specifies no criteria as to qualifications and training required of persons who are appointed as "peace officers". Reviewing the current law, Freedman and Stenning concluded:

> "We believe that serious efforts should be made to discover under what circumstances peace officer status is accorded to private security personnel, and to ensure that in the future the current confusions over the implications of peace officer status are cleared up. A person who is appointed a peace officer, for instance, should be fully aware of what his or her legal duties are and, as exactly as possible, what his or her powers are. This is clearly not the case under the current state of the law."[120]

Freedman and Stenning offered a number of suggestions as to how the law in this area might be clarified and rationalized, and how the practices of appointing persons as "peace officers" might be improved. Their recommendations go well beyond the limited scope of the present study. Nevertheless, they touch upon issues which, as will be noted in later parts of this study, are of critical importance to an assessment of private security powers, and for this reason we have included them as an appendix to this study.[121]

(2) *Owners of Property, Persons in Lawful Possession, and their Authorized Agents*

Numerous provisions of the law grant special powers to those who own or are in lawful possession of property, and to those who are acting as the authorized agents of such persons. This places private security personnel who are assigned to protect property in a special position in terms of the powers they may exercise on or in relation to that property. For in protecting the property of a client or an employer who is an owner or a person in lawful possession of the property, private security personnel will normally be regarded as his authorized agents, sharing the same authority in relation to the protection of the property as the owner or person in lawful possession of it possesses.

The extent to which private security personnel do share the owner's authority in relation to the property will, of course, depend on the particular circumstances of the contractual relationship (whether written, verbal or implied) between them. The fact

that private security personnel derive such authority through authorized agency, however, means that the owner may, if he chooses, specifically limit this authority. He may, for instance, stipulate that private security guards shall not exercise the powers of arrest which they might otherwise have as a result of such agency, but shall summon the police instead. Such an instruction is apparently not uncommon within the private security world.[122]

Authority to conduct searches of other persons or their property is a power which accrues to owners of property and their agents as a result of other powers which they possess. Most important among these is the power to control the property, and to establish and enforce conditions of entry to and exit from it. Although most of the law governing the rights of owners of property to protect their property is to be found only in uncodified common law (case law), a variety of statutory provisions exist, both in Federal and Provincial statutes, which are of relevance. Thus, Section 449 (2) of the *Criminal Code* grants specific powers of arrest to owners, persons in lawful possession, and their authorized agents, as follows:

> "449. (2) Any one who is
> (a) the owner or a person in lawful possession of property, or
> (b) a person authorized by the owner or by a person in lawful possession of property,
> may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property."

This provision of the *Criminal Code,* which is of great significance to private security personnel, does not appear to have been the subject of judicial interpretation in the courts as to its precise scope and meaning. Section 2 of the *Code* defines "property" for the purposes of the *Code* as "including":

> "(a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,
> (b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by such conversion or exchange, and
> (c) any postal card, postage stamp or other stamp issued or prepared for issue under the authority of the Parliament of Canada or of the legislature of a province for the payment to the Crown or a corporate body of any fee, rate or duty, whether or not it is the possession of the Crown or of any person;"

In considering Section 449 (2) of the *Code,* Freedman and Stenning have commented:

"In particular, it appears uncertain as to whether the term "property" in this Section includes all the kinds of property included in the definition of "property" under S.2 of the *Code*... More particularly we are not aware of any court decision in which the question of whether the term "property" in S.449(2) includes personal (moveable) property as well as real (fixed, i.e., land, buildings, etc.) property. We can only report that most of those whom we interviewed on the subject appeared to assume that the arrest power under S.449(2) is only intended to be for offences on or in relation to real property, and not personal property. While it seems clear that for an arrest to be lawful under this Section the offender must either commit the offence on the property (e.g., shoplifting), or involve the property in his offence (e.g., throwing a brick through a window), there appear to be no restrictions on where the arrest must be made."[123]

Other provisions of the *Criminal Code* which grant special powers to owners of property and their agents will be found in Sections 38 to 42 of the *Code.* These provisions, which are concerned with the defence of moveable property against theft or other threats to possession, and the defence of real property against trespass or other illegal occupation, are set out in full in Appendix B to this study.[124] Because they refer to persons in "peaceable possession" and to those "lawfully assisting" them or acting under their authority, they are potentially of considerable significance to private security. These provisions purport to create justifications for various acts performed in defence of property; but their legal effect has been the subject of considerable case law.

There is ample authority for the proposition that such justifications protect persons in peaceable possession of property, and those assisting them, etc., from criminal liability for acts which, if done by persons not covered by the Sections, would constitute criminal offences.[125] More debatable, however, is the question of whether such provisions can confer comparable protection for civil liability (e.g., in tort) for such acts. The principal reason for thinking that they might not is the fact that if they did have this effect they would amount to legislation in relation to "property and civil rights" which, as was noted in the previous chapter, is a head of legislative authority within the exclusive jurisdiction of the Provincial legislatures under Section 92.13 of the *B.N.A. Act.* On this reasoning, the application of such provisions to effect immunity from civil liability would be *ultra vires* the Federal Parliament.

This issue has never been definitively resolved by the courts, however, and there are numerous reported cases which the courts appear to have decided on the assumption that provisions such as those in Sections 38-42 of the *Code* do protect persons from civil as well as criminal liability.[126] A possible constitutional rationale for this would be that such provisions are necessarily incidental to

effective criminal law enforcement powers and may therefore legitimately be enacted under colour of the Federal criminal law power, even though they do also incidentally affect property and civil rights in the Provinces.

We shall return to a more specific consideration of the application of provisions such as these to search procedures later in this chapter. For the present, however, it is sufficient to note that they only apply to persons with the particular status of persons in peaceable possession of property, persons lawfully assisting them, or persons acting under their authority.

Another important source of authority for property owners and their agents is Provincial trespass legislation. Such legislation has been enacted in five Provinces[127], and in four of them a power to arrest a trespasser without a warrant is conferred on the owners of land, their servants or persons authorized by them. In British Columbia, the owner, lessee, occupier or authorized person merely has the right to demand the name and address of the trespasser.[128] A number of cases have held that these *Trespass Acts* apply to all kinds of private property, including those which are public places, such as shopping malls, plazas, etc..[129] This legislation is thus of great importance to private security.

(3) *"Any One", "Private Persons"*

Whatever other legal categories they may fall into, all private security personnel of course are included within the more general categories of "any one" and "private persons", in terms of their law enforcement powers, and rights to protect themselves. The significance which attaches to the powers they derive as a result of this general status, however, is that such powers cannot legally be withdrawn by anyone. In this respect, these private security powers are distinguishable from those they may have either as peace officers or as agents of owners, etc. of property.

This is not to say that private security personnel cannot legally agree to forego the exercise of their general citizen powers as a condition of employment. Thus, a security guard may be hired on an understanding that he will not exercise any of his powers of arrest (i.e., even his general citizen powers) during the course of his employment as a guard. Under these circumstances, what is in reality being withdrawn is his employer's or his client's responsibility for any exercise of such powers, even if it occurs during his

work. For where there has been a specific agreement not to exercise such powers, any exercise of them will be regarded as an act which is not within the scope of the guard's employment, and therefore one which does not attract the vicarious liability of the employer or client. We shall return to this question of legal responsibility for the exercise of powers after we have detailed the powers themselves.

Legal Powers of Search and Seizure of Private Security Personnel

In detailing search and seizure powers of private security personnel, two important distinctions must be noted at the outset. The most important of these is the distinction between searches of the person (hereafter referred to as personal searches) and searches of places and things (hereafter referred to as property searches). Not surprisingly, our laws, and indeed as we shall note in the following chapter, private security personnel themselves, take a very different view of personal searches from their view of property searches.

Secondly, a distinction must be made between searches by persons and searches by various electronic or other mechanical devices. We shall note that our laws relating to search were developed long before the invention of such devices, with the result that they remain almost completely silent with respect to searches which do not involve physical acts of persons. This is not to say that existing laws could not be adapted, or even simply interpreted, to cover such searches; merely that, to date, no such adaptations or interpretations appear to have been made, and our laws of search still seem to be evolving solely with searches by persons in mind.

Obviously, our concepts of privacy and human dignity are brought into play in any consideration of search powers, as well as our concepts of adequate law enforcement and protection of persons and property. Search powers may, in fact, be viewed as representing the interface between these two important areas of human rights. At this point, however, there appears to have been virtually no serious consideration of the extent to which the same rules as have been developed to govern searches by the person should also govern searches by electronic or other mechanical devices. Yet the increasing tendency of private security to resort to such technological aids as metal-detectors, electronic anti-theft devices, etc., in developing what they see as effective search procedures, makes this whole question one of growing importance.

With these two basic considerations in mind, we may now examine in turn each of the various sources of legal authority from which private security search and seizure powers derive. These may be classified under five broad headings, as follows:

1. Searches pursuant to search warrants.
2. Searches incidental to lawful arrests.
3. Searches without warrant pursuant to specific statutory provisions.
4. Searches incidental to the exercise of property rights.
5. Searches pursuant to consent of the person being searched.

Each of these five sources of legal authority will be reviewed to establish how it relates to private security authority.

(1) *Searches Pursuant to Search Warrants*

Section 443(1) of the *Criminal Code* provides that:

> "443. (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
>
> (a) anything upon or in respect to which any offence against this Act has been or is suspected to have been committed,
>
> (b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
>
> (c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant;
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptable or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law."

Various cases have held that by virtue of Section 27(2) of the Federal *Interpretation Act*[130], the provisions of Section 443 of the *Criminal Code* also apply to offences under other Federal statutes.[131] The courts have not been unanimous in this view[132] however. It seems clear, furthermore, that Section 443 will not apply to offences under other Federal statutes in which alternative search provisions have been specifically included (e.g., the *Narcotic Control Act*).[133]

Several important features of Subsection 443(1) must be noted. In the first place, neither Subsection 443(1) nor Form 1 of the *Code* appear to place any restrictions upon who may be an informant for

the purposes of the Section. Thus, it would seem that the power to apply for a search warrant applies to any one, regardless of his legal status. The question of to whom a warrant may be issued, however, is less clear. Subsection 443(1) provides that a warrant may authorize "a person named therein or a peace officer", suggesting clearly that warrants may be issued to persons other than peace officers. Subsection 443(3), however, provides that "a search warrant issued under this Section may be in Form 5", and a warrant in Form 5 is clearly addressed "to the peace officers in the said (territorial division)". Although the point does not appear to have been resolved by the courts, it would seem that the express terminology in Subsection 443(1), together with the permissive "may" in Subsection 443(3), leads to the conclusion that a search warrant may be issued to a person other than a peace officer (provided that person is named in the warrant), and that it need not necessarily be in Form 5. Substantial variations from Form 5, however, will invalidate a search warrant[134], but in view of the wording of Subsection 443(1) it seems impossible that addressing a search warrant to a named person who is not a peace officer could be viewed by the courts as a substantial variation from Form 5. The current view, therefore, is that private security personnel who are not peace officers for the purposes of the *Criminal Code* (as well, of course, as those who are) can apply for and be issued search warrants under Section 443.

A second important feature of Subsection 443(1) is that a warrant issued under it can only authorize search of a "building, receptacle or place". Personal searches, therefore, cannot be authorized by Section 443, since the courts have held that under no circumstances can the terminology "building, receptacle or place" be interpreted to include the human body.[135] The terms "receptacle or place", however, do not appear to have been exhaustively defined by the courts. That they do include property other than real estate is clear from the cases, but the extent to which they would include moveable property (e.g., a car, a tool box, etc.) is not.[136]

Sections 444-446 of the *Criminal Code* specify detailed provisions as to the proper execution of warrants issued under Section 443, and the disposition of things seized as a result of such execution. These provisions have been the subject of a mass of case law. It is not intended to review this case law here, since comprehensive reviews of it already exist[137], and this matter is also the subject of other studies being sponsored by the Law Reform Commission of Canada at this time.

Search warrants are also authorized in relation to specific offences by Sections 181 and 182 (searches of gaming houses and bawdy-houses), and 353 (searches for precious metals) of the *Criminal Code.* Warrants issued under Section 181 may only be applied for by, and issued to peace officers, but warrants issued under Section 182 may be issued to "a peace officer or other person named therein". Since this section deals with searches in relation to the enticement or concealment of a female person in a bawdy-house, it has obvious potential relevance to private security personnel employed in hotel, motel or other residential complexes. The fact that Subsection 182(2) refers only to "a peace officer" in authorizing the use of "as much force as is necessary to effect entry into the place in respect of which the warrant is issued", suggests that such warrants will rarely be issued to persons who are not peace officers.[138] It is noteworthy, however, that this Section authorizes not only search of the place in question, but detention of certain relevant persons found in the place.

Section 353 of the *Code* gives much wider authority than any of the Sections previously considered. An application for a warrant under this section may be made by "any person having an interest in a mining claim". The Section, furthermore, is entirely silent as to what persons may be authorized to conduct a search by a warrant issued under it. Unlike the provisions previously considered, however, such a warrant authorizes the search of "places *or persons* mentioned in the information". The Section authorizes seizure of "any precious metals or rock, mineral or other substance containing precious metals...unlawfully deposited in any place or held by any person contrary to law" found as a result of a search pursuant to a warrant issued under the Section. As such, the Section would appear to authorize the issuance of warrants granting potentially wide powers of search and seizure to private security personnel employed in the mining industry.

Various other Federal and Provincial statutes provide for the issuance of search warrants for various specified purposes. An inventory of such statutory provisions is currently in preparation by the Law Reform Commission of Canada. While detailed information about these provisions is therefore not currently readily available, there is good reason to believe that in most, if not all, cases they authorize the issuance of search warrants only to peace officers, constables, police officers, and other government officials. To what extent private security personnel may have legal access to search warrants under these provisions is also not known in detail at this time. To the extent that they authorize "peace

officers" or "constables", however, they undoubtedly include certain persons within private security. Two examples will suffice to illustrate this point.

Subsection 10(2) of the Federal *Narcotic Control Act*[139] provides:

> "(2) A justice who is satisfied by information upon oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant under his hand authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics."

There is no doubt that a variety of private security personnel could legally be issued search warrants under this provision, since the term "peace officer" is not specifically defined in the *Narcotic Control Act* to exclude such persons. Depending upon the terms of their appointment, special constables appointed pursuant to Federal or Provincial statutes may qualify as "peace officers" for the purposes of Section 10 of the *Narcotic Control Act.* So, presumably, would persons appointed as peace officers or constables under such statutes as the Federal or Provincial *Railway Acts*[140], the Federal *National Harbours Board Act*[141], and the variety of Provincial statutes such as Ontario's *Public Works Protection Act*[142], or Newfoundland's *Provincial Parks Act.*[143] The powers which may be exercised in the execution of such a warrant, furthermore, as spelled out in subsection 10(4) of the Act, are by no means insignificant:

> "(4) For the purpose of exercising his authority under this Section, a peace officer may, with such assistance as he deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container, or any other thing."

An example of a Provincial statute which grants authority to issue search warrants, is Subsection 93(3) of the Ontario *Liquor Control Act*[144], which provides that:

> "(3) A justice or a justice of the peace who is satisfied by information upon oath that there are reasonable grounds for believing that liquor is unlawfully kept or had, or kept or had for unlawful purposes, in any residence, building or place may issue a warrant under his hand authorizing a constable or other police officer named therein at any time, including Sunday or other holiday, and by day or by night, to enter the residence, building or place and search for liquor, and, for the purpose of exercising his authority under this subsection, a constable or other police officer may, with such assistance as he considers necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing."

Section 93(1)*(b)* of the Act adds the power of personal search to persons executing such warrants, by providing that:

> "93.(1) A constable or other police officer may at any time,...
> (b) under the authority of a warrant issued under subsection 3, enter and search any residence, building or place in which he has reasonable ground to believe that liquor is unlawfully kept or had, or kept or had for unlawful purposes, and search any person found in such residence, building or place."

Again, the extent to which the term "constable or other police officer" could legally include private security personnel appointed as railway police, harbour police, university police, or as special constables in some other capacity, is not currently clear.

(2) *Searches Incidental to Lawful Arrests*

It has long been accepted that a peace officer has a common law right to search a person whom he has arrested. In his judgement in *Gottschalk v. Hutton,* Beck, J., recognized this right and said of it:

> "It is understood law (5 *Corpus Juris tit.* "Arrest", p. 434) that "After making an arrest an officer has the right to search the prisoner, removing his clothing, if necessary, and take from his person, and hold for the disposition of the trial Court, any property which he in good faith believes to be connected with the offence charged, or that it may be used as evidence against him, or that may give a clue to the commission of the crime or the identification of the criminal, or any weapon or implement that might enable the prisoner to commit an act of violence or effect his escape"."[145]

In *R. v. McDonald, R. v. Hunter,* the court held that, except in cases where "through drunkenness or other cause" a prisoner "is incapable of an act of will or consent"[146], property of the arrested person not falling into the above categories cannot legally be removed by the police against the suspect's will, purely for safekeeping. In *R. v. Brezack* it was held that not every kind of personal search will automatically be justified when arresting someone. The search must be "justifiable as an incident of the arrest", and "it is sufficient if the circumstances are such as to justify the search as a reasonable precaution."[147] In this case the court held that the police were justified in searching the suspect's mouth, and putting their fingers in his mouth, to discover whether he was concealing drugs there. More debatable, however, is how far a peace officer may go in preventing destruction of evidence by a person he is arresting. In *Reynen v. Antonenko et al.*[148], a civil case, the Alberta Supreme Court noted without disapproval the

police practice of holding a suspect by the throat to prevent him swallowing evidence (in this case, drugs).[149]

In *Scott v. The Queen et al.,* the Federal Court of Appeal held that such practice is "a lawful act, at least in the absence of evidence of undue force in its application."[150]

In the *Reynen* case, the court reviewed the cases governing search as an incident to a lawful arrest, and concluded that:

> "It seems clear from the above authorities that the police in this case had not only the right but also a duty to conduct a search of the plaintiff for drugs, and to seize any drugs found as evidence to be presented to the Court. In making this search and seizure the police are clearly authorized to use such force as is reasonable, proper and necessary to carry out their duty, providing that no wanton or unnecessary violence is imposed. It is also clear that what is reasonable and proper in any particular case will depend on all the circumstances of that particular case, it being impossible to lay down any hard and fast rule to be applied to all cases, except the test of reasonableness."[151]

In reaching its conclusions about the "duty" of the police to arrest and search offenders, the court quoted extensively from the judgment of Williams, J., in the English case of *Leigh v. Cole.*[152] The court also cited with approval the New Zealand case of *Barnett and Grant v. Campbell* as authority for the proposition that an arresting officer is entitled to seize "articles in the possession or under the control of the accused person, as evidence tending to show the guilt of such person."[153] To what extent this permits the arresting officer to search the place or things at or near the site of the arrest, however, remains unclear.

The authorities are thus reasonably clear in upholding the common law powers of peace officers to effect personal (and perhaps limited property) searches of persons whom they arrest. They are far from clear, however, in establishing to what extent these common law powers accrue to persons other than peace officers who make lawful arrests. The Alberta Supreme Court, in the *Reynen* case, cited with approval the following *dicta* of Palles, C.B., in *Dillon v. O'Brien,* which incidentally suggest that private persons may have powers to search persons whom they arrest, similar to those of peace officers:

> "I, therefore, think that it is clear, and beyond doubt that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime...".[154]

These *dicta* are clearly insufficient in themselves to support the right of private persons to search persons whom they arrest. In his *A Manual on Arrest,* Bird says: "The provision of search by private persons I can find nowhere supported by law."[155]

Section 449 of the *Criminal Code,* which spells out the powers of arrest of private persons, and of property owners and their agents, for criminal offences, specifies in Subsection 449(3) that:

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

We have been able to find only one case in which the courts have given consideration to the impact of this Subsection. In *Perry v. Woodwards Ltd.*[156], the court stated, *obiter,* that private persons who detain persons (e.g., for shoplifting) may have a duty to question the suspect in order to ascertain whether an offence has been committed, before handing him over to the police authorities. The case, however, does not consider the possibility of a search for similar purposes.

If, under common law, a private person making an arrest has a right to search the person arrested, similar to the right recognized for peace officers, it can be part of the criminal law of Canada only by virtue of subsection 7(2) of the *Criminal Code,* which provides that:

> "(2) The criminal law of England that was in force in a province immediately before the 1st day of April 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada."

Alternatively, it may be covered by Section 7(3) of the *Code,* which provides that:

> "(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except insofar as they are altered by or are inconsistent with this Act or any other Act of The Parliament of Canada."

Assuming such a common law rule exists, therefore, its application in Canadian criminal law would seem to depend on whether or not it is inconsistent with, or has been "altered, varied, modified or affected" by Section 449(3) of the *Code,* requiring persons arrested by persons other than peace officers to be delivered "forthwith" to a peace officer.

The absence of any clear legal authority for persons other than peace officers to search persons whom they lawfully arrest is particularly disturbing in the light of the common belief within private security that such authority exists. As Freedman and Stenning noted:

> "Several people involved in the management of private security companies or the training of police and security personnel, when asked, took it for granted that a private citizen should be empowered to search an arrested person for offensive weapons or evidence, but were not clear if there was any legal justification for this belief. Several training manuals for private security personnel, including that provided by the Federal Department of Supply and Services, and David Paine's *Basic Principles of Industrial Security*[157], state that security guards, as private citizens, possess common law powers of search."[158]

It is not intended here to enter into a detailed examination of the law of arrest as it applies to private security personnel; the arrest power, it is understood, is to be the subject of subsequent studies by the Commission. Since private security powers of search are to some extent dependent on their powers of arrest, however, a brief review of their arrest powers is necessary to a clear understanding of the limits of their search powers.

(a) *Arrest without Warrant*

The principal criminal law powers of arrest without warrant are to be found in Sections 449 and 450 of the *Criminal Code.* Section 449 deals with the arrest powers of persons who are not peace officers, and provides as follows:

> "449. (1) Any one may arrest without warrant
> (a) a person whom he finds committing an indictable offence, or
> (b) a person who, on reasonable and probable 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.
>
> (2) Any one who is
> (a) the owner or a person in lawful possession of property, or
> (b) a person authorized by the owner or by a person in lawful possession of property,
> may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.
>
> (3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer".

The interpretation of four critical phrases in this Section is of great significance to private security personnel, and must be briefly reviewed here. These are: "finds committing", "freshly pursued", "a person authorized" and "on or in relation to that property".

(i) "finds committing". Until very recently, it was well understood law that a private person making an arrest under Section 449 did so entirely at his own risk. More specifically, the term "finds committing" was taken to mean that if for any reason it turned out subsequently that the suspect was not actually committing the offence — no matter what the appearances may have been — a citizen arrest would be unlawful. Thus, if the suspect later gained an acquittal in a criminal court, the person who made the arrest would find himself liable, civilly and possibly criminally too, for an unlawful arrest.[159] In 1975, however, the Supreme Court of Canada had occasion to consider the meaning of the words "finds committing" as they appear in Section 450 of the *Criminal Code* (peace officer arrest powers), in the case of *R. v. Biron.*[160] Martland, J., delivering the judgment of the majority in the case, stated that:

> "in my opinion the wording used in para. (b), which is over-simplified, means that the power to arrest without a warrant is given *where the peace officer himself finds a situation in which a person is apparently committing an offence.*"[161] (emphasis added)

In his dissenting judgment in the case, Laskin, C.J.C., observed:

> "If the word "apparently" is to be read into S.450(1)(b), logical consistency, if not also ordinary canons of construction, demand that the word be read into S.449(1)(a)...which empowers any person to arrest without warrant a person whom he "finds committing" an indictable offence. Moreover, it is plain to me, on grounds of context in aid of construction, that when S.449(1)(a) is read with S.449(1)(b), the former could not possibly embrace arrest without warrant on apparency or on reasonable and probable grounds."[162]

The judgment in *Biron* was a majority (6:3) judgment. While it is clearly a binding authority on the meaning of "finds committing" in S. 450 (1)(*b*) of the *Code,* concerning peace officer powers of arrest, the comments of the minority in the case with respect to S. 449(1)(*a*), quoted above, make the case's authority with respect to Section 449 somewhat uncertain. At best, the case can be viewed as a persuasive authority for a similar interpretation of the phrase "finds committing" in Subsections 449(1)(a) and 449(2).

The meaning of "finds committing" in Section 449 is of very considerable significance to private security, for obvious reasons;

as has been pointed out previously in this study, the great majority of private security personnel are not peace officers, and therefore rely on Section 449, rather than Section 450, for their criminal law arrest powers. The requirement of "finds committing" is thus likely to govern the majority of situations in which they may make lawful arrests for criminal offences, whether they are relying on ordinary citizen arrest power under S.449(1), or on the arrest power of persons having the status of owners of property, persons in lawful possession of property, or their authorized agents, under S.449(2).

The *Biron* case makes it clear that the term "finds committing" involves a requirement of direct observation of the offence (or the apparent offence) by the person exercising the power of arrest. In reviewing the meaning of the term in S.450(1)(b), Martland, J., speaking for the majority, observed that:

> "Paragraph (b) applies in relation to any criminal offence and it deals with the situation in which the peace officer himself finds an offence being committed. *His power to arrest is based upon his own observation.*"[163] (emphasis added)

It seems safe to assume that this dictum, with which the minority dissenters in the case did not disagree, applies equally to the meaning of the term "finds committing" in Section 449. It is clear, therefore, that in the great majority of cases, private security personnel must themselves directly observe the commission of a criminal offence before they will have authority to arrest anyone for it. As we shall note below, this represents an important practical constraint on the exercise of arrest powers by private security personnel. The only circumstances in which this constraint does not operate are: (1) where the private security person is a peace officer, and can rely on the peace officer arrest powers under Section 450 of the *Code,* and (2) where he is not a peace officer, but can rely on the power to arrest "on reasonable and probable grounds" under Subsection 449(1)(b).

(ii) "freshly pursued". In order to lawfully arrest someone for a criminal offence when the private security officer who is not a peace officer has not himself witnessed the commission (or apparent commission) of the offence, two conditions must be met: he must believe "on reasonable and probable grounds", first, that such an offence has been committed by the person whose arrest is intended and, secondly, that such person "is escaping from and freshly pursued by persons who have lawful authority to arrest

that person" (S.449(1)(b) of the *Code*). What constitutes "reasonable and probable grounds", for the purposes of this paragraph, is a question of law which can only be resolved in the light of the particular circumstances of each case. But a coherent report of an offence from a credible witness to it will normally suffice to meet this requirement.[164] To what extent a security guard will be expected to verify the facts will also depend on the particular circumstances of each case. But, given the requirement of fresh pursuit in paragraph 449(1)(b), it is reasonably clear that the power of arrest under this paragraph is not normally expected to involve much more than a snap judgement, albeit a prudent one.[165]

The second condition — that such person "is escaping from and freshly pursued by persons who have lawful authority to arrest that person" — involves a complicated set of sub-conditions which might be thought sufficient to deter anyone but a trained lawyer from invoking this particular power of arrest. Few cases have considered in any great detail the meaning of the term "freshly pursued". In *R. v. Dean,* McGillivray, J. A., with the concurrence of the majority, in the Ontario Court of Appeal, said that:

> "I am of the opinion that no narrow interpretation should be given the words 'escaping from' or 'freshly pursued by'."[166]

In *R. v. Lawson*[167], however, Charles, P. J., held that the suspect in the case was no longer being freshly pursued when the taxi driver, who had been pursuing him, stopped to summon the police to assist him. Both cases, however, appear to have been decided on the assumption that "freshly pursued" means actually physically pursued. More problematic, from a private security standpoint, is the situation, which is not at all uncommon, for instance, in hotel or industrial situations, in which an employee who is not a security employee notifies by telephone a security employee stationed at the exit to the premises, that someone whom he has witnessed committing an offence is about to try to leave the premises. The security guard, under such circumstances, faces a very real dilemma if, as is likely, he is not a peace officer. Not having himself witnessed the offence, he cannot arrest the suspect by virtue of his powers under S.449(1)(a) or S.449(2), since both of those provisions include the "finds committing" requirement. Even if he sees the suspect, for instance, carrying on his person the very thing which he is alleged to have stolen, it would seem that he cannot arrest him, either, by virtue of his powers under S.449(1)(b), because the person is not "freshly pursued by persons who have lawful authority to arrest that person".

Even assuming that the suspect is being "freshly pursued" by someone who witnessed the offence, the security guard must still make the snap decision as to whether the pursuer can reasonably and probably be believed to be a person[168] who has lawful authority to arrest that person. Whether or not the pursuer actually has such lawful authority to arrest, will, of course, depend on three things: (1) whether the pursuer actually witnessed the offence; (2) whether the offence was indictable or summary — if it was summary, the pursuer's authority to arrest will have to derive from S.449(2), rather than S.449(1); and (3) whether the pursuer is a person with the status referred to in S.449(2), i.e., a person who is an owner of the property, is in lawful possession of it, or who has been "authorized" by the owner or by a person in lawful possession. Under the typical circumstances of "fresh pursuit", it is difficult to see how a security employee can be expected to form a belief "on reasonable and probable grounds" about such technical matters. Under the circumstances, he is unlikely to be able to make more than a quick and intelligent guess, which may very likely turn out to be wrong.

The fact that a security employee, exercising arrest powers under S.449(1)(b), does make a judgement which actually turns out to be wrong on any one of these conditions for a lawful arrest under that provision, will not, of course, make the arrest unlawful if the security employee can convince a court that his judgement was, under all of the circumstances, based on "reasonable and probable grounds". The complexity of paragraph 449(1)(b), however, makes it hardly surprising that, as we shall note further in the following chapter of this study, many security employees are unwilling to take this risk, and express the view that it is wiser either to let a suspected thief or vandal escape entirely, or to rely on moral persuasion in trying to reason with the suspect, rather than make any attempt to exercise a power of arrest.

Even an attempt at moral persuasion is fraught with risk, however, in the light of the attitude which the courts have taken towards what one judge has described as "a psychological type of imprisonment".[169] The cases make it clear that if a suspect, even though he is not physically detained, is put in a position where he reasonably believes that an attempt by him to leave would be met with physical restraint or would result in a scene causing him public humiliation, the courts will consider him to have been detained for the purposes of a civil suit for damages for false imprisonment.[170] Describing the fact situation in one case, MacDonald, J., said:

"...I am of opinion that the plaintiff being charged with a crime[171], 'in order to prevent the necessity of actual force being used' or creating a scene in a crowded store, went with the detective to a particular room (presumably used for that purpose) to be searched. He 'was constrained in his freedom of action' : vide *Warner v. Riddiford* (1858) 4 C.B.N.S. 180, at p. 187, 140 E.R. 1052. This constraint, coupled with the subsequent searching, constituted false imprisonment for which the defendant is liable in damages."[172]

MacDonald J., cited with approval, the observations of Alderson, B., in the English case of *Peters v. Stanway:*

"There is a great difference between the case of a person who volunteers to go in the first instance, and that of a person who, having a charge made against him[173], goes voluntarily to meet it. The question therefore is, whether you think the going to the station-house proceeded originally from the plaintiff's own willingness, or from the defendant's making a charge, the plaintiff will not be deprived of her right of action by her having willingly gone to meet the charge."[174]

The lesson to be drawn from judicial pronouncements such as these seems pretty clear. Private security personnel, even when they decide not to exercise their limited powers of arrest, but rather attempt to reason with a suspect and use moral persuasion to induce him to remain and dispel their suspicions, run a serious risk of being considered by the courts to have illegally detained that person. For if there is anything in the circumstances that could lead a reasonable person to believe that he would not be absolutely free to go on his way without further interference, restraint or public embarrassment, the courts may treat the situation as one of detention without consent. Circumstances which the courts might recognize as leading a reasonable person to such a belief, may include the demeanour or dress[175] of the security employee, the manner of his questioning, or the fact that the encounter takes place in a public area in which there are many potential onlookers.

(iii) "a person authorized". The courts have given little guidance as to who may be included within the expression "a person authorized" in S.449(2)(b). The provision itself is somewhat enigmatic, as it does not indicate what such authorization must be for. In *Perry v. Woodwards Ltd.,* however, MacDonald, J.A. observed, *obiter,* that:

"Shoplifting would appear to call for prompt action, but I do not think that any clerk who discovered it and called the police could make the employer liable without evidence of authority...Nor could the detention or prosecution of offenders be assumed to be within the routine duties of heads of separate departments. I would think that presumption would arise in the case of the general superintendent.... who had general supervision and control of the company's property."[176]

If this interpretation is correct, it would seem that in most businesses employing private security personnel, the ordinary non-security employee (e.g., a waitress or sales clerk) could typically not be regarded as an "authorized" person.

If this is correct, then it would seem that in the typical fresh pursuit situation which we have discussed above, the security guard who is not a peace officer and has not himself witnessed the offence, will rarely be able to make an arrest, even under the most blatant circumstances, under S.449(1)(b) (fresh pursuit), since he will usually not be able to show cause for a belief "on reasonable and probable grounds" that the pursuer is a person having lawful authority to arrest. If the pursuer is an ordinary non-security employee, the guard will have to have "reasonable and probable grounds" to believe that the offence was an indictable one, permitting the pursuer to arrest under S.449(1)(a). For if the offence is not indictable, the pursuer could only have lawful authority to arrest by virtue of S.449(2), and the security guard could not have "reasonable and probable grounds" to believe that a non-security employee is "a person authorized" under S.449(2).

Under these circumstances, the security guard would appear to be given the opportunity more for a gamble than for a carefully considered assessment of the situation. Not surprisingly, many are reluctant to take such a gamble, and some are actively discouraged from doing so by their employers. To what extent commercial crimes, such as shoplifting, flourish as a result of such policies, is unfortunately not known.

(iv) "on or in relation to that property". As has been noted earlier in this Chapter[177], there appears to have been no clear judicial interpretation of this phrase, which is of critical significance to the arrest powers of most private security personnel. Critical to the scope of such arrest powers is the meaning of the words "in relation to" and "property". If "property" is given a wide meaning (e.g., to include such moveable personal property as a company car), and "in relation to" is similarly given a wide meaning (including, for instance even an incohate offence such as conspiracy, which in some way involves company property), it is not hard to see how S.449(2) could be regarded as conferring very wide arrest powers indeed, allowing private security personnel to make arrests of all kinds of persons (whether or not they are employed by, or clients of, the company) in places far remote from the company's real estate premises.

Can the bank or gas company's security officer, for instance, under colour of S.449(2), track down and arrest, in some remote place, the credit card holder whom he "finds committing" some fraud using the company's credit card? The credit card, after all, is usually clearly stated to be the property of the company. While in many cases, the offence will be an indictable one, giving a security officer a right to arrest as a private person under S.449(1), it is not difficult to imagine relevant summary offences for which a broad interpretation of S.449(2) would give a security officer power to arrest which he would not possess as an ordinary person (e.g., fraudulently obtaining food, accommodation, etc., under S.322 of the *Criminal Code*).

Section 449 of the *Code* sets out the criminal law powers of arrest possessed by persons other than peace officers. For those private security personnel who are peace officers for the purposes of the *Criminal Code,* Section 450 is, of course, of relevance. This Section sets out the powers of arrest without warrant of peace officers:

> "450.(1) A peace officer may arrest without warrant
> (a) a person who has committed an indicatable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence,
> (b) a person whom he finds committing a criminal offence, or
> (c) a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which the person is found."

It will be immediately evident that the powers of arrest without warrant of a private security officer with peace officer status, are considerably greater than those of one without such status. Most importantly, a peace officer can arrest on suspicion (i.e., with belief "on reasonable and probable grounds") in *anticipation* of the commission of an indictable offence, as well as in response to an offence which has been committed. His powers to arrest for a criminal offence which he himself witnesses are not dependent on his status as a person in lawful possession of property or as a "person authorized", and are exercisable whether or not the offence is "on or in relation to" the property in question.

It is worth noting that although the peace officer arrest powers under S.450(1) embrace most of the citizen powers under S.449, they do not embrace all of them. Thus, for instance, the only way in which even a peace officer can arrest for a summary conviction offence not committed in his presence (assuming he has no reason

to believe there is a warrant out for the suspect's arrest), is by exercising his powers as a private citizen under S.449(1)(b), if the circumstances permit it.[178] Situations can arise, therefore, in which a private security officer with peace officer status is in no better a position to arrest a suspected offender than his counterpart who does not have such status.

Subsection 450(2), incorporated into the *Criminal Code* via the *Bail Reform Act*[179] in 1972, imposes constraints on the exercise of peace officer powers of arrest without warrant, which are not imposed on citizen powers of arrest without warrant under S.449. Subsection 450(2) provides that:

> "(2) A peace officer shall not arrest a person without warrant for
> (a) an indictable offence mentioned in section 483,
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
> (c) an offence punishable on summary conviction,
> in any case where
> (d) he has reasonable and probable grounds to believe that the public interest, having regard to all the circumstances including the need to
> (i) establish the identity of the person,
> (ii) secure or preserve evidence of or relating to the offence, or
> (iii) prevent the continuation or repetition of the offence or the commission of another offence,
> may be satisfied without so arresting the person, and
> (e) he has no reasonable ground to believe that, if he does not so arrest the person, the person will fail to attend in court in order to be dealt with according to law."

Subsection 450(2), when read together with S.449, would seem to lead to some rather anomalous results. In particular, it would seem to indicate that there are some situations in which a private security officer who is not a peace officer has greater powers of arrest without warrant than a private security officer who is a peace officer — or, at least, is permitted to exercise his powers of arrest in situations in which a peace officer, by virtue of S.450(2) is not permitted to exercise them. This anomaly is further compounded by the provisions of Subsection 449(3), according to which a person who is not a peace officer and who makes an arrest without warrant, is required to "forthwith deliver the person (arrested) to a peace officer". The fact that the offences listed in paragraphs (2), (b) and (c) of Subsection 450(2) include a great many offences commonly encountered by private security personnel (e.g., virtually all shop-lifting offences) completes the anomaly.[180]

This kind of anomaly — which in practical terms is probably rarely of any great significance — may perhaps be dismissed as simply a rather strange legal quirk. However, the fact is that, as we have noted earlier in this chapter, the powers of arrest in Sections 449 and 450 of the *Code* are not only instrumental in defining some of the search powers of private security personnel, but also, more importantly, go a long way to defining the civil rights of those involved in the arrest/search encounter. They also, equally importantly, are important in determining the criminal liability of persons who may be the object of such powers, for such offences as obstructing a peace officer (S.118 of the *Code*), assaulting a peace officer (S.246(2)), escaping from lawful custody (S.133) and obstructing justice (S.127(2)). Such offences carry penalties, on conviction, of imprisonment for, respectively, up to two (Sections 118 and 133), five (S.246(2)) and ten (S.127(2)) years. Under these circumstances, it is arguable that not even "rather strange legal quirks" should be permitted to remain on the statute book.

The anomaly to which we have referred, however, is noteworthy in the context of this study, for another entirely different reason. For it is an illustration of the fact that the powers of law enforcement in the *Criminal Code* and in other statutes, have evolved with no explicit (or apparently even implicit) recognition or understanding of the modern phenomenon of private security. For instance, a reading of Sections 450(2) to 453.3, enacted via the *Bail Reform Act,* and which govern arrest and release powers of "peace officers", makes it quite clear that these provisions were drafted without any serious consideration of their implications for peace officers (including some private security personnel) who are not members of public police forces. Section 453, for instance, refers to the responsibilities of "the officer in charge", where a person who has been arrested by a peace officer has not been subsequently released by him. Section 448 defines "officer in charge" as:

> " 'officer in charge' means *the officer for the time being in command of the police force* responsible for the lock-up or other place to which an accused is taken after arrest or a *peace officer designated by him* for the purposes of this Part who is in charge of such place at the time an accused is taken to that place to be detained in custody."

Nowhere is there any requirement that a peace officer who has such a person in custody must take him to a "lock-up or other place" for which a "police force" is responsible. This is presumably because these provisions were not drafted with peace

officers who are not members of police forces in mind. Yet a number of such peace officers are to be found within the ranks of private security.

We have so far been considering the arrest without warrant provisions of the *Criminal Code*. These, however, are by no means the only statutory arrest provisions in our law. Many Provincial statutes contain wide powers of arrest. While a complete inventory of such powers has not been compiled, many of them are well known to private security personnel, and considered of some importance by them. Most commonly cited are statutes dealing with traffic, liquor and trespass.

As we have noted earlier in this chapter, the trespass legislation in four Provinces grants power to arrest without warrant to various persons having an interest in the land. In Ontario, such power is vested in "any peace officer" and in "the owner of the land on which it (i.e., the trespass) is committed, or the servant of, or any person authorized by such owner".[181] In Quebec, such power is held by "the owner, or his representative or servant".[182] In Alberta, the power is vested in "any peace officer", and in "the owner or occupier of the land on which the trespass is committed, or the servant of, or any person authorized by the owner or occupier of the land".[183] And in Manitoba, the power may be exercised by "any peace officer, or by the owner of the property on which it is committed, or his servant, or any person authorized by him".[184]

The act of trespass is one which is defined by the common law, and has been the subject of a great deal of case law over the centuries. While it is not intended to undertake a review of this case law in this study, it is nevertheless important to stress that a proper appreciation of the extent of the powers of arrest granted under these Provincial trespass statutes requires an understanding of this common law doctrine of trespass. In some cases, the courts appear to have interpreted trespass in very broad terms. In *Chaytor v. London, New York and Paris Association of Fashions Ltd. and Price*[185], for instance, Dunfield, J., enunciated the principle that a person's status as either trespasser, invitee or licensee may be affected by his purpose in being on the premises. The case involved the ejection by a store manager, assisted by a store detective and two local policemen, of the plaintiffs who were employed by a rival store in the same city, and were "comparison shopping" in the defendants' store. Dealing with the question of the legal status of the plaintiffs at the time of the incident, Dunfield, J., cited Lord Atkin for the proposition that:

> "The duty of an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises...for the purposes of which he had been invited."[186]

Applying this principle to the case before him, Dunfield, J., continued:

> "The defence in the instant case uses this as an argument that even if the public generally was invited into the shop to see the goods, as soon as it become clear that the plaintiffs were interested only in inspecting, not in buying, they became trespassers. That seems reasonable; though the subject-matter in the *Hillen* case is not *pari materia* with ours."[187]

If this interpretation of the law of trespass is correct[188], it can be seen that the powers of arrest without warrant granted by the trespass legislation, in those Provinces which have such legislation, are potentially very wide indeed, and potentially very adaptable to the interests of private security.

We should also reiterate here a point made earlier, which is that the courts have held that such trespass legislation applies equally to all privately owned property, regardless of the character of that property as a "public place".[189] This, of course, means that the broad arrest powers which private security personnel derive from such statutes are not limited to private places, but may be exercised in such public places as shopping mall parking lots, motel forecourts, condominium grounds, stadiums, etc..

Provincial *Highway Traffic Acts,* similarly grant quite extensive powers of arrest without warrant, both to peace officers and to private citizens. Subsections 153(2) and (3) of Ontario's *Highway Traffic Act*[190], for instance, grant the following powers:

> "(2) Every constable, who, on reasonable and probable grounds, believes that a contravention of any of the provisions of subsection 1 of section 7; clause a, b, c or d of subsection 1 of section 9; subsection 1 of section 10; subsection 2 of section 14; subsection 2 of section 17; subsection 2 or 3 of section 27; section 30; section 83, 117 or 127 or clause *a* of section 140[191] has been committed, whether it has been committed or not, and who, on reasonable and probable grounds believes that any person has committed such contravention, may arrest such person without warrant whether such person is guilty or not.
>
> (3) Every person may arrest without warrant any person whom he finds committing any such contravention."

Similarly broad powers of arrest without warrant are granted to "any constable or other police officer", by Section 94 of Ontario's *Liquor Control Act*[192], which provides that:

"94. Any constable or other police officer may arrest without warrant a person whom he finds committing an offence against this Act or the regulations."

Some appreciation of the breadth of this power to arrest without warrant may be gained from S.86 of the Act, which provides that:

"86. Every person who contravenes any provision of this Act or the regulations is guilty of an offence against this Act, whether so declared or not."

As we have noted earlier, it is not clear as to exactly who is intended to be included within the term "constable or other police officer", as it is used in the Act. Ontario's *Interpretation Act,* however, defines "peace officer" as including, amongst others, "a police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace"[193], etc.. The use of both terms, "police constable" and "constable", here might suggest that where the term "constable" is used in Ontario statutes, it is intended to include constables who may not be "police constables".[194] On this interpretation, the term as used in the *Liquor Control Act* would probably apply to such persons as special constables, railway constables, etc., except insofar as their appointments specifically exclude such an interpretation.

The provisions cited here are cited as examples of a wide variety of Provincial statutes, to be found in all Provinces, which grant such powers of arrest without warrant to peace officers and other persons, who may or may not include private security personnel in some contexts.

(b) *Arrest with Warrant*

The provisions for arrest with warrant for criminal offences are to be found in Section 455.3 and 456 to 456.3 of the *Criminal Code.* Warrants issued under these provisions may only be directed to peace officers (S.456.2), although of course persons other than peace officers may, and frequently do, swear out informations which form the basis of such warrants. The law governing arrests made with a warrant, however, is, for the purposes of this study not materially different from that described above in relation to arrests without a warrant. The same rights to search the person arrested, if any, and the same liabilities in civil and criminal law, may arise whether an arrest is made with or without a warrant. A warrant is thus merely another legal mechanism whereby an otherwise illegal detention may be converted into a lawful arrest.

To summarize this section on search as an incident to a lawful arrest, we may say that not only is the law of arrest in Canada technical, complex and fraught with legal problems for private security personnel, but the law with respect to the right to search a suspect upon making a lawful arrest is even less clearly established. Even assuming that the law regarding arrest provisions under the *Criminal Code* could be clarified (and perhaps simplified), there would still remain the problem of the extent to which rules of law developed in the context of criminal law arrest powers (e.g., decisions such as that in *Biron,* as to the meaning of "finds committing"), are applicable to powers of arrest enacted in Provincial statutes. If the legal rights of private security personnel with respect to Sections 449 and 450 of the *Criminal Code* are currently unclear, their rights with respect to the exercise of other arrest powers under other statutes are still less clear. Given the modern realities of private security, this is not a situation which should be tolerated for much longer.

In 1969, the Ouimet Committee commented in its report that:

> "The Committee has already indicated that it considers that police powers should be clearly defined and readily ascertainable. The existing law with respect to the nature and extent of the power to search the person of the accused, the premises where the accused is arrested, the vehicles or chattels under his control, as an incident of arrest, does not meet this test."[195]

It will be apparent from the preceding analysis, that this comment is no less true of our law with respect to the powers and liabilities of private security personnel in arresting persons.

(3) *Searches without Warrant Pursuant to Specific Statutory Provisions*

A wide variety of provisions in both Federal and Provincial statutes confer special powers of search without warrant on various persons for specific purposes. Some of these provisions limit the power of search to personal searches, others to property searches, while others allow both personal and property searches. The common characteristic of all of these provisions, however, is that they permit searches without a warrant, and without the need for a prior arrest of the person being searched. While the Law Reform Commission has undertaken an inventory of such search provisions which are to be found in Federal statutes[196], no such inventory has ever been undertaken of the great number of such

provisions which may be found in Provincial Statutes. A brief review of a few examples of such provisions, however, will serve here to illustrate their scope, and how they are applicable to private security personnel.

The *Criminal Code* itself grants some wide powers of search and seizure without warrant to peace officers, for a number of specific purposes. Sections 99, 100 and 101(2) grant extensive powers with respect to search for, and seizure of, prohibited or restricted weapons, firearms, ammunition and explosives connected with offences, or illegally possessed, or in emergency situations where the presence of such weapons represents a danger to some person. Such powers are generally exercisable "on reasonable and probable grounds". These provisions permit personal as well as property searches.

Section 181(2) of the *Code* gives to a peace officer the right to seize without warrant anything that may be evidence of the offence of keeping a common gaming house, where he finds a person committing this offence. The same subsection allows him to take into custody the person who is committing the offence, as well as any other person he finds on the premises, without a warrant.

Under Section 299(3) of the *Code,* a peace officer is given power, without warrant to enter into or upon "any place" to look for illegally possessed lumber, provided he has "reasonable and probable grounds" for suspecting that such lumber might be found there.

The most sweeping powers of search without warrant, however, are to be found in legislation governing drugs and alcohol. Section 10(1) of the *Narcotic Control Act*[197] provides that:

> "10. (1) A peace officer may, at any time
> (a) without a warrant enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling-house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed;
> (b) search any person found in such place; and
> (c) seize and take away any narcotic found in such place, any thing in such place in which he reasonably suspects a narcotic is contained or concealed, or any other thing by means of or in respect of which he reasonably believes an offence under this Act has been committed or that may be evidence of the commission of such an offence."

In interpreting Section 10(1), the courts have held that the requirement of reasonable belief does not extend to searches of persons under paragraph (b) of the subsection, and that provided a peace officer has a reasonable belief that there is an illegal narcotic in the place in which he conducts the search, he may search any person in such place regardless of whether or not he has reasonable and probable grounds to believe that that person is in possession of an illegal narcotic.[198] The latitude of this interpretation has been widely criticized.[199] An almost identically worded provision is to be found in S.37(1) of the Federal *Food and Drugs Act*[200], dealing with controlled drugs.

Section 93 of Ontario's *Liquor Control Act*[201] provides an example of a specific power of search without warrant granted by a Provincial statute:

> "93. (1) A constable or other police officer may at any time,
> (a) without a warrant, enter and search any vehicle or other conveyance in which he has reasonable grounds to believe that liquor is unlawfully kept or had, or kept or had for unlawful purposes, and search any person found in such vehicle or other conveyance,...[202]
>
> (2) A constable or other police officer who has made a search under subsection 1 may at any time seize and take away,
> (a) any liquor and packages in which liquor is kept;
> (b) any book, paper or thing that he reasonably believes may be evidence of the commission of an offence against this Act; and
> (c) any vehicle or other conveyance in which the liquor is found."

As with the Federal drug legislation, there is reason to believe that S.93(1)(a) and other similar Provincial provisions, allows a person to be searched regardless of whether or not the constable or other police officer has reason to believe that that person possesses liquor illegally; it is sufficient that the officer has reasonable grounds for believing that liquor is illegally being kept, etc. in the vehicle or conveyance in which the person is found.[203]

An apparently wide power to search vehicles is to be found in Ontario's *Highway Traffic Act.* Section 55 of this statute provides that:

> "55. (1) Every constable and every officer appointed for the purpose of carrying out the provisions of this Act may require the driver of any motor vehicle to submit such motor vehicle, together with its equipment and any trailer attached thereto, to such examination and tests as the constable or officer may consider expedient."

The overall context of Section 55 makes it clear that the purpose for which such random "examinations and tests" are permitted is to establish whether the vehicle is in safe condition. The absence of any requirement, in Subsection 55(1), that the constable reasonably believes that the vehicle is not in safe condition, before he conducts such an examination, however, has the effect, in practice if not in strict law, of converting the provision into a licence to undertake random searches of vehicles. Refusal to permit such an "examination" is, by virtue of Subsection 55(3), a summary conviction offence for which the offender is liable to a fine of not less than $50 and not more than $100.

Random personal and property searches are permitted by Section 3 of Ontario's *Public Works Protection Act*[204], which provides that:

> "3. A guard or peace officer,
> (a) may require any person entering or attempting to enter any public work or any approach thereto to furnish his name and address, to identify himself and to state the purpose for which he desires to enter the public work, in writing or otherwise;
> (b) may search, without warrant, any person entering or attempting to enter a public work or a vehicle in the charge or under the control of any such person or which has recently been or is suspected of having been in the charge or under the control of any such person or in which any such person is a passenger; and
> (c) may refuse permission to any person to enter a public work and use such force as is necessary to prevent any such person from so entering."

Refusal to comply with a request or direction made by a guard or peace officer under this Act is a summary conviction offence punishable by a fine of up to $100 or by imprisonment for up to two months or both.[205] It is noteworthy that the statute contains a broad definition of "public work", which includes:

> "(i) any railway, canal, highway, bridge, power works including all property used for the generation, transformation, distribution or supply of hydraulic or electrical powers, gas works, water works, public utility *or other work,* owned, operated or carried on by the Government of Ontario or by any board or commission thereof, or by any municipal corporation, public utility commission *or by private enterprises.*"[206] (emphasis added)

Indeed, this definition appears on its face to be so broad that it is difficult to imagine what industrial enterprise could not be considered a "public work" according to its terms. Section 2 of the Act, furthermore, provides that "for the purpose of protecting a public work, guards may be appointed by" a number of officials, as well as by "the chairman or other person who is the head of a board,

commission *or other body owning* or having charge of the public work" (emphasis added). Section 2(2) provides that: "Every person appointed as a guard under this section has, for the purposes of this Act the powers of a peace officer".

One final example of a statute which confers extensive powers of random personal and property search without warrant on private security personnel is the Federal *Aeronautics Act*[207] as amended in 1973.[208] Section 5.1 of this Act now provides that:

> "(3) No person who, before boarding an aircraft, has been required by a security officer
>
> (a) to submit to an authorized search of his person, or
>
> (b) to permit an authorized search to be carried out of the personal belongings and baggage that he intends to take or have placed on board the aircraft
>
> shall board the aircraft unless the person has submitted to an authorized search or permitted an authorized search to be carried out, as the case may be.
>
> (4) Where, after having boarded an aircraft, a person who has been required by a security officer
>
> (a) to submit to an authorized search of his person, or
>
> (b) to permit an authorized search to be carried out of the personal belongings and baggage that he took or had placed on board the aircraft
>
> refuses to submit to an authorized search or to permit an authorized search to be carried out, as the case may be, the security officer may order that person to leave the aircraft and remove from the aircraft the personal belongings and baggage that he took or had placed on board the aircraft, and such person shall thereupon remove himself from the aircraft and remove or authorize the removal of such personal belongings and baggage from the aircraft.
>
> (5) No person who, having been required by a security officer to permit an authorized search of baggage, goods or cargo that he intends to have transported on an aircraft, refuses to permit such a search to be carried out shall place the baggage, goods or cargo on board the aircraft, cause the baggage, goods or cargo to be placed on board the aircraft or attempt to place the baggage, goods or cargo on board the aircraft.
>
> (6) Where baggage, goods or cargo are received at an aerodrome for transport on an aircraft and are unaccompanied by any person who may give the permission referred to in subsection (5), a security officer may carry out an authorized search of such baggage, goods or cargo and, in carrying out that search, may use such force as may be necessary to gain access to the contents of the baggage, goods or cargo.
>
> (7) When security measures authorized under this section are instituted to observe and inspect persons at aerodromes or on aircraft, there shall be posted at prominent places where persons are observed or inspected under those measures, where they depart for boarding aircraft and where they enter upon aircraft, a notice, in at least the official languages of Canada, stating that authorized security measures are being taken to observe and inspect passengers and that no passenger is obliged to submit to a search of his person, personal belongings or baggage if he chooses not to board an aircraft."

"Security officers" having such powers under the statute are "persons or classes of persons", designated by the Federal Minister of Transport, "who, in his opinion, are qualified to be so designated".[209] In practice, such persons are frequently members of the private contract manned security industry. An "authorized search" is defined in Section 5.1(12) as meaning "a search carried out in such manner and under such circumstances as may be prescribed by the regulations made under this section". The regulations, in turn, require that air carriers establish and maintain prescribed security measures at aerodromes, including "systems of searching persons, personal belongings, baggage, goods and cargo by persons or by mechanical or electronic devices"[210], and "security measures on aircraft consisting of systems of searching the aircraft and persons, personal belongings, baggage, goods and cargo thereon by persons or by mechanical or electronic devices".[211] The regulations also require that: "An authorized search shall be carried out (a) in accordance with the systems referred to" above; "and (b) using reasonable force, if necessary".[212]

These provisions of the Federal *Aeronautics Act* are particularly noteworthy because, like the provisions under Ontario's *Public Works Protection Act,* they grant to certain private security personnel powers to conduct random personal and property searches, without there having to be any suspicion of criminal or other wrongful behaviour or intent on the part of the persons who are, or whose property is, searched. Unlike the provisions of the *Public Works Protection Act,* however, the provisions of the *Aeronautics Act* do give the option to the public of declining to submit to such searches, and require that this option be brought to the public's attention by notices "posted at prominent places where persons are observed or inspected under those measures, where they depart for boarding aircraft and where they enter upon aircraft".[213] A person who does decline to submit to such searches, of course, may be refused permission to board an aircraft. The notices actually in use for this purpose at one airport state as follows:

> "Authorized security measures are being taken to observe and inspect passengers at this airport. No passenger is obliged to submit to a search of his person, personal belongings, or luggage if he chooses not to board an aircraft."

(4) *Searches Incidental to the Exercise of Property Rights*

As we shall note later in this chapter, most searches made pursuant to the exercise of property rights can be made only with the consent of the person being searched, or whose property is being searched. Sections 38 and 39 of the *Criminal Code,* however, raise the possibility that searches of persons or property without a warrant and without the consent of the person being searched may, in certain circumstances, be permitted in defence of movable property. The Sections provide as follows:

> "38.(1) Every one who is in peaceable possession of movable property, and every one lawfully assisting him, is justified
> (a) in preventing a trespasser from taking it, or
> (b) in taking it from a trespasser who has taken it, if he does not strike or cause bodily harm to the trespasser.
>
> (2) Where a person who is in peaceable possession of movable property lays hands upon it, a trespasser who persists in attempting to keep it or take it from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation.
>
> 39.(1) Every one who is in peaceable possession of movable property under a claim of right, and every one acting under his authority is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.
>
> (2) Every one who is in peaceable possession of movable property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it."

These Sections must be read in the light of Section 25(1) of the *Code,* which provides that:

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

It would seem that these provisions, when read together, give considerable scope to the possibility of searches without warrant, both of persons and of property, and without the consent of the person being searched, to defend possession of movable property. There appear to have been very few judicial considerations of the scope of these provisions, and so it is difficult to state with

certainty how they might apply to routine private security work. In those cases in which these provisions have been considered, however, the courts have strongly emphasized that no action which involves the use of any personal violence will normally be considered justified by Sections 38 and 39 of the *Code.*

In *R. v. Doucette et al.,* in a unanimous judgment, the Court of Appeal of Ontario enunciated the principle that:

> "There must be reasonable limits imposed upon the right of self-help assumed and asserted by private individuals in order to preserve peace and tranquility and to avoid the evil consequences which are bound to flow from insistence upon a right to use private force. Under S.39 of the *Criminal Code,* the peaceable possessor of movable property under a claim of right is protected from criminal responsibility (although not from civil responsibility)[214] for resisting its taking even by the person legally entitled."[215]

The *Doucette* case involved an attempt by private bailiffs to repossess a television set which had been purchased on an installment payment basis, the purchaser having fallen behind on his payments. There seems no reason, however, why the principles enunciated in that case should not have general application to those who, for whatever reason, attempt to repossess movable property pursuant to their rights under Sections 38 and 39 of the *Code.* In concluding its judgment in the *Doucette* case, the court expressed in strong terms the general principle it will observe in applying Sections 38 and 39. Speaking for the court, Schroeder, J.A., said:

> "I hope that the expression of this opinion may serve to correct certain impressions which seem to have got abroad that merchants who sell their wares on credit under the terms of hire-purchase agreements, finance companies to whom such agreements are sold and assigned, or bailiffs employed by the vendors or their assignees, may take the law into their own hands and exert private force with impunity. If they are unable to retake their property by peaceable means and without provoking a breach of the peace, the Courts are always open to them and they may institute replevin proceedings or take such other action as they may be advised in order to recover their property."[216]

By ruling out any force at all, the court in this case appears to have gone somewhat further than words of the *Criminal Code* itself. Section 38 provides that repossession will be justified provided that the person repossessing does not "strike or cause bodily harm to the trespasser"[217], and Section 25(1) suggests that in doing an act which is "authorized by law", a private person is justified in using "as much force as is necessary for that purpose". Section 39 itself

provides that defence of possession of movable property under a claim of right will be justified if "no more force than is necessary" is used. Both Sections, therefore, appear to contemplate that some force may be justified, and it may be that the strong language of the court in the *Doucette* case must be read in the light of the particular facts of that case (which involved substantial personal violence), and that courts would not generally hold illegal attempts at repossession (e.g., through involuntary search of property) which involve minimal force and no personal violence.

There is no doubt, however, that private security personnel who choose to invoke Sections 38 and 39 of the *Code* to justify personal or property searches, to protect company property or merchandise, for instance, from theft, must do so at their own (or their company's) risk. In this sense, it seems likely that the courts will treat these rights under Sections 38 and 39 in much the same way that they treat the right of persons other than peace officers to make an arrest, under Section 449 of the *Code,* of persons whom they "find committing" an offence. In exercising rights under Sections 38 and 39, the private security officer will thus bear the risk of liability for his actions if it turns out that the person from whom he attempts to repossess goods is not a trespasser or has not, in fact, taken the goods. Whether the courts would apply to the interpretation of "has taken it" in Section 38 the same kind of approach that was taken in the *Biron* case[218] to the interpretation of "finds committing" in Section 450, and interpret the section to mean "has apparently taken it", remains a matter of speculation. Obviously, the job of private security would be made much easier, and perhaps the rights of the general public would be significantly diminished as a result, if they did.

(5) *Searches Pursuant to Consent of the Person Being Searched*

No examination of the law governing private security search and seizure powers can be considered complete which does not examine the law governing consent as it relates to submission to such powers. In particular, the law of consent must be scrutinized in terms of how far it takes into account the modern reality of the phenomenon of private security. This is because all the laws ever written, and all the cases ever decided, which purport to give citizens freedom from undue interference and subjection to security powers such as search and seizure, come to nothing in the face of the individual who freely and voluntarily consents to submit to such powers. As we shall note in the following chapter, it is on

such consent and public cooperation that private security personnel most commonly rely in doing their day-to-day work, and in availing themselves of the opportunity to search persons and property as part of that work. It therefore becomes of great importance in understanding the legal framework within which they operate, to examine how the law defines free and informed consent, and what behaviour is recognized by the law as indicating that such consent has been given.

If a private security guard, or any one else, searches a person or a person's property without that person's consent, and other than pursuant to some specifically recognized statutory or common law power of search, he will be committing a civil wrong against that person, for which he may be sued in damages (for, e.g., assault, battery, false imprisonment, etc.). Depending on the circumstances he may also be committing a criminal offence (e.g., of assault). An understanding of what the law recognizes as free and informed consent under such circumstances is, therefore, critical to an understanding of the legal scope of private security search and seizure powers.

The legal concept of consent is to be found almost exclusively in case law which elucidates the common law. Consent is scarcely to be found at all mentioned in statute law. In the *Criminal Code,* which defines the more significant criminal law enforcement powers, there is no reference to the subject of consent other than in relation to certain specific offences[219] which have little bearing on the exercise, or purported exercise, of police powers. The general defence of consent is rather left defined by common law, and preserved as part of our criminal law by virtue of Section 7 of the *Code.* The concept of consent as it applies in civil law (e.g., as a defence against liability for damages in tort) is similarly defined exclusively by case law.

Because the exercise of law enforcement powers, or their purported exercise, are only rarely made the subject of civil suits or criminal prosecutions, the case law governing consent in this area is meagre indeed. General concepts of the nature and limits of valid consent to search, for instance, must thus be derived largely by analogy to concepts of consent developed in other legal contexts.

In order to establish whether or not there has been consent in a given situation, the courts will not only consider explicit expressions of consent (either verbal or written), but may also under

certain circumstances be willing to infer the existence of consent from the conduct of the parties involved, or from their special relationship to one another. And in considering the overall circumstances in which consent is alleged to have been given, the courts will usually be vigilant in considering aspects of the circumstances which may suggest that consent which is apparently given (even expressly) should nevertheless not be regarded as sufficiently free and informed consent to warrant recognition as legally valid consent. In determining whether consent has been given, therefore, the courts will generally be as much, if not more, concerned with what was actually in the mind of the person who is alleged to have consented, as with the perceptions of the person to whom consent is alleged to have been given.[220] In practical terms, however, the appearances will provide important evidence from which a court or jury may infer whether or not consent was actually given in the circumstances.

Although consent is commonly referred to as a defence to a criminal charge, or to a civil suit in tort, it is important to understand that in strictly legal terms it is the absence of consent which usually comprises an integral part of the crime or tort which the prosecutor or plaintiff must prove. Thus under our current law, both the criminal offence of assault, and the torts of assault, battery and false imprisonment, are defined as being done without the consent of the accused or plaintiff.[221] The practical result of this is that the burden of proof in such cases is on the "victim", to establish that he was assaulted, imprisoned, etc. without his consent. The accused (or defendant in a civil case) is not required to prove that the victim did consent.[222] The theoretical advantage which this gives to the defendant in a civil or criminal case, is of course somewhat diminished in practice by the fact that a court or jury will often be willing to infer the absence of consent when no evidence is led to suggest that consent may have been given. In practice, therefore, there will often be some initial evidential burden on the defendant to introduce some evidence of consent, even though the final burden in a case rests on the prosecutor or the plaintiff to prove the absence of consent. However, the fact that our law requires the prosecutor or plaintiff to prove the absence of consent, rather than requiring the defendant to prove that consent was given, reflects an attitude towards individual freedoms which may perhaps go some way to explaining why the purported exercise of police powers such as search and seizure are so rarely made the subject of criminal prosecutions or civil suits for damages. A legal system which was more protective of individual

freedom would presumably reverse this onus of proof, and require a defendant to justify any interference with such freedom.

Our law recognizes some limits to the freedom of individuals to validly consent to assaults and other trespasses to the person, but it would be unusual indeed for those limits to be exceeded in search situations. In reviewing the law on this point, Freedman and Stenning have concluded that the law

> "appear(s) to support the contention that a person may consent to being assaulted, detained, etc., and that such consent may be given expressly, by implication, or may spring from the terms of an agreement. The *Abraham* case[223] suggests that there are limits to the kinds of consent which the courts will accept as a defence to a criminal charge; it would appear that they would not normally accept consent as a defence if the accused has "beaten up" the victim, although the degree of brutality for which consent of the victim will provide a defence is not clear."[224]

There is some reason to believe that these limits to the scope of consent which will be recognized as valid in law, apply equally to civil as well as criminal liability. In *R. v. Shand*[225], the Ontario Court of Appeal cited with approval the English case of *Edwick v. Hawkes*[226], in which it was held that a clause in a lease which purported to give the landlord a right to eject the lessee by force in the event of a breach of convenant, or at the end of the term of the lease, was void as being a licence to commit an act forbidden by law. This case suggests that consent, even when it is enshrined in the terms of a written contract, will not always be accorded legal recognition by the courts, if it purports to licence physical violence to the person or even to his property.

Of more immediate concern with respect to the law of search, however, is the case law which deals with how consent may be ascertained and, more particularly, under what circumstances it will be implied from the conduct of the person being searched. In practice, this issue may arise in four different ways with respect to typical situations involving private security personnel. First, it may arise where a person goes onto private property, or remains there, after reading a notice which clearly states that submission to some kind of search is a condition for entering or remaining upon the property. Here, the issue is the effect of unilaterally posted notices. Secondly, is the question of when consent will be implied from the conduct of a person who submits to a search, usually after some kind of verbal request, without resistance. Thirdly, is the issue of the effect, if any, which the wearing of uniforms by private security personnel may have on the court's attitude towards the voluntariness of consent which may be implied from submission to search. Finally, we must consider whether consent is ever implied

from the special relationship of the parties involved in a search or seizure.

(a) *Unilateral notices.* It is quite clear that an occupier or owner of premises may, either as a contractual term or through the exercise of his rights over the premises as an occupier, make access to the premises by other persons conditional upon submission by them to search procedures. The only limits to the occupier's rights in this respect would seem to be those described above, whereby courts will sometimes decline to give effect even to express consent where it is consent to personal violence or other substantial physical force.

Whether such conditions are imposed as a contractual term (e.g., through a condition printed on an admission ticket for which money has been paid), or simply by the posting of unilateral notices on the premises by the occupier, the main issue is likely to be that of the adequacy of notice of such conditions given to the visitor or contractor. In each case the courts will inquire as to whether the parties were given sufficient notice of the conditions that their consent to them could be implied from their subsequent conduct.

In cases dealing with conditions which are set out as terms of a contract, the courts have approached the matter differently depending upon whether the contract was one which was reduced to writing and signed by the parties (e.g., a written lease), or whether the contract was one, whether reduced to writing or not, which was not signed by the parties. The law on this point was most clearly set out by Mellish, L.J., in the leading English case of *Parker v. The South Eastern Railway Co.:*

> "In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are..."[227]

Dealing more specifically with cases in which conditions are printed on tickets of admission, etc., Mellish, L.J., summarized the law as follows:

> "I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions."[228]

In considering the effects of unilaterally posted notices by occupiers in situations in which there is no contractual relationship between the occupier and the visitor, the courts have adopted an almost identical approach. The cases, however, have largely been concerned with notices which purport to exclude the occupier's liability, rather than those which impose such obligations as submission to search as conditions of entry onto the premises. Since both types of notice essentially involve the imposition of conditions of entry on visitors, however, it seems plausible that the same basic principles would apply in either case.

In the leading English case of *Ashdown v. Samuel Williams and Sons Ltd.,* the court considered the effects of two notices which were posted on the defendants' land, and which purported to exempt the defendants from liability for any injury which persons using a short cut, which passed over the defendants' land, might suffer. During the course of his judgement in the case, Jenkins, L.J., observed that:

> "It is not in dispute that it is competent to an occupier of land to restrict or exclude any liability he might otherwise be under to any licensee of his, including liability for his own or his servants' negligence, by conditions aptly framed and adequately made known to the licensee."[229]

Jenkins, L.J., went on to remark that:

> "I see no reason in principal for holding that something more is needed to give a mere non-contractual licensee constructive knowledge of a condition restricting or excluding his ordinary right to be treated with reasonable care while on the land to which the licence relates, than is required to give a party to a contract constructive knowledge of a term restricting or excluding some right of action he would or might otherwise have under the general law."[230]

These cases appear to give property owners very wide authority, not only to impose submission to search as a condition of entry onto premises, but also, it would seem, to exempt themselves from common law liability which might otherwise arise from such searches, by unilaterally and carefully placed notices on their premises. As Weir has pointed out, and as was noted above in Chapter 2 of this report:

> ". . . the tort of trespass protects all premises...Nor does the law of contractual damages distinguish between the various kinds of premises...(T)he law of damages, whether in contract or in tort, does not distinguish between private places and places of public resort in private occupation . . ."[231]

The common law thus gives to the corporate occupier the power to confer wide powers of search on his private security employees over those who voluntarily come onto his premises, and equally wide powers to exempt himself and his employees from common law liability, and even criminal liability, in conducting such searches, provided actual violence is not used. Since this is all accomplished through his right to make consent to such procedures a condition of entry onto his premises, however, the visitor/client may avoid exposing himself to these powers by declining to come onto the premises.

One other matter which arises over unilaterally posted notices is the question of exactly how they affect the rights of those who enter having read and understood them (or, which has the same legal implications, having "constructively" read and understood them). Clearly, since consent to submit to search is a condition of remaining on the premises under such circumstances, a refusal to submit to search will make the visitor a trespasser and, as we have noted, liable to be removed from the premises, by force if necessary.[232] More questionable, however, is whether an occupier, or his private security personnel, may insist on conducting a search before allowing the visitor/client to leave the premises. Although there is no clear authority on this point, the review of the common law set out above would seem to suggest that the combined effect of Sections 38 and 39 of the *Criminal Code* and carefully worded and carefully placed notices, could give an occupier this right, provided that he does not resort to physical violence in enforcing it.[233] It may be, however, that if the courts were squarely confronted with this issue, they would be reluctant to accept the effect of such notices as a defence to a suit for false imprisonment, and would find some way of avoiding this conclusion.

(b) *Consent implied from acquiescence.* If a person acquiesces in search procedures, without protest or resistance of any kind, this of course constitutes *prima facie* evidence of consent. As we have seen, however, the courts will generally inquire into many of the preceding and surrounding circumstances before concluding that the person who acquiesced in search procedures did legally consent to them. The cases demonstrate a concern to discover whether the person being searched felt that he had any real alternative to submitting to search procedures. In assessing this, the courts tend to consider such matters as: the forcefulness with which private security personnel insist on submission to search; whether the incident occurs in a public area and is likely to be seen by many other members of the public; any suggestion or hint that refusal to submit to search will lead to detention by force, whether such suggestion arises from anything said by private security personnel, or by the demeanour or numerical superiority of the private security personnel involved; whether the request for submission to search has been accompanied by any public accusation of criminal conduct on the part of the person being searched.[234]

This broad approach which the courts appear to have taken in establishing the circumstances in which consent will be implied from acquiescent conduct by the person being searched, provides considerable aid to the plaintiff or prosecutor who must prove that a search was undertaken without the consent of the person being searched.

(c) *Uniforms and consent.* Special concern arises over the effects of uniforms worn by private security personnel because of the possibility that they might induce consent to such procedures as searches, which would otherwise not be forthcoming, because of public misconceptions about the authority and powers of uniformed personnel. As Kakalik and Wildhorn have put it:

> "As a practical matter, however, private security personnel are likely to be able to take fuller advantage of their citizen powers. Their experience and training is likely to increase their ability to exercise their powers. Moreover, by training or uniform, they can exercise the most useful tool of private security work — consent or acquiescence of others."[235]

There appears to have been no research undertaken in Canada or elsewhere which examines public attitudes towards, and perceptions of, private security personnel, or which can give any indication as to whether members of the public do in fact believe that persons wearing uniforms do have greater authority and powers

than others. In the light of the modern growth of private security, such research would seem long overdue.

There is some evidence, however, that private security personnel themselves are not indifferent to the effects of uniforms. In their recent study of manned contract security in Ontario, Shearing and Farnell asked security employees: "Do you think wearing a police-type uniform increases your effectiveness as a security guard in dealing with the following three groups of people: the general public, offenders, the police?" Eighty per cent of the guards responded that they did feel wearing such a uniform increases their effectiveness in dealing with the general public, 68 per cent similarly answered affirmatively with respect to offenders, and 62 per cent answered affirmatively with respect to the impact of uniforms in relations with the public police.[236]

In her study of in-house security forces in a variety of industrial and commercial settings, Jeffries has suggested that the structure and style of an in-house security force is determined by a variety of factors, including: the number of persons employed by the company; the physical features of the location to be secured; the location in the community of the place to be secured; the nature of the product manufactured or service provided; the presence or absence of a union; the historical traditions of the company; the personality of the security director; and the company structure in terms of reporting relationships. In speaking of retail security, however, Jeffries notes that:

> "In looking at the various models or structures of retail security included in the sample, I would reiterate that deterrence is perceived by all departments to be their *raison d'être*. This concept is operationalized in two basic ways: deterrence by intimidation, i.e., a highly visible security department, usually attired in fairly police-like uniforms; deterrence by apprehension, i.e., an active corps of floor detectives apprehending and charging shoplifters."[237]

The available research, then, suggests strongly that the effect of uniforms in facilitating their work and in encouraging acquiescence and cooperation by the public, is not lost on private security personnel.

The wearing of uniforms by private security personnel is currently more or less controlled through a variety of legal provisions. Sections 119 and 377 of the *Criminal Code* prohibit the wearing of military and police-like uniforms of such a kind as would give rise to charges of impersonation. Similar provisions may be found in various police statutes[238], and even in a municipal

by-law.[239] With respect to contract security personnel who are required to be licenced under Provincial legislation, there are also of course legal and administrative controls which may be exercised through this medium. These licensing statutes generally require the wearing of uniforms by licensed security guards while on duty, and forbid the wearing of uniforms by private investigators while on duty.[240] They also often give power to licensing authorities to make regulations specifying types of uniforms, etc. which may be worn by licensees, and requiring approval of such uniforms by the licensing authority.[241] Such statutes also usually prohibit licensees from performing police duties, or holding themselves out as "performing or providing services or duties ordinarily performed or provided by police.[242]

Charges against private security personnel for offences against these statutory provisions are extremely rare, as are complaints to licensing authorities alleging improper use of uniforms. While the matter of sanctions against licensees will be considered further below, we may note here that in their study of the administration of licensing statutes, Stenning and Cornish reported that only in Quebec and Nova Scotia did licensing authorities report receiving complaints of "impersonation of public police or investigator" or use of "improper uniform or equipment".[243]

Whilst provisions of this kind commendably attempt to reduce the likelihood of confusion in the public mind between private security personnel on the one hand, and public police and military personnel on the other, they do not go far in dealing with the more fundamental question of what effects uniforms of any kind (whether distinct from police uniforms or not) may have on public perceptions of a security guard's status and authority. Concern over this issue must increase with the growing tendency of Provincial governments to think in terms of extending current statutory controls over manned contract security to cover in-house security forces also. In Ontario, such a move has reached the stage of legislative proposals incorporated in a bill (Bill 87) currently before the Provincial Legislature. Under this bill, while in-house security personnel will not themselves have to be licensed[244], they will become subject to the various standards and prohibitions laid down in the bill's provisions. Sections 37(1) and 39 of the bill require all security guards and burglar alarm agents to wear uniforms which are "in accordance with the regulations" while on duty. The results of this bill, if it is enacted, would seem to be that more private security personnel in Ontario will be required by law to wear uniforms than are presently required to do so. This

kind of regulation, therefore, is likely to make the question of the effect of uniforms in inducing consent when it may otherwise not be forthcoming more, rather than less, critical.

(d) *Consent implied from special relationships.* One final matter for consideration on the issue of consent, is the question of whether the courts will ever imply a right or permission to search from the special relationship of the person searching to the person being searched. Private security employees, as agents of their employers or client companies, find themselves in a variety of such special relationships, such as that of an employer to his employee, a landlord to his tenant, a hospital to its patients, a hotel to its guests, a carrier to his passengers, etc. The law governing search and seizure, however, appears to have been developed exclusively around concepts of criminal law enforcement on the one hand, and rights over property on the other, with the result that rights or implied permission for search or seizure arising specifically out of such relationships are not generally recognized by the law. A notable exception to this general proposition is the well-established right of lien which innkeepers have at common law over the property of their guests who fail to pay their bills. Amirault and Archer have described this right of lien as follows:

> "If a guest fails to pay his bill at the end of his stay, an innkeeper has the right at common law to prevent the guest from removing his belongings from the hotel, to take actual possession of such goods, to hold them, and eventually, if necessary, to sell them. The purpose of this action is to ensure payment for the accommodation and any other services related to the guest's stay that have been provided. This right of lien is conferred upon an innkeeper to compensate him for the fact that he is required by law to accept any qualified traveller. It exists only with regard to an innkeeper and a guest, as strictly defined in common law. It would not apply, for example, to a person considered by law to be a boarder in a hotel rather than a guest, nor would it apply to the operator of a motel, resort, boarding or lodging house, or restaurant that does not satisfy the legal requirements of an inn."[245]

The authors also note that:

> "It should be noted that the innkeeper's right of lien extends to any traveller who incurs a debt to the innkeeper, not just to guests who are staying overnight. Thus, a person who stops by a hotel for a meal or a drink may also have his goods held until he pays his bill."[246]

And, finally, that:

> "It should be emphasized that the innkeeper's lien relates only to the guest's belongings and not to the guest's own person. It is therefore illegal for an

innkeeper to detain, or attempt to detain, a guest until he has paid his bill."[247]

In many of the larger hotels, the practical enforcement of the innkeeper's right of lien will fall to private security personnel. Clearly, such enforcement does not involve any right to conduct personal searches. Property searches, however, may be inevitable if such a right of lien is to be effective. The extent to which private security may go, in searching for and seizing a hotel guest's property in the exercise of the innkeeper's rights of lien, however, does not seem to have been clearly defined by the courts.[248]

In many Provinces the common law right of lien of innkeepers has been codified by statute and broadened in the process. Section 2 of Ontario's *Innkeeper's Act*[249], for instance, provides that:

"2.(1) An innkeeper, boarding-house keeper, or lodging-house keeper has a lien on the goods of his guest, boarder or lodger for the value or price of any food or accommodation furnished to him or on his account."

An "inn", for the purposes of this Act, is defined by Section 1 as including, "a hotel, inn, tavern, public house or other place of refreshment, the keeper of which is by law responsible for the goods of his guests".

Beyond this exceptional and historic privilege the law does not appear to recognize any relationships as giving any implied rights, or warranting any inference of consent, to personal or property searches or seizure.[250] Arbitrators in the field of labour relations have over the years begun to develop some principles with respect to search of employees and their property by employers. Labour arbitration decisions, however, unlike court decisions, do not have general legal force, and are binding only on the parties involved in the particular disputes out of which they arise. Consideration of these decisions, therefore, will be postponed to the following chapter of this study.

Legal Redress for Wrongful Searches and Seizures

In concluding this chapter, we must now consider briefly the various avenues of legal redress which are available to persons who may be wrongfully subjected to search procedures by private security personnel. In the following chapter we shall consider some of the other, non-legal, avenues of redress which are available to such persons.

In considering legal liability for wrongful searches, two main issues arise. First, is the liability of the person(s) who actually carried out the illegal search. Secondly, is the possible vicarious liability of that person's employer (s) or other person (s) to whom he provides his services. In the case of certain mechanical search devices, which are not backed up by searches by private security personnel, of course, the first issue does not arise, and the corporate owner of the search equipment bears original rather than vicarious liability for any illegality. There appear to be no reported cases yet, however, in which a company or institution has been sued for damages for an illegal mechanical search not involving actions by corporate personnel.

There are essentially three major avenues of legal redress against illegal searches by private security personnel: (a) criminal charges, (b) civil suits for damages, and (c) complaints to licensing authorities, in the case of searches involving licensed private security personnel. We shall describe each of these briefly in turn, considering in each case both original and vicarious liability.

(1) *Criminal Charges.* A wide variety of possible criminal charges could arise out of illegal personal or property searches. Depending upon the circumstances, such searches may give rise to charges of common assault, assault causing bodily harm, wilful damage to property, break and enter, causing a disturbance, impersonating a peace officer, theft, extortion, or an attempt to commit any of these offences. A personal search of a female by a male security officer could also give rise to a charge of indecent assault, and it is for this reason that a common practice has grown up within private security never to allow a body search involving personal contact between persons of the opposite sex. A personal search conducted with an electronic device (e.g., a metal detector), however, is not generally considered to present problems of this kind, at least when clothing is not removed.

With respect to all of these charges, except those of causing a disturbance and impersonating a peace officer, it will be up to the prosecution to prove beyond a reasonable doubt all the elements of the offence, including the fact that the person being searched did not consent to the search. Furthermore, the requirement of *mens rea* for these offences is sufficiently high that a person who genuinely, but mistakenly, believes that he has a right to search will rarely be convicted on such charges. In *R. v. Wallace, R. v. Hall, R. v. Leach*[251], for instance, bailiffs who were not peace officers were acquitted of impersonating a peace officer on the grounds that they did not have the necessary *mens rea* for the

offence because they genuinely believed that they were peace officers. This would seem to suggest that criminal prosecutions of private security personnel in cases of illegal search will only be successful in the grossest cases of abuse. This is undoubtedly one of the reaons why they are so rare.

In those Provinces in which *Petty Trespass* legislation has been enacted, an illegal search or seizure which involves trespass to land, may also give rise to a prosecution for the Provincial offence of trespass under such statutes.[252]

Corporations are only rarely held vicariously liable for the criminal acts of their employees and, when this does occur, it is generally only in cases of strict liability offences.[253] Case law demonstrates, however, that a corporation may be held *directly* responsible in criminal law where the acts of its employees can truly be said to be acts attributable to the company itself. The question in each case will be whether the employees represented the "acting and directing will" of the company.[254] Such a finding will generally only be made where the person actually responsible for the conduct in question held a position within the company in which he was called upon to make major executive decisions in carrying on the company's business. It will be extremely rare, if ever, therefore, that a corporation is held either vicariously or directly criminally responsible for an illegal search by one of its security employees.

(2) *Civil Suits for Damages.* As we have noted earlier in this chapter, the most likely avenues of civil redress for persons who have been subjected to illegal searches are civil suits for damages in trespass. These would include suits for assault, battery, false imprisonment, and trespass to land. In the event of articles being seized as a result of an illegal search, civil actions in conversion or detinue may lie.

As with criminal liability, civil liability for damages for any of these torts will depend upon the person who has been searched (plaintiff) proving that the search or seizure was conducted without his consent. The only exception to this general rule would appear to be in the case of trespass to land "where, by the weight of authority, the burden of proving a licence is upon the defendant".[255] Similar problems to those of proving *mens rea* in criminal prosecutions, however, do not arise in civil suits of this kind.

In four Provinces, statutes have been enacted which create civil remedies for invasions of privacy,[256] and these remedies may often

be available to those who have been subjected to illegal searches or seizures by private security personnel. These remedies exist in addition to the common law remedies referred to above. The *Privacy Acts* of British Columbia, Manitoba and Saskatchewan, are all quite similar, and each establishes a tort of invasion of privacy. Section 2 of British Columbia's Act, for instance, provides that:

> "2.(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of another, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties."

Section 3(1) provides that an act or conduct is not a violation of privacy (a) where it is carried out with the subject's consent, (b) where it is incidental to the exercise of a lawful right of defence of persons or property, (c) where it is authorized by law, or (d) where it is carried out by a peace officer or public officer in the course of his duty.

Quebec's *Charter of Human Rights and Freedoms* enumerates, in Sections 4-8, a number of human rights which are of relevance to search and seizure situations, as follows:

> "4. Every person has a right to the safeguard of his dignity, honour and reputation.
>
> 5. Every person has a right to respect for his private life.
>
> 6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.
>
> 7. A person's home is inviolable.
>
> 8. No one may enter upon the property of another or take anything therefrom without his express or implied consent."

Section 49 of the *Charter* creates the civil remedy for invasion of these rights, by providing that:

> "49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom."

The section also authorizes a court to order exemplary damages to be paid by the defendant in such a case.

There is no clear indication as yet as to what attitudes the courts will take towards private security personnel in applying these Provincial *Privacy Acts.* One reported case which involved the application of the B.C. *Privacy Act* to the work of a private investigator, however, suggests that the courts may be willing to give greater latitude to *bona fide* private security personnel in applying such legislation. In *Davis v. McArthur,* a wife, separated from her husband and suspecting him of infidelity, hired a private investigator who watched and followed him for several months, and attached a "bumper-beeper" to his car. The trial judge's award of damages for invasion of privacy was reversed on appeal on the grounds that what the private investigator did was "reasonable in the circumstances". In giving the judgment on appeal, Tysoe, J.A., observed:

> "I respectfully agree with the learned trial Judge... that the appellant's "role as private investigator does not give a claim of right within s.2(1) or authorization within s.3(1)(c) so as to afford a complete defence, but it does not follow that his position as private investigator is not relevant..."
>
> The appellant was acting as agent of the wife who had a legitimate interest in her husband's conduct. He was not activated by malice or mere curiosity. It appears to me that throughout he acted with circumspection. His shadowing and observation of the respondent, was not conducted in such a way as to attract public attention; nor was it carried out in an offensive manner. In my respectful opinion, it was not so close and continuous as to go beyond reasonable bounds."[257]

Commenting on this decision, Freedman and Stenning have suggested that:

> "It would appear, therefore, that although he remains subject to *Criminal Code* restraints even where he is acting in the course of his business...[258], a private investigator is, if he acts "with circumspection", allowed a greater freedom to interfere with the privacy of others than is an ordinary private citizen, even though neither may have any lawful "authority" to act."[259]

The question of vicarious civil liability of employers and contract security clients for the illegal acts of private security personnel is a complex one and it is intended only to briefly summarize the main issues surrounding this question here.[260] In order to establish such vicarious liability in tort a plaintiff must prove: (i) that a master/servant relationship existed between the company and the private security officer; (ii) that the private security officer was acting within the scope of his employment;

and, (iii) that the conduct of the private security officer was such as to render him civilly liable.

The third of these issues has already been considered and need not concern us further. The first two issues, however, present serious problems when applied to private security.

(a) *a master/servant relationship.* Whether or not a master/servant relationship exists in any particular case will depend upon the circumstances. Where an incident involves in-house security personnel, problems will rarely arise, since the in-house security officer's employer will normally be in a master/servant relationship to his employee. Where problems do arise, however, is where the employee is also a peace officer (e.g., a special constable or railway constable), or where he is a contract security employee hired by the company from a private security contract agency.

With peace officers, the problem arises out of their special status, which has been recognized by the courts, whereby they cannot be viewed in the same light as ordinary employees with respect to the performance of their duties as peace officers. As such, they exercise an original, ministerial authority, and not a delegated authority as ordinary employees do.[261] After reviewing the law governing responsibility for the actions of peace officers, Freedman and Stenning concluded that the nature of the legal relationship between a privately-employed special constable and his or her employer is "uncertain and problematic". They conclude:

> "It may be that no simple 'formula' for legal responsibility could be found, or desirably imposed, to meet the very wide variety of circumstances and purposes for which special constables are appointed. The present uncertainty of the law in this regard, however, can surely be to no-one's ultimate advantage, and even a small improvement might be achieved if it were required that some clear understanding was reached (perhaps through negotiation between the institution or person applying for special constable status and the appointing authority) as a pre-condition to any such appointment. This could presumably be achieved through some kind of formal agreement at the time of appointment, and while it would not necessarily lead to complete uniformity (which may not even be wholly desirable), it would at least lead to much greater certainty in individual cases."[262]

In the case of contract security personnel working for a client company, there are of course also at least two potential "employers" who might be held vicariously liable for torts committed by such employees. The basic principles for determining who is the

responsible "master" under such circumstances, are those enunciated by Lord Thankerton in the leading English case of *Short v. Henderson Ltd.*[263] In that case four *indicia* of a contract of service were identified. These are: (a) the master's power of selection of the servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and, (d) the master's right of suspension and dismissal. Of these, (c) was considered to be most crucial in determining whether a true master/servant relationship exists (in which case there will be vicarious liability), or whether the relationship is that of independent contract (in which case, the company hiring the security will not be vicariously liable).

In reviewing the case law in which these criteria have been applied to contract security situations,[264], Freedman and Stenning have concluded that:

> "It seems clear, then, that a contract security agency will be liable for its employees unless the client company can be shown to exercise in practice any one of the *indicia* enumerated by Lord Thankerton. The client may insist on interviewing all security personnel sent by the agency and choosing those it wants, or otherwise take some part in the selection process; it may demand the specific right to dismiss the employee in certain circumstances, and be prepared to exercise this right; or it may give the employee specific instructions with regard to the carrying out of his duties, in which case, if the employee commits a tort while following these instructions, he can be held to be acting in the interests of the client in the same way as a privately-employed peace officer may act in the interests of his employer."[265]

The question of who will be liable vicariously for the torts of private security employees, however, may often be determined by the terms of the fine print in the contract between the contract security agency and the client company. As Freedman and Stenning point out[266], it is not uncommon for such contracts to contain elaborate provisions exempting the contract security agency from legal liability for the torts of its employees while they are acting for a client company. In these circumstances, the bonding and insurance requirements which some licensing authorities require of contract security agencies[267] may be of little or no practical help to the victim of illegal behaviour by contract security personnel.

(b) *the scope of employment.* In determining whether search procedures are within the scope of employment of private security personnel, the particular circumstances of that employment must be examined in each case. The question is thus a question of fact, in much the same way that whether or not a peace officer is acting "in the execution of duty", for the purposes of certain sections of

the *Criminal Code*, has been held to be a question of fact for the jury to decide in each case.[268] Very important in establishing the facts will be specific instructions and training given to the security employees, such as are often included in the manuals and "post orders" commonly in use within the larger security organizations. Because of the general nature of security work, it seems likely that detentions, arrests, investigations and searches, and even the use of force to accomplish these tasks, would normally be regarded as within the authorized scope of a security employee's employment, in the absence of specific instructions to the contrary, although such a presumption does not appear to have been given any formal recognition by the courts. Under normal circumstances, however, it would seem that an employer will be held vicariously responsible for torts of security employees committed during the course of such activities, unless it can be shown that such activities were specifically forbidden by the employer, or that the security employee was exercising such powers purely for his own motives (e.g., out of personal vengeance) and not in the interests of his employer.[269]

(3) *Complaints to Licensing Authorities.* The Provincial licensing statutes covering certain parts of the manned contract security industry in a number of Provinces contain provisions for the receipt and investigation of complaints against licensees, and this represents therefore another potential avenue of redress against illegal searches or seizures by certain private security personnel.[270] In practice, however, as Stenning and Cornish have reported, these complaint mechanisms are largely ineffective in many jurisdictions because regulatory agencies are not under any legal requirement to investigate such complaints, formal procedures for registering or dealing with complaints are inadequate or do not exist, and the complaint process is largely unknown to the general public.[271] Of the few regulatory agencies which were able to provide any data about the complaints they had received and investigated, none reported dealing with any complaints they had received and investigated, none reported dealing with any complaints concerning improper or illegal searches. Agencies report being insufficiently staffed and funded to adequately carry out this potentially important agency function.[272]

A further problem with current complaint provisions in many of the Provincial licensing statutes where they exist at all, as Shearing and Farnell have pointed out[273], arises from the fact that such statutes often provide only for complaints against licensed agencies, and not against individual licensed security guards or investigators.[274] This means that in some jurisdictions, the authority of the regulatory agency to investigate complaints against

individual licensees is at best tenuous and at worst non-existent. As Stenning and Cornish have pointed out, there are substantial problems involved in any attempt to exert sanctions against contract security agencies[275], which would not arise if licensing statutes gave clear authority for regulatory agencies to investigate complaints against individual licensees.

It is noteworthy that the most recent and comprehensive proposals for revision of such Provincial licencing legislation — Bill 87 in Ontario, currently before the Provincial Legislature — promise little to meet the problems described above. Although the bill provides for extensive discretionary powers for the Provincial Registrar to make investigations and inquiries with respect to licence applications, renewals, suspensions or revocations, and where he believes "on reasonable and probable grounds" that various contraventions of the legislation or of the *Criminal Code* have been committed by licensees[276], the bill contains no provisions for the receipt and investigation of complaints against licensees by the general public. Nor does the bill contain any provision which would require the Registrar to receive or investigate such complaints.

In reviewing the legal provisions under Provincial licensing statutes for complaints against licensed private security personnel, and their administration, Stenning and Cornish concluded that "it seems probable...that the handling of complaints against licensees is not a significant part of the private security licencing function in Canada at the present time, other than in Ontario and Quebec".[277] While the situation may have improved since that judgment was made five years ago, one cannot state with any confidence that existing complaint procedures are likely to represent a very significant or effective avenue of redress for those who may be the object of improper or illegal search procedures by private security personnel. Apart from the problems which have been outlined above, it must also be remembered that only a limited sector of private security personnel (licensed contract security personnel) are covered by such legislation.

Summary

The legal powers of search and seizure of private security personnel are defined according to the status held by such personnel as "peace officers", owners or persons in lawful possession of property or their authorized agents, or as mere private

citizens. Private security personnel are to be found in each of these three status categories.

The definition of "peace officer" status is complex and confused. The concept has been defined with no explicit, and little implicit, recognition of the modern phenomenon of private security, and its application to private security personnel is consequently in need of clarification.

Private security personnel derive substantial authority from their status as agents of the owners of property. Numerous provisons in Federal and Provincial statutes, as well as in the common law, give such owners and their agents powers which are not possessed by persons who do not own or possess property. Again, these provisions were not developed with the modern phenomenon of private security in mind.

Although distinctions between personal searches and property searches, on the one hand, and between searches by persons and searches by mechanical and electronic devices, on the other, may be considered of great practical significance in assessing private security powers, such distinctions are not currently adequately reflected in the law governing searches and seizures by private security personnel.

Search and seizure powers of private security personnel derive essentially from five sources of authority. These are:

1. Searches pursuant to search warrants.
2. Searches incidental to lawful arrests.
3. Searches without warrant pursuant to specific statutory provisions.
4. Searches incidental to the exercise of property rights.
5. Searches pursuant to consent of the person being searched.

Wide powers exist for the issuance of search warrants, many of which may be available to private security personnel. The applicability of such powers to private security personnel, however, remains unclear, especially in that the law does not make it clear whether references to "peace officers" in such provisions apply to peace officers who are not public police personnel.

The law governing search pursuant to a lawful arrest is unclear as to the crucial question of whether such a search may be made by private persons (including private security personnel) who make lawful arrests. The extent of such search power, if it exists, is also

unclear. Some of the arrest powers which may be available to private security personnel are very broad and do not appear to have been defined with private security personnel in mind. Arrest powers are also not clearly defined, and in particular it is not clear whether a citizen arrest is always made at the arresting person's own legal risk, or if an arrest will be legally justified even if an honest mistake as to the guilt of the suspect is made.

A substantial array of statutory powers to search both persons and property without a warrant are also to be found in our law. In some cases, these involve powers to conduct random searches in which no prior suspicion of wrongdoing is required. Many of these powers are available to some private security personnel, although few of them appear to have been defined with private security personnel in mind.

Sections 38 and 39 of the *Criminal Code* would appear to be broadly enough worded to give private security personnel limited powers of search in defence of movable property, without the necessity of making arrests. The application of the Sections has been the subject of little case law, however.

The common law governing consent confers great latitude on property owners and others who may employ private security personnel, to make submission to searches by such personnel a condition of entry to premises.Consent will frequently be implied by the courts from acquiescent conduct. The law generally requires the person searched to establish lack of consent, rather than the person conducting the search to establish that consent was given. There is currently no requirement that private security personnel specifically advise persons of their rights not to submit to search procedures, before securing consent to them and proceeding with them. Although the wearing of uniforms is more or less controlled by statute, and although the courts will take into consideration this factor in determining whether consent has been freely given, the law does not explicitly recognize any direct relationship between the wearing of a uniform and securing consent to submission to search powers. Nor does the law appear to imply such consent from any particular relationships which may exist between the person conducting the search and the person being searched. The ancient right of lien of inn-keepers, now statutorily extended to various other persons in the hospitality industry in some Provinces, is an exception to this general proposition.

Illegal searches by private security personnel may give rise to liability to criminal charges, civil suits in damages, or, in certain

circumstances, complaints to licensing authorities. Because of standards of *mens rea*, and the burden of proof, criminal prosecutions for illegal searches are unlikely to be successful, and are in fact very rare. Criminal vicarious liability of employers of private security for illegal searches is virtually unheard of.

Obstacles to successful civil suits are not so great, although such civil suits have also in practice been rare. In four Provinces, privacy statutes have added to the arsenal of available remedies against wrongdoing by private security personnel, although the courts have demonstrated some willingness to apply such legislation more favourably to such personnel. While there are few problems establishing vicarious liability in the case of in-house security personnel, the law governing such liability for contract security personnel is unclear, and the plaintiff is likely to find that through contractual provisions between the contract agency and its client, his remedies may be significantly reduced in practice.

Complaint mechanisms under provincial licensing statutes are often largely ineffective in providing adequate redress to persons who are the object of wrongful conduct by licensees. Not only do such provisions not impose a duty on regulatory agencies to receive and dispose of complaints, but in many instances complaints can only be made against agencies rather than against individuals. Regulatory agencies are generally insufficiently staffed and budgeted adequately to deal with such complaints, and show some reluctance to exert sanctions against licensed agencies. Few members of the public are aware of these complaint mechanisms, and in practice very few complaints are received in most jurisdictions. In any event, the statutes only apply to certain parts of the manned contract security industry.

CHAPTER 5

Private Security Search and Seizure Policies and Practices

No substantial empirical research has yet been undertaken, in Canada or elsewhere, which examines in detail the search and seizure policies and practices of private security personnel. From more general research into the phenomenon of private security, however, some data on search policies and practices are available. In this chapter, we shall review the limited information on this subject which is available, and attempt to place private security search and seizure practices within the more general context of private security work, and the environment of private justice within which private security personnel function. Only within this wider context can private security search and seizure practices be properly understood.

Controlling Access

As we have noted in Chapter 2 of this study, private security operates in a wide variety of environments, ranging from very public places (e.g., a shopping mall) to very private places (e.g., a corporate head office or a diplomat's private residence). In between these two extremes lies a continuum of more or less public places, to which different sectors of the general public have varying degrees of access, either by general or by specific invitation. A factory or a large nickel mine, for instance, is not a public place in the same sense that a shopping mall is. But nor is it a private place in the sense that a private residence is. It is, rather, a public place to which perhaps two or three thousand members of the public have regular daily access as workers, and a much more limited

number of people have routine access as maintenance crews, salesmen, delivery men, etc..

Two characteristics of the access of the public (or some limited sector of it) to more or less public places are of importance to an understanding of private security work and the exercise of private security powers. In the first place, access is never unlimited. Even in a shopping mall, not all places are equally public; as a shopper, one may have a generally free access to open areas and merchandising areas of a shopping mall, but not to the stockrooms and staff areas. One's access is limited by the purpose for which access is granted, and one of the major functions of private security personnel is the policing of these limits. In performing this policing function, private security personnel are generally expected to use whatever means are available and effective, including sometimes search and seizure procedures.

The second important quality of public access to privately-owned public places, is that such access is usually in some way essential to the success of the enterprise being carried on in the place. A factory cannot function as a factory unless the workforce has sufficient freedom of access to various places in it to be able to perform the work necessary to the production of whatever it is that the factory was established to produce. Nor could it function as a factory if workers or visitors had such freedom of access as would disrupt and interfere with the production process. This means that private security personnel, in policing access, must not only enforce the necessary limits of access, but must also ensure that necessary access is not limited. This is because the essential purpose of private security is to protect and promote the enterprise it is hired to police, and concepts of law enforcement or crime control are generally subordinate to this overall purpose.[278]

Property Protection and Loss Prevention

Access control, while it is a central function of private security, is of course not its only function. Protection of property from damage or loss is an equally important objective. Again, however, this is not an end in itself, but a means to ensuring the effectiveness of the enterprise being policed, and it is only in this wider context that private security strategies and procedures (including search

procedures) for the protection of property can be properly understood. Under these circumstances, abstract notions of "justice" or "crime" will inevitably occasionally become subordinated to the more immediate goals of the enterprise being policed. Thus, for instance, whatever corporate managers may feel about the rightness or wrongness of theft, they will not usually instruct or even permit their security force to adopt a strategy and procedures to combat it which result in substantial impairment of the enterprise being protected. Powers such as those of search and seizure, therefore, are viewed not so much as instruments of law enforcement or crime control, as tools of effective business management. "Justice", in such environments, becomes essentially privately defined and privately enforced. In this chapter, we shall consider some of the factors and interest groups which influence these private notions of "justice", and how such notions are practically translated into private security search and seizure policies and practices.

Research Findings

The environments in which private security functions are so diverse, and the implications of these environments for effective security so varied, that generalizations about private security search and seizure practices are difficult to make convincingly. In interviewing private security personnel, we found this to be a constantly recurring theme. Security directors see themselves primarily not as instruments of criminal justice or law enforcement, but as major actors in securing private property. And the nature of that property, and the activities which are expected to be carried out on it, are by far the strongest determinants of the security practices and procedures they adopt. This is undoubtedly why so many in-house security directors appear to be so ready to differentiate themselves not only from the public police, but also from other in-house security directors in other fields of activity. The dissimilarities between the job of a hospital security director and that of a retail store security director may well be greater than the similarities, in terms of the demands which their respective environments make upon the allocation of security resources. Each sees himself as a specialist. Which is perhaps why in-house security directors so often hold more generalist contract security personnel in such low esteem.

Research on private security has so far been of a quite general nature which has not adequately distinguished the impact of different environments on the private security role. Even where these distinctions have been made, they have been explored in terms of varying organizational structures of private security forces, rather than in terms of the impact of different environments on specific security practices such as search and seizure.[279] All that can be offered at this stage, therefore, are some findings about private security search and seizure policies and practices culled from the more general research, together with some hopefully suggestive illustrations of the wide variety of such policies and practices which were observed during the course of preparing this study.

The only research to date which has attempted to explore, in a general way, the exercise of powers by private security personnel in Canada, is Shearing and Farnell's study of licensed manned contract security in Ontario.[280] To what extent search and seizure policies and practices revealed by this study's findings may reflect the search and seizure policies and practices of in-house security forces, or even of contract security forces in jurisdictions other than Ontario, remains largely a matter of speculation. Although it has not been substantiated by research, however, there is some reason to believe that contract security personnel may be more cautious in exercising powers such as search and seizure than in-house personnel, and contract security agencies and their clients less willing to authorize the exercise of such powers than in-house security employers. This is because, in the case of contract security agencies, the possibility of gaining a reputation for attracting lawsuits as a result of wrongful exercise of such powers would seriously threaten an agency's ability to secure future contracts. In the case of clients of contract security, authorization for the exercise of such powers is also perhaps likely to be less willingly given, because in practice effective control and supervision of contract security employees is likely to be more difficult to maintain than would be the case with an in-house force, and because security contracts not infrequently contain provisions exempting the contract security agency from liability for the actions of contract security employees while working for the client.[281]

(1) *Authorization.* The great majority of the respondents (71% of guards and 77% of investigators) in Shearing and Farnell's study reported that they were *not* expected to search persons

suspected of having committed a crime.[282] Of those who indicated that they were expected to conduct searches under such circumstances, the majority indicated that such instructions were given by the security agency rather than by the client.[283] Respondents in this study were not asked about comparable policies regarding random search procedures, where no criminal activity on the part of the person searched is necessarily suspected.

On the question of policies with respect to the use of force in conducting searches, again the great majority of Shearing and Farnell's respondents (86% of guards, 79% of investigators) reported that they were not expected to use force in conducting searches. Four per cent of the guards who responded to this question indicated that they did not know whether they were expected to use force for this purpose or not.[284]

(2) *Training re Search Powers.* Shearing and Farnell asked contract security agencies what training they provided to their personnel, to familiarize them with their legal powers (of arrest, search, seizure, etc.). In response to the question: "Does your agency train all new employees?", 26% of security guard agencies, 27% of investigation agencies, and 19% "dual" agencies (i.e., those which employ guards and investigators) indicated that they do not.[285] Only 32% of guard agencies, but 89% of dual agencies, indicated that they include training about legal powers in their training programs for guards. Forty-seven per cent of investigation agencies, and 70% of dual agencies, indicated that they include such subjects in their training programs for investigators.[286] All agencies which give such training indicated that it was mostly given at the agency prior to the agent being sent on any assignment, although some agencies indicated that such training is also given on the job or at the agency during assignments.[287] Fifty per cent of guard agencies, 65% of investigation agencies, and 40% of "dual" agencies, reported that they do not offer their employees any training which is additional to basic pre-employment or on-the-job training.[288]

In order to provide some verification of these agency-reported data, Shearing and Farnell also asked security employees about the training they had received. Eight per cent of guards and 6% of investigators reported having received no training before being sent to work.[289] Less than half of the respondents (43% of guards and 39% of investigators) indicated that training with respect to legal powers had been included in their training program.[290] Only

26% of the guards, but 53% of the investigators, reported that they had been given the opportunity to take further training by their agency after starting work.[291] Forty per cent of the guards indicated that their total basic training lasted half a day or less, 19% that it lasted a whole day, 14% two days, 14% three days, 6% one week, and 7% more than one week. For investigators, by contrast, the figures were: 10% two days, 10% one week, and 80% more than one week.[292] The majority of respondents (55% of guards and 35% of investigators) indicated that training was given by their agency supervisor. Only 7% of guards and 2% of investigators reported having received training from the clients for whom they worked.[293] Sixty-two per cent of guards and 71% of investigators felt that the training they had received was adequate. Thirty-six per cent of guards and 23% of investigators felt that they had not been given enough training, while 2% of guards and 6% of investigators felt that their training was not sufficiently relevant.[294]

Shearing and Farnell also asked guards and investigators questions designed to test their knowledge of the law and their legal powers. Three questions about private security powers of search were included, and the overwhelming majority of both guards and investigators answered these questions correctly.[295]

(3) *Exercise of search powers.* With respect to the actual exercise of search powers, Shearing and Farnell asked their subjects whether searching employees for theft or searching vehicles for theft were part of their job, and how frequently they conducted such searches on their current assignment. With respect to searching employees for theft, 34% of the respondents indicated that they did this "frequently" as part of their current assignment, 11% "occasionally", and 55% "never". As to searching vehicles for theft, 16% reported doing so "frequently", 3% "occasionally", and 81% "never." Three per cent of respondents reported doing "airport pre-boarding" tasks (presumably including random searches) "frequently", and 1% "occasionally".[296] Asked if they had ever needed to use force to carry out a lawful search during their current assignment, 6% of guards and 5% of investigators responded that they had.[297]

These data portray search as a security technique which is quite commonly resorted to by private contract security personnel, but which is normally accomplished without resort to force, and therefore presumably with the consent, or at least acquiescence, of the person being searched. The data seem to imply that the exercise

of *Criminal Code* and other powers to search without consent or a warrant is discouraged within private security. This is reflected not only in the instructions given to private security personnel by their employers and clients, but also in the relative infrequency with which guards and investigators receive training regarding such legal powers.

Factors Influencing Search Policies and Practices

In the course of interviews with security personnel during the preparation of this study, it became clear that there are several reasons for this reluctance on the part of private security to exercise powers of search without consent. These reasons may be roughly divided into legal reasons and business reasons.

(1) *Legal factors.* Despite the fact that most security personnel appear to believe that they have a right to search a person whom they legally arrest even though they are not peace officers — a belief which, as has been pointed out in the preceding chapter, does not appear to be clearly supported by any legal authority — most also seem to think that making arrests is too risky from a legal point of view. As we have noted in the previous chapter, it is only recently (since the decision of the Supreme Court of Canada in *R. v. Biron*[298]) that the traditional view that a citizen's arrest will be illegal if the suspect is subsequently acquitted of the offence for which he was arrested, for whatever reason, has come to be questioned. Even now, as has been pointed out above, there is no clear authority for the proposition that a citizen's arrest will be considered legal, despite a subsequent acquittal, if a reasonable person in the circumstances would have honestly believed he was witnessing the commission of an offence. Whatever may actually be the law on this point, however, it is evident that most private security personnel still believe that a citizen's arrest is made entirely at one's own legal risk. Consequently, many private security personnel will contend that other than in the most flagrant cases, if persuasion fails to detain a suspected thief, it is better to watch stolen goods be carried away than risk making an arrest.

These impressions appear to be supported by Shearing and Farnell's findings. Asked whether they were expected to detain persons whom they suspected of committing a crime, only just over half (54%) of the guards, and just under a quarter (24%) of the investigators in their sample indicated that they were.[299] Thirty-five

per cent of guards and 45% of investigators indicated that they had found it necessary to detain persons during the course of their work.[300] Asked how they had accomplished this the last time they had detained someone, 52% of the guards and 46% of the investigators who responded to this question indicated that they had simply told the person to stay. Twenty-nine per cent of the guards and 36% of the investigators indicated that detention had been effected using verbal threats, and 12% of guards and 14% of investigators indicated that physical force had been used. Only 2% of the guards and 4% of the investigators indicated that they had actually arrested the person.[301] When asked whether they tell a person he is under arrest when they have detained him against his will, only 10% of the guards and 34% of the investigators indicated that they do. Eighty-five per cent of the guards and 40% of the investigators responded that "it depends on circumstances", and 5% of the guards and 26% of the investigators replied that they do not tell the suspect he is under arrest in such circumstances.[302]

This concern to avoid leaving a suspect with the impression that he is under arrest, when he has been detained against his will, appears to involve a misconception as to the scope of legal liability for unlawful detentions (the tort of false imprisonment), and may be interpreted as an attempt to take advantage of public ignorance of civil rights. For, in order to establish the tort of false imprisonment, it is not necessary to establish that an arrest was made, but merely that the plaintiff was unlawfully detained. Any detention without consent and without specific legal authority (whether technically an arrest or not) will be unlawful for these purposes. It will be clear from our brief review of the arrest power in the preceding chapter, that in order to legally detain someone against his will, a lawful arrest must usually be made, and that for persons who are not peace officers, a lawful arrest usually requires that the person making the arrest must find the person whom he is arresting committing an offence (or at least "apparently" comitting one). The cases make it reasonably clear, furthermore, that in the absence of this requirement the courts will often hold a detention to be involuntary (and therefore unlawful) where the person who agrees to stay does so after being threatened or being told that he must stay.[303] Attempts to use "persuasion" or subtle intimidation will not normally be recognized by the courts as turning what would otherwise be an unlawful arrest into a lawful detention.

Many private security personnel appear to be aware of the delicate legal position in which such attempts at detention by

persuasion may place them if they are practised on someone who knows his legal rights. They accordingly recommend that only the most courteous forms of persuasion should be attempted, and that if these fail, the matter should never be pressed. Such personnel will often accompany such advice with anecdotes about how often they have had to watch helplessly as suspects walk away with stolen merchandise or company property.

One remedy (from the private security perspective) for this situation, of course, would be to accord to all private security personnel the powers of peace officers for arrest. Very few private security personnel advocate such an extreme remedy. Quite commonly heard, however, is the suggestion that private security personnel should be given a more limited power to legally detain a suspected thief until the public police can be called. Opinion seems to be divided, however, as to whether such a power should be accompanied by a limited power of immediate search, comparable to that currently accorded to peace officers making a lawful arrest. Those who urge such a search power argue that without it, the power to detain would be largely useless since the security officer would be powerless to prevent disposal or destruction of evidence prior to the arrival of the public police.[304]

Many private security personnel stress that no additional detention or search powers should be granted to private security personnel unless minimum standards of training, fitness, etc. have also been imposed on them, e.g., through licensing or some other from of legal regulation. Such regulation, it is urged, would also have to provide for greater public accountability of private security personnel, and more effective avenues of redress against wrongful exercise of powers by them. Standards of this kind, it is stressed, would have to be imposed on *all* private security personnel exercising such powers, and could not remain limited to certain contract security personnel as at present.[305]

Search warrants appear to be very rarely applied for or executed by private security personnel, and in practice never issued to private security personnel who are not peace officers. There seems to be a common belief among private security personnel that a search warrant can only be executed by a public policeman[306], although this does not appear to be a legal requirement at present. Many private security personnel express the view that if a matter is serious enough to justify a search warrant, it is likely to be a matter for the public police and not one which should be dealt with by private security personnel without such assistance.

With respect to the various other statutory powers of search and seizure outlined in the preceding chapter, these appear to be little known even by many of those private security personnel who hold peace officer status. They do not in practice seem to represent an important source of authority for private security personnel.

(2) *Business Factors.* The legal risks involved in resorting to coercive legal search powers are by no means the only factors which private security personnel take into account in shaping their policies and practices with respect to such powers. This is evidenced by the fact that private security personnel will often decline to exercise search powers against a person's will even where clear legal authority to do so (e.g., as a result of implied or express consent arising out of acceptance of a unilateral notice limiting access to property, or out of a clear contractual term) exists.

The strongest influence over the exercise of search powers by private security personnel may perhaps be described as the fear of loss of "good will". Whatever may be the legal rights arising out of a given situation these will rarely take precedence, in the minds of security personnel or those who establish policy for them, over the need to maintain "good will". Whether the "good will" sought to be preserved is that of customers (e.g., in a retail or hotel environment), of clientele (e.g., in a hospital environment) or of the work force (in almost any industrial or commercial environment), it is likely to be the major consideration governing the selection of security procedures generally, and in the exercise of search and seizure powers in particular. The importance of "good will", furthermore, is likely to be measured in terms of its contribution to the overall success of the enterprise being policed. One training manual consulted during the preparation of this study expresses this approach characteristically:

> "...the traditional concept of plant protection is one of law enforcement. We must all know, and we must all believe, that plant protection has no relationship with police work...
>
> This brings us to the concept that the plant protection objective is not a police and law enforcement objective, but an objective that is an aid to the production of goods and services. The new concept of plant protection's relation to production must replace the old concept. It is up to all members of any Security Company at all times to promote the idea that plant protection is related to production. They must also, at all times, use every argument to show that plant protection is not related to law enforcement...
>
> The modern concept presupposes an engineering approach to the problem. The old concept does not. The new concept is an *aid to production.* The old concept is a *burden on production."*

The operationalization of such an approach does not, of course, rule out search procedures. Indeed, it will often be seen as mandating them. In determining what procedures to adopt, and what persons shall be subject to such procedures, however, private security personnel will usually be particularly concerned to assess the likely reaction of the various important constituencies (customers, work force, etc.) to such procedures, and the significance of that reaction for the success of the enterprise which such procedures are intended to serve.

Such an assessment will necessarily involve consideration not only of the relative power and status of the constituency it is proposed to subject to search, but also of the product of service which is being provided to that constituency. A high-class store selling very expensive items to a presumably rich clientele is less likely to adopt spot searches as a condition of entry onto its premises than a large discount store providing "bargains" to a poorer clientele. A workforce represented by a strong union is less likely to tolerate arbitrary search procedures than one which is unorganized and relatively powerless in the face of the exercise of such management authority. Yet, it may be easier or more worthwhile to enforce search procedures around the time of contract negotiations than at other times.[307] Fans wishing to see a "once only" rock concert or sporting event may be willing to tolerate more thorough search procedures than regular visitors to a routine event which is competing with other similar attractions, etc..

Another business consideration which influences the choice of procedures, and which is related to the concern over "good will", is the desire to avoid introducing the public police into the security environment other than in the most extreme cases. The notion that having the public police in evidence is "not good for business" — because it may engender unease on the part either of the workers or of the customers — is commonly expressed by private security personnel, and is probably often a major motivating factor in the establishment of many private security forces in the first place, especially in-house forces where uniforms do not have to be worn. This thinking was encapsulated, somewhat ironically, in the remark of one plant security officer interviewed during the preparation of this study, in which he explained that the reason he felt peace officer status (which he held as a special constable) was important to his work, was that it allowed him to deal with certain matters within the plant without having to involve the public police. This, he felt, was much better for morale within the plant,

and allowed problems to be dealt with according to procedures with which the workers were familiar, rather than through less familiar police and criminal justice procedures.

Another, at first sight somewhat circular, reason for the reluctance to avoid procedures which may result in involvement of the public police, is the feeling, especially common among industrial security personnel, that the public police are insufficiently sensitive to the work/production environment, and consequently cannot be relied upon to conduct investigations in such a way as to minimize disruption of this environment.[308] As we shall see below, private security search procedures often appear to be carefully designed to suit industrial conditions, even to the point of specifying how much an employee shall be paid for time spent undergoing such procedures. Specifications like this, of course, not only serve to satisfy union concerns, but also effectively discourage search practices which might be considered "unproductive" from a management viewpoint.

Associated with the desire to avoid public police involvement, and particularly relevant to search and seizure procedures, is the desire not to lose control over merchandise or company property which may be the subject of dispute. Procedures which are likely to involve resort to the public criminal justice system are frequently avoided for this reason. Keeping merchandise or company property in storage so that it can be used as evidence in some possibly distant court hearing, is understandably viewed with considerable disfavour not only by many private security personnel, but also by those who hire them.

Reasons for Search Procedures

It will be apparent from the foregoing that the paramount reason for the adoption of search procedures — and indeed of virtually any security procedure — by private security personnel, is to enhance the functioning and success of the enterprise being policed. Within this overall framework, however, some quite specific factors which motivate search procedures are discernible.

The most obvious of these reasons for the adoption of search procedures, is the desire to prevent property losses to the company or institution being protected. In the retail context, of course, this is usually the exclusive reason behind search procedures, whether

they involve customers or employees. Prevention of property loss may involve a concern about theft — in which case the size of items which can be stolen is likely to have a major influence over what search procedures are adopted — or a concern about vandalism or sabotage.

Another reason for search procedures is the protection of life. The security guards searching for objects which could be used as missiles, at the entrance to a rock concert or political meeting, are likely to be concerned more about the dangers to the performer than about the dangers to the place where he is performing. The same, obviously, is true of private security personnel who are hired to give personal protection to executives, diplomats, etc..

Protection of confidentiality or privacy is also frequently a reason for the adoption of search procedures. This may involve preventing photographic or sound recording devices from being brought into some private gatherings.

The enforcement of certain agreements may also provide a reason for search procedures. On a construction site, for instance, searches may be conducted to ensure that a contractor is not using materials which are of an inferior quality to those contracted for. In one industrial site which was visited during the course of preparing this study, security personnel indicated that vehicle searches which were conducted regularly by the security staff were designed principally to satisfy the union that jobs involving driving skills were only done by those who were hired for these jobs.

Safety or health concerns also motivate private security search procedures. This kind of concern may, for instance, lead to searches for combustible objects in dangerously flammable areas, searches to detect objects which may be contaminated with radio-activity, or searches for non-sterile objects in areas which, for medical reasons, must be kept germ free.

Lying behind many of these reasons for searches are two factors which may exert considerable influence over security procedures (including search procedures), but about which little detailed information is currently available. These are the demands which are placed on the operators of various enterprises by potential legal liability, and the demands of insurance companies. There is little dispute that in the realm of civil liability, not only are the causes of action gradually being expanded by the courts, but also

the standards of care demanded of operators of various industrial and commercial enterprises are being raised, as are the damages which are awarded when a breach of these standards is proved. The recent, and notorious, "Connie Francis Case"[309] in the United States, in which the well-known singer was awarded almost $1.5 million against a motel chain as a result of being sexually assaulted by an assailant who entered her motel room through a sliding patio door, represents a growing trend in that country towards the imposition of a higher duty of care owed by operators in the hospitality industry. In an article which reviews the astonishing trends towards increased liability which the United States courts have established for that industry, Wallace and Sherry note that:

> "There has been almost exponential growth in cases outside the hotel area that involve negligence in the form of inadequate or non-existent security standards.[310]

The authors note that the trend towards stricter liability has been accompanied by a trend towards greater control over the kinds of techniques and equipment which private security personnel may employ to protect their employers against such liability. This, they argue, is leading to an increasing dilemma for private security, which they describe as "the conflict between greater standards of care on the one hand and restraints, on the other hand, against taking the necessary precautionary steps."[311]

While there is no doubt that Canadian courts have by no means gone so far as their counterparts in the United States in imposing stricter liability for the results of inadequate security procedures, private security personnel in this country are quick to point out the relative ease with which such legal innovations in the United States seem to penetrate Canadian judicial thinking.[312]

Such legal developments also inevitably filter through eventually to the insurance industry, and some private security personnel in Canada point to the growing influence of insurance companies over their choice of security procedures. While shoplifting losses are not currently an insurable risk, major thefts and property damage caused by vandalism and sabotage are. The extent to which insurance companies may go in requiring various security measures (including search procedures) to be undertaken as a condition for granting coverage for losses or legal liability is by no means clear, and requires further study. In the past, however, insurance companies have shown little reluctance to impose quite specific security requirements as a condition for

insurance coverage[313], and apparently are free to incorporate broad exemption clauses into insurance contracts whereby the liability to meet claims is nullified if such security measures are not adequately effected.[314]

The variety of reasons for private security search policies and practices, and of the factors which influence them, reflects the wide variety of environments in which private security personnel operate, and of interests which they protect. Other than giving virtually carte blanche to private security personnel to conduct searches "on consent", our current law takes little account of these different reasons for the establishment of search procedures. It may be, however, that any restructuring or clarifications of the law in this area should take account of such matters, bearing in mind that some reasons for searches — and thus for interfering with the freedom of citizens — may be more socially justifiable than others. In this sense, a uniform and inflexible law of search, designed for instance to accomplish only law enforcement goals, may not be the most socially desirable goal.

The other important aspect of these various reasons for search procedures by private security personnel, is that many, if not all, of them, in the context of private security work, are seen as calling for random searches rather than searches "on suspicion". This is because private security personnel tend to view their work as essentially preventative rather than punitive. In this view of the private security role, the deterrent and preventative effects of random search procedures are seen not only as more effective, but also as more acceptable, than searches only "on suspicion".

Securing Consent

The fact that the great majority of searches by private security personnel are apparently made "on consent" rather than through the exercise of coercive legal powers, makes the issue of consent, and how it is obtained, the central issue in any discussion of private security search policies and practices. As has been noted in the previous chapter of this study, the law allows great latitude to private security in this regard, and places few restraints on the manner in which legally valid consent to search procedures may be obtained. Provided it is not obtained by fraud or outright intimidation, such consent will normally be recognized as legally valid, and as justifying search procedures which may substantially

interfere with individual privacy and freedom. Despite the fact that submission to such procedures may be highly self-incriminating, none of the "safeguards" which have been built into other potentially self-incriminating situations by the courts (e.g., the requirement to explain reasons for an arrest, the requirement to "caution" a suspect before interrogating him, etc.), have been incorporated into the law governing searches. Indeed, if anything, the law appears to go to some lengths to protect the person conducting a search by requiring the person alleging an illegal search to bear the burden of proving lack of consent in order to establish civil or criminal liability. As we have noted earlier, this apparent solicitude for the person conducting the search appears to be a reflection of the fact that the law of search has been developed principally as a matter ancillary to rights of property ownership and possession, rather than as a matter of individual civil liberties. An illegal search is not *by itself* an offence or a civil wrong (although, of course, it may involve either), nor does it in this country legally taint evidence obtained as a result of it, as it does in the United States.

As might be expected, private security personnel take full advantage of their right to conduct consensual searches where it is felt that this can be accomplished without unduly prejudicing the interests of the company or institution being protected. Consent for such searches is obtained by means of verbal persuasion, unilaterally published notices stipulating submission to search procedures as a condition of admission to or exit from premises, and through written contractual or other agreements.

(1) *Verbal Persuasion.* Techniques of verbal persuasion, and the possible impact of uniforms in such situations, have already been considered in this study, and do not need further elaboration here, other than to point out the rather obvious fact that private security personnel understandably do not go out of their way to inform persons subjected to such searches of their right not to be searched. Silence on this matter is generally, and not surprisingly, considered more effective in securing cooperation with search procedures.

(2) *Unilateral Notices.* The use of unilateral notices to secure submission to search procedures is also well known, and regularly resorted to by private security personnel. Whatever the law may say about the rights of security personnel to search persons who, having entered after reading such notices, later decline to submit to search procedures, many private security personnel indicate that

they would never insist on conducting searches under such circumstances. The instructions on this point contained in one security manual which was consulted during the preparation of this study, seem to reflect a common approach to this problem by many private security managers. Under the heading "Voluntary Searches", the manual lists the various ways in which consent to search procedures may be obtained, including "agreements or notices which specify search of vehicles or persons on entry/exit is a condition of entry." The manual goes on to note that: "Persons who do not wish to agree to the procedure need not enter or may leave their vehicle outside, etc.".This is followed by the instruction that:

> "*NOTE:* Where a person refuses to abide by the notice or agreement, even where in writing, a search shall not be made while on or when exiting (company) property, *UNLESS* the search is made on specific authority of a statute . . .
>
> If a person refuses to abide by the notice or agreement, then action can include:
> (a) cancellation of contract, or portions thereof,
> (b) cancellation of parking privileges (vehicle not allowed on (company) property)
> (c) other administration or disciplinary action depending on the agreement, notice or regulations in effect."

This instruction hints strongly at the private pressures which may be brought to bear in securing consent to search procedures, as well as the reluctance to authorize any action which could lead to involvement of police or other outside agencies other than in extreme cases (i.e., those where search can be made on statutory authority). The clear impression from this instruction is that while notices or agreements are to be used to encourage cooperation with random search procedures, they are not to be used to coerce it.

(3) *Management Rights and Collective Agreements.* A common method of securing general consent to search procedures in industrial and commercial settings is through collective agreements. This method differs significantly from other methods of securing consent in that it involves collective rather than individual consent. Once such a collective agreement is signed and ratified, all the workers who are covered by it can be considered to have given their consent to its provisions, whether they actually know the details of these provisions or not. Consequently the presence and power of a union in many such situations is likely to

be the major factor in determining who is to be subjected to search procedures, what type of search procedures are to be used, and what consequences will arise as a result of searches. Obviously, this gives to unions great power in protecting or neglecting individual freedoms.

Typically, a collective agreement contains a "Management Rights" clause. Such a clause will normally include union recognition of exclusive functions of the company, including "maintaining order, discipline and efficiency", and the right to "discharge and discipline for just cause". In many companies the management rights clause is considered sufficient authority for management, through its security department, to impose security procedures (including search procedures), and to discipline or ultimately discharge any employee who refuses to comply with them.

The normal source of the resolution of disputes over the meaning or scope of clauses in collective agreements are decisions (awards) of tripartite boards of arbitration. Such awards bind only the parties to the agreement, and do not therefore have the force of law which court decisions have. Nevertheless, arbitrators frequently invoke previous decisions of other arbitrators to lend weight to their own decisions, and in the process of negotiating collective agreements arbitration awards carry considerable persuasive force.

In a few arbitration awards, the application of the concept of "management rights" to search procedures has been considered, and from these decisions some generally accepted principles seem to be emerging. The typical situation in which such an award arises is where management, pursuant to the management rights clause, promulgates rules and regulations which include mandatory submission by employees to certain search procedures. In one company visited during the preparation of this study, such company rules stipulated that "vehicles and lunch pails may be subject to searches at any time." In another the rules stated that: "An employee who commits any of the following offences may be subject to disciplinary action up to and including dismissal either initially or on repetition." Among the 23 offences listed was: "Refusal to submit to lunch-pail or parcel check on entering or leaving premises". In a third, company employees were provided with personal lockers in which to store their belongings while at work. On joining the company, they were required to pay a small deposit on the combination lock provided for the lockers, and to

sign a form which included the statement that: "I further acknowledge that the company may from time to time carry out locker inspection excluding my presence".

A failure to comply with such rules often leads to disciplinary action by the company, which in turn may lead to the initiation of a grievance by the employee, usually backed by the union. If such a grievance is not resolved through informal settlement, it may go to arbitration.

Labour arbitrators have tended to uphold such rules as valid exercises of management rights under collective agreements. In one such arbitration award, the board of arbitration held that random inspection of lunch-pails by company security officers had been the "unchallenged practice of the company for many years" and "had become a term of the grievor's employment."[315] In another case, the board held that: "Human nature being what it is, in the case of a company employing hundreds of persons, a rule or regulation requiring inspection of lunch boxes and personal packages of employees when leaving the plant premises is not unreasonable".[316]

While these cases involved search procedures relating to vehicles, parcels, tool-boxes, lockers, etc. a much cited award in 1961 dealt with the validity of a requirement of submission to personal search as a term of employment. The procedure was described in the award as follows:

> "The procedure of a spot check is that a number of employees, say six to ten, are selected at random by the plant protection officers and requested to step into the gate house where each is asked if he has any company property on his person. The employee is then asked if he objects to being searched. If there is no objection, the employee is then "frisked". The officers were instructed not to irritate the men and not to search an employee if he objected. The position of the company is that it had the right to search but did not exercise the right unless the employee consented; if the employee withheld his consent, this was just cause for discharge according to the company."[317]

In a lengthy award, the arbitrator in this case analyzed the various ways in which such a company right might be established. After noting that "the evidence did not disclose that stealing of company property was a major problem of the (company)", the arbitrator indicated that the only way in which such a right of personal search could be established was (a) pursuant to a lawful arrest, (b) pursuant to an express term of the grievor's employment, or (c)

pursuant to an implied term of the grievor's employment. After dismissing the first two grounds as not relevant to the case at hand, the arbitrator went on to consider under what circumstances a right of personal search might be considered to be an implied term of employment. If there was such an implied right, he argued, it must have existed,

> "(1) Because every master has this right to search his servant; or
>
> (2) By reason of the size and nature of this company's operations, it is necessary and implied that the company has the right; or
>
> (3) Because past practice has established the right of search as a term of employment."[318]

Dealing with the first of these possibilities, the arbitrator noted that:

> "The learned counsel for the company expressed the view that management generally, that is, of all industrial plants, retail stores, large and small, offices, etc., has the right to give this order and the disobedience of it is cause for discharge. This argument is of course on the premise that the order is lawful by reason of the employer-employee relationship — that every employer has the right to issue the order because of that relationship. With respect, I do not agree... It is my conclusion that this right at common law did not exist and that the master at common law was in no better position than any other individual with respect to searching the person of his servant without his consent... I do not believe the common law has been modified to give the employer this extraordinary authority over an individual today... In my opinion, then, the relationship of master and servant in itself did not justify the company's action in this grievance."[319]

Dealing with the second possible justification for such a right, the arbitrator held that:

> "There was no attempt by the company to prove that the right of search was more necessary in its operations than is the case with any other firm or place of business. There was no evidence to show that losses by theft was a major problem with the company and that the other security measures such as opening tool boxes, obtaining passes for parcels and opening parcels and the right to search vehicles were not sufficient to control stealing from the plants.[320]

And on the third possible justification, the arbitrator held that:

> "As set out, the evidence was somewhat contradictory as to the frequency and extent of the practice of the company in carrying out spot checks. My conclusion from all the evidence is that the company carried out spot checks over the years but not frequently nor widespread enough to establish the practice as an implied term of employment. I find that it was regular practice

accepted by the employees to: (1) open and show their lunch boxes as they left the company premises; (2) obtain a pass for parcels which were examined at the gate; and (3) have their vehicles searched on leaving the company premises, but that there was no general acceptance by the employees of the company's right to search the person."[321]

Noting that the grievor had been under the impression that when a person was searched it was because the company suspected him of theft, the arbitrator added that:

"If spot checks were given publicity and explained to the employees, that is, that their purpose was to serve as a deterrent and that the person being searched was not under suspicion of theft, the embarrassment of being searched on a spot check might well be eliminated."[322]

Finally, in upholding the grievance, the arbitrator concluded that:

"In conclusion, the right to search an individual is a serious invasion of personal freedom. An employee could only lose his fundamental right of refusing to be searched by the clearest kind of evidence."[323]

In a much more recent arbitration award, the principles enunciated in the *Chrysler* award were adopted and applied to searches of lunch-pails and parcels. In this case, the mining company involved admitted that such searches had not been established by past practice, but argued that recent bomb attacks against Hydro installations not far from the company's property, and bomb threats at certain of its mines, coupled with the fact that the nature of the company's business involved the storage of large quantities of explosives on company premises, and their availability for use by its employees, justified the company in taking special precautions against theft of these explosive materials. In upholding the company's right to conduct lunch-pail and parcel searches under such circumstances, the arbitration board held that:

"It may be that an employer must show some justification for an inspection of lunch pails and parcels where such has not been an accepted practice. Such justification is certainly much easier to establish than that which would permit a personal search... In the instant case, justification for inspection is found in the circumstances of the bombings and threats which were the immediate occasion for increased security measures, and in the nature of the company's operations involving widespread storage and use of explosives. Those circumstances, in our view, would justify the inspection of lunch pails and parcels in a systematic, non-discriminatory manner, as was the case here. While it is naturally, we think, an unpleasant thing to be subject to inspection, there was nothing in the procedures to justify any degree of personal embarrassment to the grievor as an individual or as a union member."[324]

The board also noted that:

> "Where the inspection was carried out, it was carried out on all persons, indiscriminately, and was not just for the hourly-paid work force. There is no question, then, of the sort of embarrassment which would be involved in a search of the person, or in being singled out for inspection."[325]

These awards are of importance, despite the fact that they do not carry general legal force, because the principles which they enunciate are likely to be highly influential in contract negotiations between unions and management over security procedures in general, and search procedures in particular, in the workplace. Such negotiations are always carried out with an eye not only to the relative political and economic strengths of the parties to them, but also to what ruling could be gained if a matter were pursued to arbitration. They illustrate, too, that in practical terms consent to searches by private security personnel in the workplace involves a great deal more than simply express written or verbal consent of individuals, and that under appropriate circumstances consent to search procedures may be implied as a term of employment even though it is not expresssed in any agreement between the employee and his employer, written or otherwise, and has not been established by past practices. The *Chrysler* award, furthermore, seems to suggest that under appropriate circumstances, consent even to personal searches may be implied in this way.

We have been concerned so far with situations in which consent is secured by management pursuant to the general "management rights" clause in collective agreements. In many cases, however, this is not necessary because the collective agreement will contain specific clauses dealing with security procedures. In such cases, of course, such clauses will bind every member of the collective bargaining unit covered by the agreement, regardless of their personal feelings about searches. The nature and scope of such provisions vary greatly, and will depend largely on the relative power of the union vis-a-vis the company, and on what other matters happen to be on the bargaining table at the time of contract negotiations. Less complex provisions may involve simply a letter of understanding, addressed to the union local and appended to an agreement, such as the following:

> Dear Sirs:
>
> *Re: Right to Search*
>
> This letter will confirm the understanding and agreement between the Company and the Union, who are parties to a collective agreement, with

respect to the Company's practice of requiring employees to submit to a search of personal belongings on request of the Company.

The Union recognizes the need and right of the Company in this respect and the obligation of employees to submit to a search on request, it being understood that a female employee may request that the search be made by a female representative of the Company.

It is further understood and agreed that the Union will cooperate in publicizing this Company rule and will advise employees that refusal to submit to a search will be a basis for discipline.

Yours very truly,
(Company name)
(Signature)
Personnel Manager

Receipt of and Agreement with the
foregoing is hereby acknowledged:

(Signature) _____
(Name of Union Local)

Some provisions with respect to search procedures in union contracts, however, are very detailed and comprehensive, and clearly designed to meet all the requirements of minimum disruption of the production process, and minimum dissatisfaction on the part of the work force. An example of such provisions is reproduced in Appendix E of this report[326], together with a company memorandum outlining the specific search procedures established in pursuance of them. The particular plants to which those provisions apply are plants in which precious metals are manufactured and the nature of the product (in terms of its very small size and considerable value) was thus a major influencing factor over the negotiation of these provisions. The provisions, however, allow for very extensive powers to search "an employee and his effects while he is on Company premises". While the company undertakes to "generally employ a random sampling procedure" in conducting such searches, it nevertheless "reserves the right to institute selective sampling, as it deems necessary, to ensure the security of its resources". The contract contains detailed provisions for the compensation of employees for time spent going through the search procedures, as well as for the regular collection by the company of statistics on the search procedures. The company undertakes to review these statistics every thirteen weeks, in order to ensure that employees are adequately compensated for time actually spent in search procedures, and to adjust the levels of compensation if necessary. The company undertakes to provide

copies of these statistics to the union president when requested. The contract also stipulates that "the above may only be changed, at any time, by the mutual agreement between the Company and the Union." Finally, "the Union reserves the right to grieve as per the Collective Agreement".

A "letter of intent" appended to this agreement, and also reproduced in Appendix E to this report, elaborates further on these procedures, and makes it clear that in this instance search procedures may be backed up by lie-detection tests. The company undertakes to train a union representative in P.S.E. (psychological stress evaluation[327]), and to allow him to review P.S.E. tapes and charts, but only with the written consent of the interviewed employee, and only in cases in which personal searches took place. The company agrees to consult with the union "regarding the structure of the questions to be asked in the P.S.E. interview", and to "publicize the questions so that an employee will know questions he may be asked before being tested". The letter of intent also stipulates that "each person tested under P.S.E. will be asked if he was intimidated by the interviewer and his response will be recorded on the tape". Finally, the letter provides that an employee's car is considered one of his effects and is subject to search while it is on the company's premises, but that such search can only be made in the employee's presence.

The specific search procedures adopted by the company under these provisions, as set out in the company memorandum, involve an unusually sophisticated selection procedure, which the company claims is designed to "ensure the *random* and *impersonal* principle in all steps of this type of selection process." The procedure requires the employee, at the end of his shift, to pick a stick out of a large barrel. Each stick has a different coloured tip — some "clear", some red, and some red and black — but the colour of the tip cannot be seen by the employee until he has drawn the stick out of the barrel. If the employee picks a "clear" stick, he will proceed only through "parcel search". A red stick would require him to submit to a personal search by a security officer using a metal detector (similar to those used at airports), excluding a search of his feet. A red and black stick requires him to submit to a personal search by metal detector including a search of his feet. If metal is detected, he may be required to remove his footwear and submit both it and his feet to more detailed search with a metal detector.

(4) *Other Contracts.* Consent to more or less limited search procedures may be secured through all kinds of other contractual or quasi-contractural terms. We have already referred to the practice whereby employees in many companies are given (sometimes on payment of a small rental fee) locker space in which to keep their personnal belongings while working, and their work clothes and tools while not working. Not infrequently, such agreements involve a condition that gives management some rights to search the lockers, either in the presence of the worker or excluding his presence. In many large mining, lumber or construction projects, especially in more remote areas, full housing or bunk-house accommodation is provided to the workers, often at nominal rents.[328] Agreements for such accommodation sometimes contain provisions to the effect that such housing shall be subject to normal security (including perhaps search procedures) in operation on the project.

Where work is contracted out to a sub-contractor (e.g., on a large construction site), it is again not uncommon to find provisions in the contract requiring the contractor's employees to conform to security procedures (including search procedures) established by the contracting company in control of the site. The same is sometimes true of situations (e.g., in shopping malls, large office complexes, etc.) in which commercial space is rented to tenants by a corporate landlord.

Contracts of membership of various organizations or institutions (e.g., libraries) are often sources of consent to search procedures. Often such a contract will simply involve a stipulation that the member agrees to abide by the rules and regulations of the institution, and the requirement to comply with search procedures is found in the rules and regulations themselves.

The Context of Private Security — Private Justice Systems[329]

It will be clear from the preceding descriptions that in a great many settings in which private security is the predominant instrument of policing, rights to search, and rights not to be searched, are in practice entirely negotiable. Indeed, to speak of "rights" at all in this context is perhaps a little misleading, since to the legal mind the term "rights" generally refers to claims which are enforceable through the public legal system. As we have noted

previously in this study, however, private security personnel and those with whom they principally interact tend, more often than not, to eschew recourse to the public legal system, and avoid where possible the exercise of powers which will inevitably result in involvement of public authorities. This appears to be as true of those who hold quasi-public appointments as peace officers (e.g., as special constables, railway constables, etc.) as of those who do not. Instead recourse is had to what may be called private justice systems, to resolve disputes which arise within the private security environment. An appreciation of the nature of such private justice systems is essential to a proper understanding of private security policies and practices, and it is to a consideration of this wider context of private justice that we must now turn.

Private justice systems do not conform to any uniform model, any more than private security forces do. This is because such systems tend to be localised, and adapted to the peculiarities of the environments in which they operate. Little is known about the wide variety of such systems, because until recently they have not attracted the attention of criminologists and other social scientists. Perhaps the simplest way to explain what a private justice system looks like, and how it differs from our formal criminal justice system, however, is to examine, through an example, the way each of the two systems might deal with the same incident. The incident we shall take, by way of example, is the unauthorized removal of company property by an employee. Let us suppose that employee X, who works in a tool manufacturing plant, is found to be routinely removing tools from company property without authorization, in order to use them in his basement construction project at home. As a result of random search procedures, this is discovered by a security officer who is employed and paid by the company. On making this discovery, the security officer has a number of possible choices of action.[330] He may decide to do nothing about it, regarding it as a pecadillo which is so insignificant that it is not worth treating it as a problem. Alternatively, he may take a very serious view of employee X's behaviour and call in the public police to investigate, thus invoking the formal criminal justice system. Or, as a third option, he may decide that this is a matter most effectively resolved through internal company procedures. In this last case, he will be invoking what we have called a private justice system. If he selects either of these last two options, he is essentially deciding to treat the matter as a problem of social control which requires some resolution. The conception of the problem, the process of resolution, and the outcomes of the resolution process, however, are likely to differ dramatically according to the option he chooses.

In choosing the option of calling in the police to investigate the incident, the security officer would essentially be adopting the assumptions and objectives of the formal criminal justice system. In particular, calling in the police involves treating the incident as a crime — i.e., as an offence against the state (in this case theft) which involves not simply the employee and the company, but the wider society. It also results in the company losing most of the initiative in determining how the matter shall be dealt with, and what would be an appropriate outcome of this process. Finally, it submits the dispute to an adversarial adjudicative resolution process in which the determination of the employee's guilt or innocence and of an appropriate coerced sentence, if guilty, will be the principal objectives.

From the company's point of view, deciding to submit the matter for resolution by the formal criminal justice involves some very important implications. They may temporarily or permanently lose the employee's services, they may temporarily lose the use of the tools which were removed (while they are held as trial exhibits), they may have to expend considerable money and manpower in assisting the police to investigate the case, in presenting evidence before the court, etc.. Furthermore, the court process will offer no guarantees that the tools will ultimately be restored to the company. The company may also have to spend time and money hiring and training a new employee to replace employee X. Finally, the more general problem of tool loss, of which employee X's behaviour represents but one example, will not have been addressed. Other less tangible considerations might also be of relevance to the company. These might include the likely effect on the morale of other employees of involving the formal criminal justice system in such a case, the possibility that this course of action might lead to union intervention or even industrial strike action in support of employee X, etc..

If the company, for all or any of these reasons, decided not to invoke the formal criminal justice system, but to resolve the matter through its own private justice system, a radically different set of assumptions, objectives, processes and outcomes are likely to be brought into play. We may consider each of these in turn.

(1) *Assumptions.* Dealing with the matter internally involves the adoption of quite different assumptions about the nature of the problems posed by employee X's behaviour. In the first place, the incident is likely to be viewed not principally, if at all, as a crime,

but as a problem of "loss prevention". As a problem of loss prevention, the incident will be seen as one which is of principal concern to the company and its employee, and only of marginal concern to other persons (e.g., in terms of the likely effect on the price of tools which a persistent loss problem at the factory will involve — even this, however, is likely to be viewed principally in terms of a problem of competitiveness for the company). Secondly, it is likely that the emphasis on loss will lead the company to take a course of action which goes beyond dealing with the individual incident at hand. The problem is likely, therefore, to be viewed principally as part of a general loss prevention problem, rather than simply as a problem of how to punish or compensate for a particular incident.

(2) *Objectives.* A whole host of objectives are likely to be given prominence which would be given less or no emphasis by the criminal justice system. Some of these might be: maintaining optimum production at the factory; minimization of disruption of management-employee relations; recovering the stolen tools with as little cost as possible; maintaining employee X on staff if possible; minimizing the possibility of company-union conflict; developing a strategy to minimize future tool losses at the plant, etc.. It is likely, too, that many of the objectives of the formal criminal justice system will also be shared by the company's private justice system, although perhaps given different emphasis and priority.

(3) *Processes.* The process of resolution is likely to be quite different in a private justice system than in the criminal justice system, involving different participants in different roles. If the plant in which employee X works is unionized, the dispute would almost certainly be resolved through recourse to a well-established grievance procedure, the basic form of which would be laid down in the collective agreement covering the bargaining unit of which employee X is a member. This process would normally commence with some disciplinary action by the employer (e.g., a notice of suspension or dismissal), which would then be made the subject of a grievance by employee X. Resolution of the grievance will normally go through a series of steps in the predetermined procedure, each of which is progressively more formal. The initial steps, however, are likely to be highly informal, involving discussions and negotiation between employee X, his supervisor, a union representative and a representative of the security department. In the event that the plant is not unionized, the resolution procedure is likely to be governed by *ad hoc* negotiations, or by

procedures established by past practice within the plant. In either case, as in the case of an official grievance procedure, emphasis is likely to be placed on minimum disruption of work at the plant.

Only the investigative stage of this procedure is likely to be very similar to the public criminal justice process, and even at this stage the private justice system, being concerned with the incident principally as a symptom of a wider loss prevention problem, is likely to launch a much more broadly-based investigation than could be expected from investigators preparing a case for a court hearing. In particular, the extent to which employee X's behaviour is typical or atypical of behaviour of other employees at the plant is likely to be a prime point of concern in the investigation of the incident. During the whole investigative and resolution process, employee X is likely to be represented, if at all, not by his lawyer but by fellow workers or a union official.

Adjudication, in a formal sense, is likely to be given quite low priority in the initial process of resolution of the problem. The private justice system is likely to be concerned with the allocation of guilt or innocence (blame) only to the extent that it makes the implementation of a wider solution to the wider problem (of loss prevention) more feasible. Thus, for instance, if a wider solution is found to be more acceptable to the union or employees if employee X is not formally held to be "guilty" of removing the tools, such a finding is not likely to be sought or made. The matter of employee X's conduct is thus more likely to be resolved through negotiation, mediation and settlement, than through any formal adjudicative process. This process is likely to involve a wide range of people, e.g., from the union, from the personnel department, from the security department, and from higher management. If the process is unsuccessful, resort may well be had to some form of arbitration, by an arbitrator who is acceptable to all or most of the interested parties involved. The arbitrator's award, even though it is theoretically binding on the parties, may still be the subject of further negotiation (e.g., between the union and company management at the time of collective bargaining). The final resolution of the dispute is thus always liable to be a product of negotiated settlement.

(4) *Outcomes.* The range of outcomes which are considered by a private justice system are likely to be much broader than those considered in most cases before the criminal courts. Obviously, some of the outcomes which might be considered by the courts (e.g., imprisonment of employee X) would not normally be

contemplated by a private justice system. Any disposition of employee X's case by the private justice system at the company, however, is likely to be as much, if not more, concerned with the general problem of loss prevention as with the fate of employee X.[331] One such company, for instance, when faced with problems similar to those discussed here, agreed, as part of the resolution of a particular case, to establish a tool lending library for employees. Another agreed to offer employees a very substantial discount on the price of any tools they bought from the company. In each case, the union concerned agreed that if the company met these undertakings, automatic dismissal would be considered a just and fair penalty for any employee found removing tools from the company premises without authorization in the future. Any dissatisfaction with the company's security procedures generally, or with its search procedures in particular, by which such offences are detected, might also be made the subject of changes as part of the resolution of the dispute.

In terms of a more specific outcome to deal with employee X, again it is likely that a private justice system will give much greater priority to restitution and/or compensation than to punishment in the form of dismissal, fines (in the form of docking pay, etc.) and other dispositions most commonly associated with the criminal courts.

It will be apparent that private justice systems incorporate many values which are foreign to the public criminal justice system, or at least place such values in quite different orders of priority. For this reason, they tend to evoke quite negative reactions from many professionals (including police and lawyers) who are more used to the values and procedures of the public criminal justice system. In the light of the scant knowledge which we currently have about these private justice systems, however, it is perhaps presumptuous at this point to assume that the kind of justice they dispense is necessarily inferior to the kind of justice dispensed by our public criminal justice system.

It is important to realize that such private justice systems flourish today partly as a result of dissatisfactions with the public criminal justice system, and partly as a result of significant structural changes which are occurring within our society. We should not be blind to the possibility that such systems, because of their sensitivity to the environments in which they operate, and because of their diversity, may offer a more realistic and palatable

resolution of social problems within those environments than our public criminal justice system is able to do, as it currently operates. For these reasons, private justice systems hold out the promise of some valuable insight into the kinds of innovations which might be desirable within our public criminal justice system. They should, therefore, not simply be dismissed as is all too often the case, as undesirable competition to the public criminal justice system which should, at best, be reluctantly tolerated and, at worst, strictly regulated or eliminated entirely.

Summary

No substantial empirical research has yet been undertaken to examine in detail the search and seizure policies and practices of private security personnel. From more general research into private security, however, some data on these matters are available, but they do not distinguish between policies and practices in different environments in which private security personnel operate. Since the major goal of all private security activities is to enhance the success of the particular enterprise being policed, however, the peculiar characteristics of the environment in which private security operates are of critical importance in determining what procedures (including search procedures) are adopted, and how they are implemented.

Access control, loss prevention and property protection are the major functions of private security which lead to the resort to search procedures. Such procedures are also adopted for such reasons as the protection of life, the protection of confidentiality or privacy, the enforcement of contractual and other agreements, and the maintenance of health and safety standards. The desire to avoid legal liability in tort, as well as the need to secure liability and other insurance coverage, are also influential factors lying behind the adoption of security procedures, including search procedures.

Existing research shows that, within the contract security industry at least, searches are commonly resorted to, but that coercive search procedures are rarely encouraged by security managers or others who set security policies. There is some reason to believe, however, that companies and institutions employing in-house security forces may be more ready to sanction search procedures than those employing contract security services.

Contract security guards appear to have little training, but good knowledge, about their legal powers of search.

The fact that the exercise of coercive search powers, even when they are available, is discouraged appears to be based on a belief within private security circles that the exercise of such powers is too risky from the point of view of legal liability. It also seems to spring from a desire not to become involved with the public criminal justice system, but rather to rely on internal resources for dispute resolution. Few private security personnel advocate substantially greater powers for such personnel, although many feel that, if minimum standards were imposed on all sectors of private security, limited powers of temporary detention and on-the-spot searches would be justified.

Search warrants appear to be very rarely applied for or executed by private security personnel, and in practice never issued to private security personnel who are not peace officers.

Companies and institutions employing private security take full advantage of the latitude which the law gives them to secure consent to search procedures through implied or express agreement. Even where the legal requirements of consent have been met, however, many private security personnel demonstrate a reluctance to insist on conducting a search in the face of a refusal to submit to such procedures. Instead, they prefer to rely on other pressures which may be applied through resort to the private justice systems, within the context of which most private security personnel operate.

Collective agreement to search procedures is commonly secured through union contracts. Such agreements generally limit search procedures to searches of purses, packages, lockers, vehicles, etc., although some provide for personal searches and even lie-detection tests of those found in possession of company property. Arbitrators in industrial disputes over the years have given limited recognition to search procedures as a management right, and have spelled out guidelines for the exercise of such rights. Such rights include random as well as selective search procedures. In truth, however, the exercise of such search powers, and their outcomes, remain a matter of negotiation, even after an adjudicative arbitration of a formal grievance has been made. In consequence, the "rights" of workers in such situations depend on a variety of factors, including the presence and strength of a union,

the circumstances of collective bargaining, and the general production and labour relations situation in the company.

Private security search and seizure policies and practices can only be properly understood when viewed in the context of the private justice systems in which they operate. Such systems do not conform to any uniform model, but share relatively informal negotiated procedures and outcomes as a common characteristic. Individual incidents tend to be dealt with in terms of wider problems, with the overall success of the enterprise, rather than any fixed or objective concepts of "justice", seen as the major objective. Although many features of the public criminal justice system are to be found in private justice systems, such systems characteristically bring into play a radically different set of assumptions, objectives, processes and outcomes.

Although such private justice systems commonly evoke a negative reaction from lawyers and others involved in the public criminal justice system, it is important to realize that they flourish partly as a result of dissatisfactions with that public criminal justice system, and partly as a result of signficant structural changes which are occurring within our society. We have insufficient knowledge about the operations of such systems to be able to say with any certainty whether the justice dispensed by them is in any way inferior to the justice dispensed by our public criminal justice system. All of these reasons suggest that any inclination to regulate or eliminate such systems should be tempered with caution and open-mindedness. It may be that valuable insights into the kinds of innovations which might be desirable within our public criminal justice system, can be gained from the study of such systems of private justice.

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APPENDIX A

Recommendations re Peace Officer Status

Freedman and Stenning, 1977, at pp. 271-274

Peace Officer Status

[In Chapter Two] we have reviewed what we believe to be the unsatisfactory state of the law relating to the definition of "peace officer" status and its implications. As we noted earlier in this chapter, the legal "peace officer"/"private citizen" dichotomy is the major vehicle through which the law currently addresses itself to private security, and consequently it has substantial implications with respect to most of the law described in the remaining chapters of the Report. Although, for reasons described by Stenning and Cornish in their report, *The Legal Regulations and Control of Private Policing and Security in Canada: A Working Paper**, we cannot accurately estimate how many private security personnel in Canada have peace officer status, it seems probable that, while such persons do not represent a major percentage of the total private security population, they are by no means negligible in numbers. We believe that serious efforts should be made to discover under what circumstances peace officer status is accorded to private security personnel, and to ensure that in the future the current confusions over the implications of peace officer status are cleared up. A person who is appointed a peace officer, for instance, should be fully aware of what his or her legal duties are and, as exactly as possible, what his or her powers are. This is clearly not the case under the current state of the law. A number of ways of achieving this desired objective suggest themselves. In the first place, the law could provide that no person shall be considered to have peace officer status unless his or her appointment expressly states that this is the case; it seems to us that the current law which creates a presumption that someone who acts as a peace officer or testifies that he is one, is deemed to be one, is unnecessary and

* Stenning and Cornish, 1975, at pp. 207-209.

likely to lead to undesirable confusion and uncertainty. In the 1970's it should not be beyond the limits of feasibility to require that if a person claims to be a peace officer, having special powers and duties, he or she should be expected to produce, if required, positive proof of the fact in the form of a certificate of appointment.

Secondly, the definitions of "peace officer" in the *Criminal Code* and other Federal and Provincial legislation should be amended to eliminate the existing confusion as to exactly who is or is not included within them.

Thirdly, if it is intended to maintain the current scheme of things whereby some peace officers may have more limited powers and protections than others, we recommend that two steps should be taken. In the first place, the form of appointment for a peace officer should specify in detail the purposes for which he or she is appointed a peace officer, in a manner which leaves as little doubt as possible as to whether he or she is a "peace officer" for the purposes of specific legislative provisions relating to peace officers. It may be that standard peace officer appointment forms could be designed to achieve this purpose of ensuring certainty about the extent and implications of a peace officer appointment. The second step we recommend is a thorough review of existing legislative provisions (especially those in the *Criminal Code*) in which peace officers are intended to be covered by the provision. Thus, for example, if it is intended that only public police constables and officers are to be allowed to demand samples of breath under S.235 of the *Criminal Code,* this should be explicitly specified in that legislative provision so as to leave as little doubt on the matter as possible. Various other significant examples of the need for such clarification may be found in Chapters Two and Three of this Report.

Fourthly, we recommend that minimum qualifications for appointment as peace officers should be specified by law. Peace officers, by definition, are vested with duties and powers which are not granted to ordinary citizens. They are accorded special privileges, immunities and protections which do not apply to the remainder of society. We believe that criteria should be established, and written into law, for the appointment of a person as a peace officer. We believe that these criteria should expressly take the private security industry and its role into account, and should reflect the desired relationship between it and the public police in

providing for the overall policing and security needs of the community. Finally, we believe that qualifications for peace officers should be adopted which include the satisfactory completion of some training with respect to the powers, duties, jurisdiction and protections of peace officers. If a peace officer is to be permitted to use a firearm without having to obtain a permit for it (S.100 of the *Criminal Code*)*, in the course of his work, suitable training should be a pre-condition of appointment.

*See now, Sections 90 and 96 of the *Code,* as amended by S.C. 1976-77, c.53, s.3.

APPENDIX B

Sections 38-42 of the Criminal Code

Defence of Property

DEFENCE OF MOVABLE PROPERTY — Assault by trespasser.

38. (1) Every one who is in peaceable possession of movable property, and every one lawfully assisting him, is justified

(a) in preventing a trespasser from taking it, or

(b) in taking it from a trespasser who has taken it, if he does not strike or cause bodily harm to the trespasser.

(2) Where a person who is in peaceable possession of movable property lays hands upon it, a trespasser who persists in attempting to keep it or take if from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation. 1953-54, c.51, s.38.

DEFENCE WITH CLAIM OF RIGHT — Defence without claim of right.

39. (1) Every one who is in peaceable possession of movable property under a claim of right, and every one acting under his authority is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

(2) Every one who is in peaceable possession of movable property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it. 1953-54, c.51, s.39.

DEFENCE OF DWELLING.

40. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority. 1953-54, c.51, s.40.

DEFENCE OF HOUSE OR REAL PROPERTY — Assault by trespasser.

41. (1) Every one who is in peaceable possession of a dwelling-house or real property and every one lawfully assisting him or acting under his authority is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation. 1953-54, c.51, s.41.

ASSERTION OF RIGHT TO HOUSE OR REAL PROPERTY - Assault in case of lawful entry —Trespasser provoking assault.

42. (1) Every one is justified in peaceably entering a dwelling-house or real property by day to take possession of it if he, or some person under whose authority he acts, is lawfully entitled to possession of it.

(2) Where a person

(a) not having peaceable possession of a dwelling-house or real property under a claim of right, or

(b) not acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,

assaults a person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be without justification or provocation.

(3) Where a person

(a) having peaceable possession of a dwelling-house or real property under a claim of right, or

(b) acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,

assaults any person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be provoked by the person who is entering. 1953-54, c.51, s.42.

APPENDIX C

Regulations under Alberta's Private Investigators and Security Guards Act, R.S.A. 1970, c.283

ALBERTA REGULATION 568/65

THE PRIVATE INVESTIGATORS AND SECURITY GUARDS ACT

1. These Regulations may be cited as "Private Investigators and Security Guards Regulations." [A.R. 568/65]

2. In the Regulations

(a) "Act" means The Private Investigators and Security Guards Act, 1965.

(b) Reference to forms are to the forms in the Schedule. [A.R.568/65]

PART I

APPLICATION FOR LICENCES

3. All applications for licences or renewal of licences under The Private Investigators and Security Guards Act shall be made to the Administrator on the forms provided by the Schedule. [A.R. 568/65]

4. (1) An applicant for a licence under the Act

(a) shall be at least 21 years of age in the case of an applicant for a private investigation agency licence or a security guard agency licence;

(b) shall be at least 18 years of age in the case of an applicant for a private investigators or security guards licence;

(c) shall be of good character.

(2) An applicant for a licence under the Act, other than a renewal of a licence, shall, upon request, have his fingerprints taken.

(3) Where the Administrator refuses to issue a licence or a renewal of a licence he shall give written reasons for his decision.
[A.R. 568/65; 208/70; 188/73]

5. (1) An applicant for

(a) a Private Investigation Agency Licence, or

(b) a Security Guard Agency Licence

shall forward to the Administrator an application in Form A.

(2) An applicant for

(a) a Private Investigator's Licence, or

(b) a Security Guard's Licence

shall forward to the Administrator an application in Form B.

(3) An applicant for the renewal of

(a) a Private Investigation Agency Licence, or

(b) a Security Guard Agency Licence

shall forward to the Administrator an application in Form C.

(4) An applicant for the renewal of

(a) a Private Investigator's Licence, or

(b) a Security Guard's Licence

shall forward to the Administrator an application in Form D.
[A.R. 568/65; 181/74]

AFFIDAVITS

6. (1) Each applicant for a licence shall attach to the application an affidavit in Form E.

(2) Repealed A.R. 181/74.

[A.R. 568/65; 208/70: 188/73; 181/74]

LICENCES

7. Licences issued by the Administrator shall be:

(a) Private Investigation Agency Licence	Form H
(b) Security Guard Agency Licence	Form I
(c) Private Investigator's Licence	Form J
(d) Security Guard's Licence	Form K

[A.R. 568/65]

LICENCE FEES

8. (1) The fees payable for licences under the Act shall be:

(a) Private Investigation Agency Licence	$100.00
(b) Security Guard Agency Licence	$100.00
(c) Private Investigator's Licence	$ 10.00
(d) Security Guard's Licence	$ 10.00

(2) The fees payable for licences under the Act issued on or after September first of each year shall be one half of the fee stated in subsection (1). [A.R. 568/65; 444/66; 188/73]

9. (1) Where a person who holds a private investigation agency licence or security guard agency licence dies, the Administrator may without payment of a fee grant a temporary licence to his executor or administrator, and in such a case all employees of the deceased person who hold licence under this Act shall be deemed to be licensed as employees of the executor or administrator.

(2) Where the Administrator receives an application for a licence he may, if special circumstances exist, issue a temporary licence in Form R pending his decision for a period stated in the licence but not exceeding three months.

(3) A temporary licence issued under authority of subsection (2) terminates upon the issue of the permanent licence and the temporary licence shall be returned to the Administrator.

(4) When a temporary licence is issued by the Administrator there will be no refund or fees paid for a licence unless the final decision of the Administrator is against the issuing of a permanent licence. [A.R. 568/65; 188/73]

SECURITY

10. (1) A security bond, as required by section 7 of the Act, shall be deposited with the Administrator before any licence is issued to a Private Investigation Agency or a Security Guard Agency.

(2) The security bond shall be in Form P and comply with the following conditions:

(a) The security bond company shall be licensed under The Alberta Insurance Act.

(b) The bond shall be in the penal sum of $5,000.00 and payable to the Provincial Treasurer of the Province of Alberta.

(c) The terms of the bond shall ensure the faithful, honest and lawful conduct of the licensee and his employee.

(3) One security bond will suit the requirements of section 7 of the Act in cases where a private investigation agency licence and a security guard agency licence is to be issued in the name of the same person or company and the form of the bond mentioned in subsection (2) may be suitably modified provided the bond recognizes that the person or company to whom the security bond is issued will be authorized to do business as both a private investigation agency and a security guard agency, and that the one bond is intended to apply to both functions.
[A.R. 568/65; 188/73; 181/74]

IDENTIFICATION CARDS

11. The holder of a licence under this Act shall be issued with an identification card bearing the signature of the Administrator, which will be in the form prescribed hereunder:

(a) Private Investigation Agency Licence	Form L
(b) Security Guard Agency Licence	Form M
(c) Private Investigator Licence	Form N
(d) Security Guard Licence	Form O

[A.R. 568/65]

12. No person shall be in possession of an identification card unless it bears the signature of the Administrator. [A.R. 568/65]

13. Repealed A.R. 181/74.

14. Repealed A.R. 142/75.

PART II

ADVERTISING

15. (1) Pursuant to section 23 of the Act, where in the opinion of the Administrator, any person is making false, misleading or deceptive statements in any advertisements, circulars, pamphlets or similar material, the Administrator may order the immediate cessation of the use of such material.

(2) The holder of a security guard agency licence or a private investigation agency licence will forward for the information of the Administrator, a copy of all circulars, pamphlets or similar material used for advertising the services of the agency.
[A.R. 568/65; 188/73]

SURRENDER OF LICENCES

16. (1) Where a licence under the Act is suspended, cancelled or terminated, or where the licensee ceases to be employed by the agency, the licence or licences shall be returned forthwith to the Administrator together with the identification card or cards issued to the licensee.

(2) When a licence has been cancelled due to termination of employment with the agency for whom the licence has been issued, it cannot be reactivated except through a new application and the payment of the prescribed fee. [A.R. 568/65; 188/73]

17. Where a private investigation agency licence or a security guard agency licence is terminated due to the death of the licensee, the licence or licences and the identification card or cards shall be returned forthwith to the Administrator and held by him pending the granting of a temporary licence to the executor or administrator of the estate. [A.R. 568/65]

APPEALS

18. to 22. Repealed A.R. 188/73.

UNIFORMS AND EQUIPMENT

23. (1) Uniforms and equipment worn by security guards including badges and rank insignia must be of a colour, pattern and design approved in writing by the Administrator.

(2) A security guard will not wear a uniform, equipment, badge or insignia similar in colour, pattern or design to the uniforms, equipment, badges or insignia used by the municipal police or the Royal Canadian Mounted Police located in the area in which the security guard intends to be employed.

(3) The uniform worn by a security guard shall plainly display the words "Security Guard" on each shoulder of the outermost garment of the uniform being worn.

(4) A security guard shall not wear on a uniform any insignia or badge which uses or displays the word "Police".

(5) A security guard shall not wear as part of his uniform a combination of belt and shoulder strap commonly known as Sam Browne equipment or any belt and shoulder strap of this type which may be similar in design to the belt and shoulder strap equipment normally worn by municipal police or members of the Royal Canadian Mounted Police.

(6) Notwithstanding subsection (5), a security guard who has been authorized and granted a permit to carry a restricted weapon as described in the Criminal Code, while in the execution of the specific duty provided for in section 33, subsection (2) of these Regulations, may wear Sam Browne equipment when actually carrying the restricted weapon and performing the specific duty for which the permit has been issued. [A.R. 568/65; 188/73]

24. to 26. Repealed A.R. 444/68.

27. (1) A security guard shall wear a uniform while employed as a security guard.

(2) A private investigator who is also licensed as a security guard, shall not act as a private investigator while in uniform. [A.R. 568/65]

RECORDS AND RETURNS

28. In addition to the requirements set out in section 13, clause (a) of the Act, the holder of a private investigator agency licence or security guard agency licence shall keep complete records of the name and address of each person acting for or employed by the holder of such licence and record the exact date that employment commenced and terminated and this information shall be included in the return made annually to the Administrator as required by section 14 of the Act. [A.R. 188/73]

29. (1) A private investigation agency rendering the return required by section 14 of the Act, will supply the undermentioned information regarding work in the year covered by the return:

(a) The number of investigations carried out.

(b) A breakdown of the types of investigations.

(c) to (e) Repealed A.R. 444/66.

(2) The security guard agency rendering the return required by section 14 of the Act, will supply the undermentioned information regarding work in the year covered by the return:

(a) The number of businesses under the contract for security guard service.

(b) Repealed A.R. 444/66.

(c) The number of types of security guard services supplied by the agency:
  (i) Escorts
  (ii) Patrolling
  (iii) Others

[A.R. 568/65; 444/66]

GENERAL

30. A licensee shall not act as a collector of accounts, or bailiff, or undertake, or hold himself out or advertise as undertaking to collect accounts, or act as a bailiff for any person either with or without remuneration. [A.R. 568/65]

31. A person to whom a licence is granted under the provisions of the Act is not an authorized peace officer. [A.R. 568/65]

32. A person appointed as a constable or special constable under The Police Act may not hold a licence as a private investigator or a private investigation agency.
[A.R. 568/65; 188/73]

32.1 (1) A person licensed as a security guard, a security guard agency, a private investigator or a private investigation agency shall not carry a restricted weapon as described in the Criminal Code of Canada.

(2) Notwithstanding subsection (1), the local registrar of firearms as defined in the Criminal Code of Canada may authorize a person licensed under the Act to carry a restricted weapon in the execution of a specific duty if the application is supported by a recommendation from a senior member of the police force located in the area in which the specific duty is to be performed that

(a) the nature of the work to be performed by the licensee is such that it is necessary and in the public interest that the licensee be permitted to carry a restricted weapon,

(b) the licensee is fully trained in the use of restricted weapons,

(c) the licensee has a complete knowledge and awareness of the law with respect to the use of force, and

(d) the licensee is fully qualified to obtain a permit to carry a restricted weapon as is required by the Criminal Code of Canada. [A.R. 188/73]

32.2 The holder of a security guard agency licence or private investigation agency licence shall not use the word "police" in the title name of the agency, its letterhead, advertising material or in any other way that may create the impression the agency is performing a police function. [A.R. 188/73]

33. The Regulations under The Private Investigators and Security Guards Act as authorized by Alberta Regulation 435/65 are repealed. [A.R. 568/65]

34. These regulations come into force on the fifteenth day of November, 1965. [A.R. 568/65]

Form A
(Sec. 6)

ALBERTA
SOLICITOR GENERAL
THE PRIVATE INVESTIGATORS AND SECURITY GUARDS ACT
APPLICATION FOR PRIVATE INVESTIGATION AGENCY AND/OR
SECURITY GUARD AGENCY LICENCE

.....
DATE

APPLICATION is hereby made by .....

to carry on business under the trade name of.....

..... at .....
(address)

....., for a licence to engage in the business of employing and/or hiring Private Investigators and/or Security Guards.

Name of applicant, including each partner of a partnership.

1. (A) NAME: .....
ADDRESS: .....
PLACE AND DATE OF BIRTH: .....
(B) NAME: .....
ADDRESS: .....
PLACE AND DATE OF BIRTH: .....
(If more space required, use separate sheet of paper.)

2. (A) The principal officer or place of business in Alberta will be located at .....
(B) The branch offices in Alberta will located at.....
.....

3. I have been a resident in or carrying on business in the Province of Alberta for six months immediately preceding the date of this application and my address during this period was.....
.....

4. The business reputation of the applicant(s) is well known to the following three persons (none of whom are related):

(A) NAME: .....

ADDRESS: .....

BUSINESS OR OCCUPATION: .....

(B) NAME: .....

ADDRESS: .....

BUSINESS OR OCCUPATION: .....

(C) NAME: .....

ADDRESS: .....

BUSINESS OR OCCUPATION: .....

5. I enclose the licence fee of ..... ($.....) Dollars payable to the Provincial Treasurer.

[A.R. 590/65; 181/74]

Form B
(Sec. 6)

ALBERTA
SOLICITOR GENERAL
THE PRIVATE INVESTIGATORS AND SECURITY GUARDS ACT
APPLICATION FOR LICENCE AS PRIVATE INVESTIGATOR AND/OR SECURITY GUARD

.....
(DATE)

1. Application is made by:
NAME (in full): .....

ADDRESS: .....

PLACE AND DATE OF BIRTH: .....
for a licence as private investigator and/or security guard.

2. My place of residence and employment during the immediate past three years prior to the filing date of this application were as follows:

.....

.....

3. The licensed private investigation agency and/or security guard agency by whom I will be employed is .....

.....
(Name and Address of Agency)

4. Has the applicant been convicted of an offence under the Criminal Code of Canada or are there any proceedings now pending that may lead to such conviction? (If affirmative, give particulars, including the Offence, Penalty Imposed, Date and Place of Conviction.)

.....

.....

.....

5. Has the applicant any experience in investigation, police duties and security guard work? (If affirmative, give particulars) .....

.....

.....

6. Has the applicant ever been refused a licence as a Private Investigator and/or Security Guard in Alberta or any other Province in Canada? (If affirmative, give particulars): .....

.....

.....

.....

7. The character of the applicant is well known to the following persons (none of whom are related to the applicant):

(A) NAME: .....

ADDRESS: .....

BUSINESS OR OCCUPATION: .....

(B) NAME: .....

ADDRESS: .....

BUSINESS OR OCCUPATION: .....

8. I enclose the licence fee of ..... ($.....) Dollars payable to the Provincial Treasurer.

.....

Signature of Applicant

[A.R. 590/65; 181/74]

Form C

ALBERTA
SOLICITOR GENERAL
THE PRIVATE INVESTIGATORS AND SECURITY GUARDS ACT
APPLICATION FOR RENEWAL OF A PRIVATE INVESTIGATION AGENCY AND/OR SECURITY GUARD AGENCY LICENCE

The undersigned hereby applies for a renewal as a Private Investigation Agency and/or Security Guard Agency and furnishes the following information in support thereof:

1. Application is hereby made by .....
..... to carry on business under the trade name of
.....
.....
at.....
(address)

2. (A) Branch Office, if any: .....
.....
(place and address)

(B) Name of Branch Manager(s): .....
.....

3. (A) Name and address of each partner of a partnership:
NAME: .....
ADDRESS: .....

(B) NAME: .....
ADDRESS: .....

4. Statement of any change in the facts set out in the application for licence or any prior application renewal:
.....

5. There is no unsatisfied judgments recorded against the applicant except as follows:.....

.....

.....

6. I enclose the licence fee of ..... ($.....) Dollars payable to the Provincial Treasurer.

DATED this..... day of .....

19..... .

.....

.....

Signature of Applicant

[A.R. 590/65; 181/74]

Form D

ALBERTA
SOLICITOR GENERAL
THE PRIVATE INVESTIGATORS AND SECURITY GUARDS ACT
APPLICATION FOR RENEWAL OF A PRIVATE INVESTIGATION AND/OR SECURITY GUARD LICENCE

The undersigned hereby applies for a renewal of a licence as a private investigator and/or security guard and furnishes the folllowing information in support thereof:

1. Name of applicant: .....

2. Address of applicant: .....

.....

3. Name and address of employer: .....

.....

4. Statement of any change in the facts set out in the application for licence or any prior application for renewal: .....

.....

.....

5. I enclose the licence fee of ..... ($.....) Dollars payable to the Provincial Treasurer.

DATED this ..... day of ....., 19..

.....
Signature of Applicant
[A.R. 590/65; 208/70; 181/74]

Form E

ALBERTA
SOLICITOR GENERAL
THE PRIVATE INVESTIGATORS AND SECURITY GUARDS ACT
AFFIDAVIT

I, ...

OF THE..... OF .....

IN THE PROVINCE OF..... MAKE OATH AND SAY:
That I have made application for a licence under The Private Investigators and Security Guards Act;

1. That I have not been convicted of any offence under the Criminal Code of Canada and that there are not any proceedings pending that might lead to such conviction (other than the following):

.....

.....

.....

2. That I have not been refused a licence to act as a Private Investigator and/or Security Guard in Alberta or any other Province in Canada (other than the following):

.....

.....

3. That I have never used a name other than the name given in this affidavit (other than the following):

.....

.....

SWORN BEFORE ME AT THE

.....

OF .....

IN THE.....

OF .....

THIS.....

DAY OF ..... , 19.....

.....

A JUSTICE OF THE PEACE
IN AND FOR THE PROVINCE
OF ALBERTA.

.....

Signature of Applicant

[A.R. 590/65; 181/74]

Form F Repealed A.R. 181/74.

Form G Repealed A.R. 181/74.

Form P

BOND

under

THE PRIVATE INVESTIGATORS AND SECURITY GUARDS ACT

KNOW ALL MEN BY these presents that .....

of ..... in the Province of

..... (hereinafter called the Principal)

and..... a body corporate and being a guarantee and surety authorized to do business in the Province of Alberta (hereinafter called the Surety) are bound unto Her Majesty the Queen in the penal sum of five thousand dollars of lawful money of Canada to be paid to the Provincial Treasurer of the Province of Alberta, for which payment well and truly to be made, the Principal and Surety jointly and severally bind themselves, their heirs, executors, administrators, successors and assigns firmly by these presents.

SIGNED, sealed and dated the ..... day

of ..... in the year of

Our Lord one thousand, nine hundred and .....

WHEREAS the Principal has applied for a licence under The Private Investigators and Security Guards Act by which when issued the Principal will be authorized to do business in the Province of Alberta as a private investigation agency and/or security guard agency from the .....

day of..... , 19.....

to the thirty-first day of December, 19..... , both days inclusive.

NOW THE CONDITION of the above written bond or obligation is such that if upon the granting of such licence(s), the Principal and his employees faithfully observe the provisions of the said Act and all regulations thereunder, and faithfully perform all his or their duties thereunder, then this obligation shall be void and of no effect but otherwise shall be and remain in full force and virtue.

IF THE PRINCIPAL or any employee of the Principal fails in any respect to observe faithfully the said Act and all regulations made thereunder or to perform his or their duties as a private investigation agency and/or security guard agency or private investigator and/or security guard the Surety agrees to pay any and all claims under this bond within a period of sixty days after such claims are submitted to him by the Administrator, provided that the aggregate amounts of such claims shall not exceed the penal sum of this bond.

PROVIDED always, that if the Surety at any time gives three calendar months' notice in writing to the Principal and to the Provincial Treasurer of the Province of Alberta of its intention to put an end to the suretyship hereby entered into then this bond and all accruing responsibility on its part of its funds and property shall from and after the last day of such three calendar months aforesaid cease and terminate insofar as concerns any acts or deeds of the Principal subsequent to such determination, but the Surety and its funds and property shall be and remain liable hereon for all or any deeds, acts or defaults done or committed by the Principal or his employees in the business as a private investigation agency and/or security guard agency from the date of this bond up to such determination.

Signed, sealed and delivered by the above named.....
.....
the Principal in the presence of
.....
.....

.....

Sealed and delivered by the above named .....
..... the Surety, ...
and countersigned by.....
.....
and.....
.....

.....

[A.R. 568/65; 181/74]

Form Q Repealed A.R. 181/74.

Form R

TEMPORARY LICENCE
GOVERNMENT OF THE PROVINCE OF ALBERTA
DEPARTMENT OF THE SOLICITOR GENERAL
THE PRIVATE INVESTIGATORS AND SECURITY GUARDS ACT

Under The Private Investigators and Security Guards Act, and the regulations and subject to the limitations thereof,

.....
(name and address of licensee)

.....
is licensed to act as a private investigator/security guard while in the employ of

.....
(Name of employer)

.....

.....
(Address of employee)

This licence terminates on the ..... day

of ..... , 19....., or on the date that a permanent licence is granted.

DATED this ..... day of..... , 19.....

.....
Administrator

NOTE: This temporary licence must be returned to the Administrator when expired or replaced by a permanent licence.

[A.R. 188/73; 181/74]

APPENDIX D

Shoplifting Detention Statutes in the United States[1]

The so-called shoplifting detention statutes which have been enacted in 40 of the States in the United States[2], find their origin in some modifications of the common law developed by the State courts. In 1936, a California court[3] held that a businessman has a limited privilege to detain a customer whom he reasonably suspects of theft, or of attempting to leave his store with merchandise without paying for it. This common law privilege, however, is a very restricted one, and may only be exercised for the limited purpose of conducting a short on-the-spot investigation to discover whether the suspected individual is in fact attempting to steal merchandise or to leave without paying for it. Such an investigation, however, must not be unduly coercive, nor must the detention be for an unreasonable length of time, or continue after the customer's innocence of wrongdoing has become reasonably plain.

The cases make it reasonably clear that the common law privilege could, under certain circumstances, justify a search, at least of personal belongings (purses, briefcases, etc.), provided physical violence is not used.[4] Furthermore, the common law privilege applies to authorized employees or agents of the businessman, and is not limited, as are many of the statutory provisions, to retail merchants. The American Law Institute's Second Restatement of Torts, defines the privilege in the following terms:

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1. For more detailed consideration of these statutory provisions and their origins, consult: Yale Law Journal, 1953; Kerr, 1959; Bock, 1963; American Law Institute, 1965, Vol. I, at pp. 202-204; Prosser, 1971; Brazener, 1973; and U.S. Department of Justice, 1976.

2. For a tabulated summary of these statutes, see U.S. Department of Justice, 1976, at pp. D1-D6.

3. *Collyer v. S.H. Kress & Co.* (1936) 5 Cal, 2d 175.

4. See, e.g., *Bonkowski v. Arlan's Department Store* (1969) 162 N.W. 3d 347.

> "One who reasonably believes that another has tortiously taken a chattel upon his premises, or has failed to make due cash payment for a chattel purchased or services rendered there, is privileged, without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts."[5]

It is clear that such a privilege could have substantial impact in protecting private security personnel from civil liability for conducting routine security investigations in a wide variety of situations.

This common law privilege does not appear to have been given explicit recognition by Canadian courts, although certain *dicta* in *Perry v. Woodwards Ltd.*[6] suggest that the privilege may be part of our law.

The privilege must be distinguished from the privilege to use reasonable force for the recaption of chattels, now embodied in Sections 38 and 39 of our *Criminal Code,* in that the temporary detention privilege "protects the actor who has made a reasonable mistake as to the wrongful taking."[7] As we noted earlier, however, Sections 38 and 39 could be interpreted in a way which would make them almost identical to the privilege, if the courts adopted a similar approach to interpreting the words "has taken" in them, as was taken in interpreting the words "finds committing" in Section 450 of the *Code,* by the Supreme Court of Canada in *R. v. Biron.*[8]

In 40 states in the United States, statutory provisions have been enacted which codify, and sometimes extend, this common law privilege. Such statutes vary considerably, but are generally limited to "mercantile establishments", and do not therefore apply to all of the wide variety of environments in which private security personnel must function. Many of the statutes, however, provide immunity from criminal as well as civil liability for temporary detentions made under the statute. In some cases, the statutes limit the amount and nature of available damages in the event that liability is established.

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5. American Law Institute, 1965, at p. 202.

6. (1929) 4 D.L.R. 751

7. American Law Institute, 1965, at p. 203.

8. (1975) 30 C.R.N.S. 109.

Most of the statutory provisions specify that temporary detentions may be made only for the limited purpose of investigation, questioning or recovery of merchandise, and that such detentions must be effected in a "reasonable manner" and for a "reasonable time". Since what constitutes "reasonable manner" and "reasonable time" are matters of fact for the jury, the question of whether a search, and what kind of search, may be permitted under such statutory provisions is always one the answer to which will depend on the particular circumstances of each case. In only one of the statutes is search enumerated specifically as one of the legitimate purposes of such temporary detentions.[9] These cases in which the statutes have been applied, however, appear to stress the importance of the absence of violence in effecting lawful detentions. They also stress that such detentions may not be used in order to extract signed confessions or releases from liability.[10]

9. Oklahoma Stat. Ann. (1970) (Suppl. 1971) 22, 1343. We were, unfortunately unable to obtain a copy of this statute during the period of preparation of this study.

10. For a comprehensive review of the cases, see Brazener, 1973.

APPENDIX E

Example of Search Provisions in a Collective Agreement

ARTICLE 43

Security — Plant

43.01 The Union acknowledges the right of the Company to search an employee and his effects while he is on the Company premises. The Company acknowledges the right of an employee to be treated with dignity and courtesy during the selection and search procedure.

43.02 The Company will generally employ a random sampling procedure but reserves the right to institute selective sampling, as it deems necessary, to ensure the security of its resources.

43.03 Each employee will be required to wear on his person in the manner prescribed, while he is on the premises of the Company, the identification card(s) issued to him and will be restricted to those areas of the building(s) as determined by the access coding issued to him by the Company.

43.04 Each employee who is detained, as a result of being selected and searched during his mealtime break, will be granted the corresponding amount of time at the end of his scheduled meal-time break.

43.05 Each employee who is not selected for search may depart during the last five (5) minutes of his scheduled shift and will be paid to the end of his scheduled shift.

43.06 Each employee who, as a result of being selected and searched:

(a) within the last fifteen (15) minutes of his scheduled shift in the case of employees working in the Melting, Plating, Concast, Wire Extrusion and Maintenance Operations.

or

(b) within the last five (5) minutes of his scheduled shift in the case of all other employees,

may depart upon the completion of being searched or within the last five (5) minutes of his scheduled shift whichever occurs later and will be paid to the end of his scheduled shift.

43.07 Each employee who:

(a) is detained beyond the end of his scheduled shift,

or

(b) enters the selection and search procedure after the end of his scheduled shift for reasons other than working overtime and is detained,

as a result of being selected and searched, will be paid, at the rate of time and one-half, for the time he is detained within the search area, beyond the end of his scheduled shift.

It is understood and agreed that such an employee referred to in 43.07 (a) and 43.07 (b) above, will not be entitled to the supper money allowance referred to in Article 27.

43.08 Each employee:

(a) upon his intended departure following his scheduled hours of overtime,

or

(b) upon his intended authorized early departure,

will be paid for an additional five (5) minutes at the applicable rate of pay.

43.09 The parties agree to review the search time statistics recorded during the period April 8, 1975 to May 7, 1975 inclusive to establish if the total time allotment of 5 minutes per day for each employee for the above period was sufficient to meet or exceed the total time detained within the search area in the case of any employee.

It is agreed that only the statistics of an employee who was actively at work for a minimum of 50% of the above period will be used and that the statistics of any employee who obviously delayed or hindered the selection and search procedure will be eliminated.

If the total time allotment for any employee is not sufficient to meet the total time that employee is detained, in the search area during the above period, the allotment for all employees will be adjusted upwards, in one minute increments, to meet the total detained time of that employee, commencing the second Monday following the end of the above period.

Similarly, the Company will review the statistics recorded during subsequent 13 week periods, excluding any plant shutdown period, using the same criteria as above.

If the total time allotment for any employee exceeds or is not sufficient to meet the total time that employee is detained, in the search area, during each subsequent 13 week period, the allotment for all employees will be adjusted either downwards or upwards but not below the 5 minutes per day employee base. Adjustments, if required, will commence the second Monday following the end of each 13 week period.

The Company will provide photostat copies of search data time sheets to the Union President when requested.

For the purpose of the above "time...detained" shall mean time spent in the search area starting not earlier than the last 5 minutes of an employee's scheduled shift.

43.10 The above may only be changed, at any time, by the mutual agreement between the Company and the Union.

43.11 The Union reserves the right to grieve as per the Collective Agreement.

Security— Plant

43.01 The Union acknowledges the right of the Company to search an employee and his effects while he is on the Company premises. The Company acknowledges the right of an employee to be treated with dignity and courtesy during the selection and search procedures.

43.02 The Company will employ whatever procedures it deems necessary to ensure the security of its resources. However, the Company agrees to consult with the Union regarding any change in search procedures affecting members of the bargaining unit.

43.03 Each employee who is detained as a result of being searched during his mealtime break, will be granted the corresponding amount of time at the end of his scheduled mealtime break.

An employee detained beyond his scheduled hours of work will be paid at the rate of time and one half times his regular hourly rate for such time he is detained within the search and/or interview area(s).

LETTER OF INTENT

April 14, 1976

Dear

The following items outline our intended initial course of action in ensuring the security of our resources in the plant.

1. The Company will train a suitable union representative in P.S.E.

2. The union representative trained in P.S.E. will be allowed to review tapes and charts, upon the company receiving written consent of the interviewed bargaining unit employee: however, this review will be limited to instances in which personal search took place and the review will be done in the presence of a company official. All tapes and charts are the property and will remain the property of Limited.

3. Management will consult with the union regarding the structure of the questions to be asked in the P.S.E. interview. The company will publicize the questions so that an employee will know questions he may be asked before being tested in P.S.E. Management will determine the questions and will not negociate their structure with the union.

4. A second bargaining unit member may not be present during a P.S.E. interview. Each person tested under P.S.E. will be asked if he was intimidated by the interviewer and his response will be recorded on the tape.

5. The Company will ensure that the P.S.E. questions are in the context of the person being interviewed.

6. An employee's car is considered one of his effects and is subject to search while it is on the Company's premises. However, in the event of searching an employee's car, the employee will be present and paid for the duration of the search of his car. Such an employee may have a union representative present if he so requests; however, the Company will not pay the time of such representative.

7. The Union has a right to grieve as per the Collective Agreement.

Yours very truly,

for

Personnel Manager.

SECURITY NOTICE

PICK-A-STICK SELECTION SEARCH PROCEDURE

We are changing this procedure to ensure the *random* and *impersonal* principle in all steps of this type of selection process.

Until now:

a CLEAR STICK - determined that the person who picked it passed for a "parcel" search only.

a RED TIPPED STICK - determined that the person who picked it was selected for metal detection search.

Some persons selected by the red stick method were also selected for metal detection scanning of the feet to ensure that precious metal was not hidden in foot covering. This was done by giving guards and witnesses a pre-set number sequence. It was random and impersonal but had some faults.

In future some sticks will be coloured with RED and BLACK. This will determine that the person who picks it is completely scanned including feet.

Therefore if you pick:

COLOUR	*THIS MEANS*	*INSTRUCTION*
CLEAR STICK	same as before	place the clear stick in the middle container in rack and proceed through parcel inspection.

COLOUR	*THIS MEANS*	*INSTRUCTION*
RED TIPPED STICK	you are selected for metal detection search of all except feet	HOLD ON TO THE STICK. *TAKE* it to the search rooms. *SHOW* it to the expeditor for recording with name, time, etc. *HAND* it to the guard. The colour will instruct him/her in what to do.
RED & BLACK TIPPED STICK	you are selected for metal detection search *including* feet	HOLD ON TO THE STICK. *TAKE* it to the search rooms. *SHOW* it to the expeditor for recording with name, time, etc. *HAND* it to the guard. The colour will instruct him/her in what to do.

Metal Detection Search of Feet

On request, the employee raises each foot separately from the floor so that the guard can scan it with the metal detector.

If no metal is indicated by the metal detector there is no need to remove shoes.

If metal is indicated by the metal detector the employee must remove his/her shoes, boots, overshoes, etc. for inspection to ensure they contain no precious metal and raise each shoeless foot for scanning by the metal detector.

Endnotes

1. See Shearing and Farnell, 1978, Chapter 1.

2. See Shearing and Stenning, 1977, at p. 6.

3. As Hadden, 1971, states (at p. 240): "The forms of action may have passed away, but the forms of legal thought still rule us to the grave."

4. See Jeffries, *et al.*, 1974; Stenning and Cornish, 1975; Stenning, 1975; Freedman and Stenning, 1977; Jeffries, 1977; Farnell and Shearing, 1977; Shearing and Stenning, 1977; and Shearing and Farnell, 1978.

5. The analysis in this chapter largely summarizes the findings of research conducted at the Centre of Criminology, University of Toronto, from 1973 to the present. These findings are reported in the following publications, which are listed in the references, above at pages 143-146: Jeffries *et al.*, 1974; Stenning and Cornish, 1975; Freedman and Stenning, 1977; Jeffries, 1977; Farnell and Shearing, 1977; Shearing and Stenning, 1977; Shearing and Farnell, 1978.

6. For a further discussion of this definitional issue, see e.g., Freedman and Stenning, 1977, Chapter 1; Shearing and Farnell, 1978, Chapter 2.

7. The question of vicarious liability is discussed further at pp. 96-104; see also Freedman and Stenning, 1977, Chapter 4.

8. The exception is Prince Edward Island. The most recent and comprehensive survey of this legislation in Canada will be found in Stenning and Cornish, 1975.

9. See Draper and Nicholls, 1976 (British Columbia); Québec Commission de Police, 1976; and Bill 87, currently before the Ontario Legislature.

10. See, e.g., Section 19 of the Alberta *Private Investigators and Security Guards Act*, R.S.A. 1970, c.283, as amended by S.A. 1973, c.45, 3.9, reproduced at pp. 50-51 of this study, A similar provision is to be found in S.43 of Bill 87, currently before the Ontario Legislature.

11. Warren, in Jeffries *et al.*, 1974, at p. 53.

12. See Shearing and Stenning, 1977, pp. 19-21.

13. Shearing and Farnell, 1978, note however that there is some evidence to suggest that this growth rate may now be levelling off: see fn. 8, on p. 112 of their report.

14. Shearing and Farnell, 1978, at pp. 88-89. The authors note that these estimates were confirmed by the agency executives whom they interviewed. They note, too that public police in Ontario showed a growth rate of 32 per cent between 1967 and 1974, compared with a growth rate of 65 per cent in the licensed manned contract security industry: see fn. 9, on p. 113 of their report.

15. Shearing and Farnell, 1978, at p. 89.

16. This figure includes all public police in Ontario, in whatever capacity, except R.C.M.P. headquarters and training staff in Ottawa. It also includes almost 500 police cadets, but does not include civilian staff: see Statistics Canada, *Police Administration Statistics,* 1975 and 1976 (Annual: Cat. No. 85-204), Table 1, at p. 30.

17. E.g., cash-carrying armoured car personnel, burglar alarm respondents, security consultants, etc.

18. See Shearing and Stenning, 1977, at pp. 74-79; and Shearing and Farnell, 1978, Chapter II.

19. Toronto *Globe and Mail,* 23rd January, 1975.

20. See Shearing and Stenning, 1977, at p. 64.

21. Ontario, Task Force on Policing, 1974, at p. 38.

22. *Ibid.*, at p. 110.

23. Shearing and Stenning, 1977, at p. 63.

24. See e.g., the Law Reform Commission's Working Papers, No. 3, 1974 (Sentencing), Nos. 5 and 6, 1974 (Restitution and Compensation, and Fines), and No. 7, 1975 (Diversion).

25. Shearing and Stenning, 1977, at p. 65.

26. Freedman and Stenning, 1977, at p. 270.

27. See Shearing and Farnell, 1978, Chapter 3.

28. (1604) 5 Coke 91; 77 E.R. 194, at p. 195.

29. (1904) 123 Iowa 368; 98 N.W. 881.

30. As quoted by Morrow, J., in *Re McAvoy* (1971) 12 C.R.N.S. 56, at p. 60.

31. For a modern judicial review of these circumstances, see, e.g., *Eccles v. Bourque, Simmonds and Wise* (1975) 1 W.W.R. 609 (S.C.C.)

32. See e.g., the now classic statement to this effect in *Rice v. Connolly* (1966) 2 All E.R. 649. A unique provision in New Brunswick's new *Police Act,* 1977, c. P-9.2, will change this law for certain persons in that Province. Section 36(1) of this Act provides that: "Peace officers and persons licensed pursuant to the *Private Investigators and Security Guards Act* other than police officers and members of the Royal Canadian Mounted Police who have knowledge of or who are investigating criminal offences shall immediately notify the police force or the Royal Canadian Mounted Police, as the case may be, responsible for policing the area where the alleged offence took place of such knowledge or investigation." Failure to observe this obligation is a summary conviction offence under S.36(2) of the Act.

33. For a review of the current law in Ontario governing inn-keepers, see Amirault and Archer, 1978.

34. In *R. v. Lavoie* (1968) 1 C.C.C. 265, at p. 266, the New Brunswick Court of Appeal held that the word "includes" in S.138 of the *Code* was not intended to indicate that the definition of "public place" in that Section is exhaustive, or to exclude "the ordinary dictionary meaning" of those words.

35. See Sections 138 and 179(1). If legislation currently before Parliament is enacted, there will soon be two separate definitions of "public place" even within the *Code* itself; the general definition (in Sections 138 and 179(1)), and a more specific definition for the purposes of the offence of soliciting, under S.195.1 of the *Code:* see Clause 24 of Bill C-51, An Act to Amend the Criminal Code...etc. Under the proposed new definition, "public place", for the purposes of the Section, will include "any means of transportation located in or on a public place". The Supreme Court of Canada has ruled, in *Hutt v. The Queen* (1978) 2 W.W.R. 247, that such places are not included under the definition of "public place" under S.179(1) of the *Code.*

36. See the *Liquor Act,* R.S.S. 1965, c.382, ss.2(t)(v), and *R. v. Severight* (1973) 23 C.R.N.S. 28.

37. See *Zeller's (Western) Ltd. v. Retail Clerks Union, Local 1518* (1962) 36 D.L.R. (2d) 581; *Zeller's (Western) Ltd. v. Retail Clerks Union, Local 1518* (1963) 42 D.L.R. (2d) 583; *Grosvenor Park Shopping Centre Ltd. v. Waloshin et al* (1974) 46 D.L.R. (2d) 750: and *R. v. Peters* 1970) 2.C.C.C. (2d) 336 and (1971) 170 D.L.R. (3d) 128n.

38. (1976) 25 C.C.C. (2n) 186.

39. (1971) 17 D.L.R. (3d) 128n.

40. (1976) 25 C.C.C. (2d) 186, at p. 202.

41. (1978) 38 C.C.C. (2d) 303.

42. *Ibid.,* at p. 304.

43. *Ibid.,* at p. 305.

44. See, e.g., *R. v. P.* (1968) 3 C.C.C. 129; *R v. Lavoie* (1968) 1 C.C.C. 265; *R. v. Hogg* (1971) 15 C.R.N.S. 196; *R. v. Benolkin* (1977) 36 C.C.C. (2d) 206; *R. v. Goguen* (1977) 36 C.C.C. (2d) 570; *Hutt v. The Queen* (1978) 2 W.W.R. 247; and *R. v. Gaudreault* (1978) Ont. C.A., as yet unreported.

45. (1971) 1 W.W.R. 147. The court had to decide whether a beverage room is a public place for the purposes of S.160(1)(a) of the *Criminal Code* (causing a disturbance in a public place).

46. (1976) 25 C.C.C. (2d) 186.

47. Arthurs, 1965, at p. 357, has described it picturesquely as "the difficulty of forcing public law pegs into private law pigeonholes".

48. See e.g., *R. v. Zelensky* (1978) 2 C.R. (3d) 107, in which the Supreme Court of Canada considered the position of restitution in the criminal law.

49. Note that even in *Harrison v. Carswell* (1976) 25 C.C.C. (2d) 186, in which the Supreme Court of Canada upheld the right of a corporate shopping plaza owner to eject a trespasser, the majority, in support of its decision, emphasized "the right of the *individual* to the enjoyment of property" etc. (*emphasis* added). See quote from the case, at p. 20, above.

50. For an exposition of the law on this point, see e.g., *R. v. Lawson* (1973) 22 C.R.N.S. 216.

51. Flavel, 1973, at p. 14.

52. (1976) 25 C.C.C. (2d) 186, at p. 191.

53. *Ibid.*, at p. 192.

54. *Ibid.*, at p. 193.

55. *Ibid.*, at p. 193.

56. *Ibid.*, at p. 194.

57. *Ibid.*, at p. 196.

58. *Ibid.*, at p. 202.

59. The author gratefully acknowledges the helpful comments and advice of Professer Eric Colvin during the preparation of this Chapter.

60. 1867, 30-31 Vict., c.3 (U.K.), as amended; R.S.C. 1970, App. II, No. 5.

61. Shearing and Farnell, 1978, at p. 122. See also Tables 6.9 and 6.10, at pp. 135 and 136 of their report.

62. As Shearing and Stenning, 1977, report at p. 45 of their report: "A leader in this field has been the Federal Department of Supply and Services which has attempted to develop standards for government security contractors, and in the early 1970's established training courses for guard and supervisory personnel in the private contract security industry. In the mid-seventies, however, these courses were abandoned, and responsibility for them was turned over to Provincial governments."

63. See, e.g., Sections 449 and 450 of the *Criminal Code,* specifying arrest powers.

64. See, e.g., Section 25 of the *Criminal Code,* which deals with protection of persons acting under authority, reproduced at p. 83 of this study.

65. R.S.C. 1970, c. R-2, as amended.

66. See also Section 5 of the *National Harbours Board Act,* R.S.C. 1970, c.N.-8, which contains similar provisions with respect to the appointment of constables to police national harbours. Some C.P. railway constables also work as security officers in C.P. hotels.

67. This industry was declared so by statute; but in *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board* (1956) O.R. 862, the court held that such legislation could also be justified under the more general "peace, order and good government" power.

68. R.S.C. 1970, c. L-1, as amended.

69. The bargaining unit, interestingly enough, is a local of the United Steelworkers of America, which of course also represents the miners in the company. This certification was unsuccessfully challenged before the Canada Labour Relations Board in 1975: see *United Steelworkers of America v. Denison Mines Ltd.* (1973-75) 6 C.L.L.C. 1157. Under S.11 of the Ontario *Labour Relations Act,* R.S.O. 1970, c.232, as amended, such joint certification would not be possible. Interestingly, at the time of writing, the in-house security force is in the process of applying for decertification, on the grounds that such joint membership in the same bargaining unit as other employees of the mine poses intolerable problems of conflict of interest for the guards and for the union. This was the main argument of the company in opposing the original certification.

70. Shearing and Stenning, 1977, at p. 39.

71. See *Johannesson v. West St. Paul* (1952) 1 S.C.R. 292.

72. Shearing and Stenning, 1977, at p. 38.

73. In *Di Iorio and Fontaine v. The Warden of the Common Jail of the City of Montreal, and Brunet and Others* (1976) 34 C.R.N.S. 57; *R. v. Zelensky* (1978) 2 C.R. (3d) 107; *Attorney General of Quebec and Keable v. Attorney General of Canada and Solicitor General of Canada and Others* (1978) S.C.C. as yet unreported; and *R. v. Hauser,* as yet undecided by the Supreme Court.

74. At p. 22 of his reasons for judgment.

75. See, e.g., the observations of Dickson, J., in the *Di Iorio* case (see fn. 73, above). Similar comments may be found in *Re Adoption Act* (1938) S.C.R. 398, and in *In Re Prohibitory Liquor Laws* (1895) 24 S.C.R. 170.

76. See *Harrison v. Carswell* (1976) 25 C.C.C. (2d) 186, at p. 194.

77. There is no dispute as to the Provincial legislature's authority to enact powers for the enforcement of Provincial laws.

78. On appeal from the Alberta Court of Appeal: see *Re Hauser and the Queen* (1978) 37 C.C.C. (2d) 129.

79. Sub-paragraphs (a), (b) and (d) - (f) of the definition are omitted here, as they concern special instances of peace officer status which are not particularly germane to this study.

80. Freedman and Stenning, 1977, at pp. 29-30.

81. See also *R. v. Jones and Huber* (1975) 30 C.R.N.S. 127, in which Magistrate O'Connor said, at p. 135: "...it is not for the council of the City of Whitehorse to determine who is a peace officer for the purposes of the *Criminal Code.* That can only be done by Parliament.".

82. See e.g, *Attorney-General of Ontario v. Attorney-General of Canada* (1894) A.C. 189, at pp. 200-201.

83. R.S.C. 1970, c.A-3.

84. S.C. 1973, c.20.

85. As we have noted above, the constitutionality of legislation which affects private security only as it operates within a specific field of activity (e.g., aeronautics) will be justified according to which legislative authority has legislative competence in relation to that particular field of activity.

86. (1978) 2 C.R. (3d) 107.

87. *Ibid.*, at pp. 115-116.

88. On appeal from *Re Hauser and The Queen* (1978) 37 C.C.C. (2d) 129.

89. R.S.C. 1970, c.A-3, as amended by 1973, c.20.

90. Section 5.1 of the *Aeronautics Act,* R.S.C. 1970, C.A-3, as amended by 1973, c.20.

91. R.S.O. 1970, c.351, as amended.

92. New Brunswick is the exception. Special constables can also be appointed under S.10 of the Federal *R.C.M.P. Act,* R.S.C. 1970, c.R-9.

93. Shearing and Farnell, 1978, at p. 204.

94. Jeffries, unpublished research finding.

95. Freedman and Stenning, 1977, at p. 56.

96. For example, the University of Toronto Police Force.

97. For example, Ontario Hydro security employees.

98. For example, Canadian Pacific security officers.

99. For further discussion of special constables, see Stenning and Cornish, 1975, at pp. 196-212; and Freedman and Stenning, 1977, at pp. 54-63.

100. R.S.C. 1970, c.R-2.

101. The definition of "railway" in the statute does not appear to be broad enough to cover hotels owned by a railway company.

102. *Railway Act,* R.S.B.C. 1960, c. 329, Sections 273-274.

103. *Railway Act,* R.S.O. 1950, c. 331, Sections 220-227 (not since consolidated, but still in force), and the *Ontario Northland Transportation Commission Act,* R.S.O. 1970, c.326, Section 24(6).

104. *Railway Act,* R.S.Q. 1964, c. 290, Sections 248-249.

105. *Railway Act,* R.S.S. 1965, c. 134, Section 189.

106. R.S.C. 1970, c.N-8, Section 5.

107. R.S.O. 1970, c.395.

108. R.S.N. 1970, c.312, Section 6.

109. R.S.O. 1970, c. 351.

110. See, e.g., Section 35 of Manitoba's *Private Investigators and Security Guards Act,* R.S.M. 1970, c.P132.

111. Section 30 of the *Private Investigators and Security Guards Act,* R.S.O. 1970, c.362.

112. See Stenning and Cornish, 1975, at p. 205 for a review of this dispute.

113. R.S.A. 1970, c.283, Section 19, as amended by S.A. 1973, c.45, Section 9.

114. R.S.O. 1970, c.362, which is the subject of complete repeal and replacement by Bill 87, currently before the Ontario legislature. The new provision with respect to peace officer status will be found in Section 43 of the Bill.

115. (1963) 2 C.C.C. 97.

116. (1972) 9 C.C.C. (2d) 433.

117. (1973) 6 W.W.R. 687.

118. (1973) 10 C.C.C. (2d) 250.

119. (1972) 9 C.C.C. (2d) 433.

120. Freedman and Stenning, 1977, at p. 272.

121. See Appendix A to this study, at p. 147.

122. In Shearing and Farnell's, 1978, study of contract security in Ontario, 41 per cent of guards and 76 per cent of investigators indicated that they were *not* expected to detain persons whom they suspected of committing a crime: see Shearing and Farnell, 1978. Table 10:6 at p. 257.

123. Freedman and Stenning, 1977, at p. 84.

124. At p. 151.

125. See e.g., *R. v. Taylor* (1970) 73 W.W.R. 636; *R. v. Kellington* (1972) 7 C.C.C. (2nd) 564; *R. v. Stanley* (1977) 36 C.C.C. (2d) 216; and *R. v. Baxter* (1975) 27 C.C.C. (2d) 96.

126. See, e.g., *Reid v. De Groot and Brown* (1963) 2 C.C.C. 327, *Lebrun v. High-Low Foods Ltd* (1968) 69 D.L.R. (2d) 433; *Priestman v. Colangelo and Smythson* (1959) 124 C.C.C. 1; *Woodward v. Begbie* (1962) 132 C.C.C. 145; *Goyer v. Gordon* (1965) 3 C.C.C. 175; *Dendekker v. F.W. Woolworth Co. Ltd.* (1975) 3 W.W.R. 429; and *Eccles v. Bourque, Simmonds and Wise* (1975) 1 W.W.R. 609.

127. See Alberta *Petty Trespass Act,* R.S.A. 1970, c.273; British Columbia *Trespass Act,* R.S.B.C. 1960, c.387, as amended by S.B.C. 1967, c.54; Manitoba *Petty Trespass Act,* R.S.M. 1970, c.P50, Ontario *Petty Trespass Act,* R.S.O. 1970, c.347; and Quebec *Agricultural Abuses Act,* R.S.Q. 1964, c.130.

128. The recent, as yet unreported, decision of the Supreme Court of Canada in *R. v. Moore,* however, raises the possibility that failure to give one's name could amount to the offence of obstruction of a peace officer, under appropriate circumstances.

129. See, e.g., *R. v. Page* (1965) 3 C.C.C. 293; *R. v. Peters* (1971) 17 D.L.R. (3d) 128n; *Harrison v. Carswell* (1976) 25 C.C.C. (2d) 187.

130. R.S.C. 1970, c.I-23.

131. See, e.g., *Re Adelphi Book Store Ltd. and The Queen* (1972) 8 C.C.C. (2d) 40; *Re Krassman and The Queen* (1972) 8 C.C.C. (2d) 45.

132. To the contrary, see *Re Purdy et al. and The Queen* (1972) 8 C.C.C. (2d) 52.

133. R.S.C. 1970, c. N-1. See *R. v. Goodbaum* (1978) 1 C.R. (3d) 152.

134. See. *R. v. Munn* (1966) 2 C.C.C. 137. See also Fontana, 1974, at pp. 19-21 and 38-40, and other cases cited therein, which seem to support these conclusions.

135. See *Re Laporte and The Queen* (1972) 8 C.C.C. (2d) 343.

136. In *Re McAvoy* (1971) 12 C.R.N.S. 56, a warrant was issued for the search, among other things, of an aircraft. See Fontana, 1974, at pp. 27-31 and 159-160 for a further discussion of this topic.

137. The most comprehensive is Fontana, 1974.

138. Section 25(1) of the *Code,* however, would presumably provide adequate protection to persons executing such warrants who were not peace officers. This Section of the *Code* is reproduced at p. 83 of this study.

139. R.S.C. 1970, c.N-1. An almost identical provision is to be found in S.37(2) of the Federal *Food and Drugs Act,* R.S.C. 1970, c.F-27.

140. See footnotes 102-105, above.

141. R.S.C. 1970, c.N-8.

142. R.S.O. 1970, c.395.

143. R.S.N. 1970, c.312.

144. R.S.O. 1970, c.249.

145. (1921) 36 C.C.C. 298, at pp. 301-302.

146. (1932) 59 C.C.C. 56, at p. 61.

147. (1949) 96 C.C.C. 97, at p. 101.

148. (1975) 30 C.R.N.S. 135.

149. More recently, it has been held that a suspect who tries to eat evidence when arrested commits the offence of obstructing justice, contrary to S.127 (2) of the *Criminal Code:* see *R. v. Andruszko* (1978 - Ont. C. A., as yet unreported).

150. (1975) 61 D.L.R. (3d), at p. 138.

151. (1975) 30 C.R.N.S. 135, at p. 142.

152. (1853) 6 Cox C.C. 329.

153. (1902) 21 N.Z.L.R. 484, at p. 491.

154. (1887) 17 Cox C.C. 245, at pp. 249-250, cited in *Reynen v. Antonenko et al.* (1975) 30 C.R.N.S. 135, at p. 141.

155. Bird, 1963, at p. 93.

156. (1929) 4 D.L.R. 751. For some discussion of this Subsection as it related to interrogation and the laying of charges by private persons making arrests, see Freedman and Stenning, 1977, at pp. 133-140 and 157-160.

157. See Paine, 1972.

158. Freedman and Stenning, 1977, at p. 122.

159. See, e.g., *Frey v. Fedoruk et al.* (1949) 95 C.C.C. 206; *R. v. Hills* (1924) 44 C.C.C. 329; *Attorney General of Saskatchewan v. Pritchard* (1961) 130 C.C.C. 61; and *Reid v. DeGroot et al.* (1963) 2 C.C.C. 327.

160. (1975) 30 C.R.N.S. 109.

161. *Ibid.*, at p. 117.

162. *Ibid.*, at p. 123.

163. *Ibid.*, at p. 114. See also *R. v. Dean* (1966) 47 C.R. 311.

164. See *Lebrun v. High-Low Foods Ltd. et al.* (1968) 69 D.L.R. (2d) 433; and *Hucul v. Hicks* (1965) 55 D.L.R. (2d) 267.

165. See *R. v. Dean* (1966) 47 C.R. 311.

166. *Ibid.*, at p. 313.

167. (1973) 22 C.R.N.S. 215.

168. It is noteworthy that S.449(1)(b)(ii) actually stipulates "persons", but no significance ever seems to have been attached to this rather inexplicable plural usage.

169. Dunfield, J., of the Newfoundland Supreme Court, in *Chaytor et al. v. London, New York and Paris Association of Fashion Ltd., and Price* (1972) 30 D.L.R. (2d) 527.

170. See e.g., *Conn v. David Spencer Ltd.* (1930) 1 D.L.R. 805.

171. He did not mean formally charged; the plaintiff had merely been accused of theft by the defendant store detective.

172. *Conn v. David Spencer Ltd.* (1930) 1 D.L.R. 805, at p. 808.

173. Again, an informal accusation is what is being referred to here, not a formal charge.

174. (1835) 6 C. and P. 737, at pp. 739-740.

175. The question of dress, of course, raises the whole matter of uniforms which are required to be worn by certain private security personnel. This matter is considered in more detail at pp. 92-95 of this study.

176. (1929) 4 D.L.R. 751, at p. 767. In his judgment in *R. v. Dean* (1966) 47 C.R. 311, at p. 321, Laskin, J.A., referred to this authority as "arresting authority given by the owner or by the person in lawful possession". His remark, however, was *obiter.*

177. See above, at p. 54.

178. For an example of this, see *R. v. Dean* (1966) 47 C.R. 311.

179. R.S.C. 1970, c.2 (2nd Suppl.).

180. The only way to avoid this anomaly would seem to be to interpret S.450 (2) as not applying to the exercise, by peace officers, of their citizen powers of arrest under S.449. Such an interpretation, however, would go a long way to defeat the objectives of the *Bail Reform Act* through which S.450(2) was enacted.

181. *Petty Trespass Act,* R.S.O. 1970, c.347, Section 2.

182. *Agricultural Abuses Act,* R.S.Q. 1964, c.130, Section 3.

183. *Petty Trespass Act,* R.S.A. 1970, c.273, Section 5.

184. *Petty Trespass Act,* R.S.M. 1970, c.P50, Section 3.

185. (1962) 30 D.L.R. (2d) 527.

186. Per Lord Atkin, in *Hillen and Pettigrew v. I.C.I. (Alkali) Ltd.* (1936) A.C. 65, at p. 69.

187. (1962) 30 D.L.R. (2d) 527, at p. 535.

188. The Supreme Court of Canada, in *Harrison v. Carswell* (1976) 25 C.C.C. (2d) 186 (discussed above at pp. 24-26), while it did not specifically reject, or even refer to, this interpretation, appears to have decided that case using different assumptions about the definition of trespass.

189. See *Harrison v. Carswell* (1976) 24 C.C.C. (2d) 186.

190. R.S.O. 1970, c.202.

191. These provisions cover such offences as: altering or defacing a number plate, use of incorrect number plate, failure to have one's driver's licence, unlawful possession of a permit or licence, driving while vehicle is suspended, careless driving, racing on a highway, failure to remain at an accident, removing highway signs or obstructions, etc.

192. R.S.O. 1970, c.249.

193. R.S.O. 1970, c.225, Section 30, Item 27.

194. It is noteworthy that similar power to arrest without warrant in Section 54 of Ontario's *Liquor Licence Act,* 1975, c.40, is limited to "police officers".

195. Canadian Committee on Corrections, 1969, at p. 62.

196. Canada, Law Reform Commission, 1978.

197. R.S.C. 1979, c.N-1.

198. See, e.g., *Scott v. The Queen* (1976) 61 D.L.R. (3d) 130.

199. See, e.g., Ontario, *Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th May, 1974,* 1975, at pp. 57-63, and 70.

200. R.S.C. 1970, c.F-27.

201. R.S.O. 1970, c.249.

202. An almost identical power to this, but limited to "police officers", is to be found in Section 48(2) of Ontario's *Liquor Licence Act, 1975,* c.40.

203. See, e.g., *R. v. Erickson* (1978) 30 C.C.C. (2d) 447.

204. R.S.O. 1970, c.395.

205. Section 5 of the Act. This provision also allows a guard or peace officer to arrest without warrant a person who refuses or neglects to comply with such a request or direction, or who is found upon, or attempts to enter, a public work without lawful authority.

206. Section 1(c)(i) of the Act.

207. R.S.C. 1970, c.A-3.

208. By S.C. 1973, c.20.

209. See Section 5.1(9) of the Act.

210. See the *Civil Aviation Security Measures Regulations,* SOR/74-226, Section 3(1)(b).

211. *Ibid.,* Section 3(2).

212. *Ibid.,* Section 5. Identical provisions to these may be found in the *Foreign Aircraft Security Measures Regulations,* SOR/76-593.

213. See Subsection 5.1(7), and also 5.1(8).

214. There is some authority for the proposition that Sections of the *Code* such as Sections 38 and 39 do confer immunity from civil, as well as criminal, liability. See the discussion of this issue at pp. 54-55 of this study, above.

215. (1960) 129 C.C.C. 102, at p. 107.

216. *Ibid.,* at pp. 109-110.

217. As to the definition of a trespasser in such circumstances, see the discussion of this at pp. 74-75, above.

218. (1975) 30 C.R.N.S. 109. See the discussion of this case at pp. 65-66, above.

219. See, e.g., Sections 14, 140, 143, 149, 158, 247 and 249 of the *Code.*

220. See, e.g. *Conn v. David Spencer Ltd.* (1930) 1 D.L.R. 805, in which MacDonald, J., said, at pp. 807-808: "In order to determine this point you have to consider the surrounding circumstances and my opinion is the plaintiff being so accused of theft, by a person in authority, *felt that he was compelled* to give himself, as it were, into the custody or control of...(the store detective)...and her assistant." See also *Chaytor v. London, New York and Paris Association of Fashion Ltd. and Price* (1962) 30 D.L.R. (2d) 527.

221. Although the standard texts on criminal law and tort law are by no means clear on this point, the case most commonly cited in support of it is an old English case, *Christopherson v. Bare* (1848) 116 E.R. 554. In that case, Denman, C.J., said (at p. 556): "It is a manifest contradiction in terms to say that the defendant assaulted the plaintiff by his permission." See also Prosser, 1971, at p. 101, and cases cited therein.

222. The leading case with respect to criminal prosecutions is *Woolmington v. D.P.P.* (1935) All E.R. Reprint 1.

223. *Abraham v. The Queen* (1964) 26 C.R.N.S. 390.

224. Freedman and Stenning, 1977, at p. 73.

225. (1904) 8 C.C.C. 45.

226. (1881) 18 Ch. D. 199.

227. (1877) 2 C.P.D. 418, at p. 421.

228. *Ibid.,* at p. 423.

229. (1957) 1 All E.R. 35, at P. 42.

230. *Ibid.,* at p. 45.

231. *Weir,* 1970, at p. 282.

232. *See, e.g., Harrison v. Carswell* (1976) 25 C.C.C. (2d) 186; *Chaytor v. London, New York and Paris Association of Fashion Ltd., and Price* (1962) 30 D.L.R. (2d) 527. As we have noted above (see footnote 127), in four Provinces there is a right to arrest without warrant under such circumstances.

233. See also the English cases of *Robinson v. Balmain Ferry Co. Ltd.* (1910) A.C. 295, and *Herd v. Weardale Steel, Coal and Coke Co. Ltd., et al.* (1915) A.C. 67, which suggest that an occupier may impose reasonable conditions of exit on an invitee, even without his or her prior consent.

234. The following cases, which are all concerned with detention and/or search situations involving private security, illustrate the application of these factors by the courts: *Perry v. Woodwards Ltd.* (1929) 4 D.L.R. 751; *Conn v. David Spencer Ltd.* (1930) 1 D.L.R. 805; *Cochrane v. T. Eaton Co.* (1936) 65 C.C.C. 329; *Cannon v. Hudson's Bay Co.; Stephen v. Hudson's Bay Co.* (1939) 4 D.L.R. 465; *Whiffin v. David Spencer Ltd.* (1941) 2 D.L.R. 727;

Sinclair v. Woodward's Store Ltd. (1942) 2 D.L.R. 395; *Chaytor v. London, New York and Paris Association of Fashion Ltd., and Price* (1962) 30 D.L.R. (2d) 527; *Hucul v. Hicks* (1965) 55 D.L.R. (2d) 267; and *Lebrun v. High-Low Foods Ltd.* (1968) 69 D.L.R. (2d) 433.

235. Kakalik and Wildhorn, 1972, at p. 7.

236. Shearing and Farnell, 1978, Table 9:11, at p. 219.

237. Jeffries, 1977, at p. 94. Elsewhere, Jeffries comments that: "The tradition which over-rides loss prevention oriented mechanisms is a basic, unwavering belief in legal deterrence to an extent which would surprise if not shock even the most traditional criminologist" (at p. 89).

238. See, e.g., Section 49(2) of the *R.C.M.P. Act,* R.S.C. 1970, c.R-9, and Section 30(2) of Alberta's *Police Act, 1973,* c.44.

239. See Section 20(5) of Vancouver's *License By-Law No. 4450* (Private Patrol Agency By-Law).

240. See, e.g., Sections 25(3) and 27 of Ontario's *Private Investigators and Security Guards Act,* R.S.O. 1970, c.362.

241. An example of some of the more comprehensive of such regulations will be found in Sections 23 to 27 of Alberta's regulations under its *Private Investigators and Security Guards Act,* R.S.A. 1970, c.283, as amended, which are set out in Appendix C to this study, at pp. 153-173.

242. See, e.g., Section 19 of Alberta's *Private Investigators and Security Guards Act,* R.S.A. 1970, c.283, as amended by S.A. 1973, c.45, which is set out at pp. 50-51, above. For a review of such statutory provisions in licencing statutes, as well as provisions dealing with uniforms, see Stenning and Cornish, 1975, at pp. 113-138, 256 and 258.

243. Stenning and Cornish, 1975, at p. 141.

244. See Section 2(2) of the Bill.

245. Amirault and Archer, 1978, at p. 193.

246. *Ibid.,* at p. 195.

247. *Ibid.,* at p. 196. See *Sunbolf v. Alford* (1838) 150 E.R. 1135.

248. The recently reported case of *Carpenter et al. v. MacDonald et al.* (1978) 4 C.R. (3d) 311, amply illustrates the kinds of problems of order maintenance which can arise from an attempt to exercise this right of lien.

249. R.S.O. 1970, c.223.

250. Even the rights of entry, etc. of landlords with respect to property occupied by tenants — most of which are now enshrined in Provincial legislation — would appear to be merely variations on common law rights of property owners and occupiers, and do not include any special rights of search or seizure.

251. (1959) 125 C.C.C. 72.

252. See footnote 127, above.

253. See, e.g., the words of Atkin, J., in *Mousell Brothers v. London and North Western Railway* (1917) 2 K.B. 836, at p. 845: "I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants."

254. See, e.g., *R. v. Fane Robinson Ltd.* (1941) 76 C.C.C. 196; *R. v. Andrews Weatherfoil Ltd.* (1971) Cr. App. R. 31; and *R. v. Waterloo Mercury Sales Ltd.* (1974) 18 C.C.C. (2d) 248.

255. Prosser, 1971, at p. 101, footnote 28. The leading English case is *Entick v. Carrington* (1765) 19 St. Tr. 1029.

256. See British Columbia's *Privacy Act, 1968,* c.39; Manitoba's *Privacy Act, 1970,* c.74; Saskatchewan's *Privacy Act, 1973-74,* c.80; and Quebec's *Charter of Human Rights and Freedoms,* 1975, c.6.

257. (1971) 2 W.W.R. 142, at pp. 146-147.

258. See, e.g., *R. v. Andsten and Petrie* (1960) 128 C.C.C. 311.

259. Freedman and Stenning, 1977, at p. 196.

260. A more complete discussion of this matter will be found in Chapter 4 of Freedman and Stenning, 1977, and at pp. 277-278 of their report.

261. See, e.g., *Re St. Catharines' Police Association and Board of Police Commissioners for the City of St. Catharine's* (1971) 1 O.R. 430; *R. v. Johnston et al.* (1966) 1 C.C.C. 226; and *Re The Metropolitan Toronto Board of Commissioners of Police and the Metropolitan Toronto Police Association* (1975) 4 O.R. (2d) 83.

262. Freedman and Stenning, 1977, at pp. 176-177. The authors note that the police statutes of British Columbia and Saskatchewan specifically provide for some joint financial responsibility of government agencies for the commission of torts by special constables. In Ontario's *Police Act,* provision is made for discretionary payments of damages and torts against a special constable, by a municipal council. See their report, at pp. 167 and 171.

263. (1946) 175 L.T. 417.

264. See, e.g., *Bahner v. Marwest Hotel Co. Ltd., Muir et al.* (1970) 75 W.W.R. 729; *McKinnon v. F.W. Woolworth Co. Ltd. et al.* (1968) 70 D.L.R. (2d) 280; *Lakotosh v. Ross and Victoria Hotel Ltd. etc.* (1974) 3 W.W.R. 56; and *Dendekker v. F.W. Woolworth Co. Ltd., et al.* (1975) 3 W.W.R. 429.

265. Freedman and Stenning, 1977, at pp. 181-182.

266. *Ibid.,* at pp. 182-185.

267. For a review of these requirements, see Stenning and Cornish, 1975, at pp. 98-99.

268. See, e.g., *R. v. Cottam* (1969) 7 C.R.N.S. 179.

269. For two contrasting cases on this point, see *Warren v. Henlys Ltd.* (1948) All E.R. 935, and *Allan v. Lee Sew and Victor Lee* (1952) 102 C.C.C. 264.

270. For a review of such provisions, see Stenning and Cornish, 1975, at pp. 138-143.

271. *Ibid.*, at p. 139.

272. *Ibid.*, at pp. 58-68. More recently see article entitled "Can't keep track of private eyes, OPP testifies", Toronto *Globe and Mail,* Thursday, 1st June, 1978, p. 5.

273. Shearing and Farnell, 1978, at pp. 50-51.

274. See, e.g., Section 17 of Ontario's *Private Investigators and Security Guards Act,* R.S.O. 1970, c. 362.

275. Stenning and Cornish, 1975, at pp. 161-162.

276. See Sections 27-35 of the Bill.

277. Stenning and Cornish, 1975, at p. 143.

278. As Shearing and Farnell put it, private security polices for profit rather than for justice: see Shearing and Farnell, 1978.

279. See, e.g., Jeffries, 1977, in which the author identifies seven environmental factors which affect the structure of in-house security forces.

280. See Shearing and Farnell, 1978.

281. See, e.g., Brownyard, 1974.

282. Shearing and Farnell, 1978, Table 10:14, at p. 261.

283. *Ibid.*, Table 10:15, at p. 261. For guards, 46% reported that such instructions came from their agency supervisor, 34% from the client, 15% from the agency and the client, and 5% indicated that they took it upon themselves to make such searches. For investigators, the figures were 57%, 29%, 0% and 14% respectively.

284. *Ibid.*, Table 10:13, at p. 260.

285. *Ibid.*, Table 9:25, at p. 226.

286. *Ibid.*, Table 9:26, at p. 227.

287. *Ibid.*, Table 9:27, at pp. 228-229.

288. *Ibid.*, Table 9:28, at p. 230.

289. *Ibid.*, Table 9:29, at p. 230.

290. *Ibid.*, Table 9:30, at p. 231.

291. *Ibid.*, Table 9:31, at p. 231.

292. *Ibid.,* Table 9:32, at p. 232.

293. *Ibid.,* Table 9:33, at p. 232.

294. *Ibid.,* Table 9:34, at p. 233.

295. *Ibid.,* Table 10:5, at p. 256. The questions dealt with powers to search persons, vehicles and purses, shopping bags, briefcases, etc., without consent. Correct answers were given by 91% of guards and 96% of investigators with respect to powers to search persons; 81% of guards and 87% of investigators with respect to powers to search vehicles; and 70% of guards and 83% of investigators with respect to searches of purses, briefcases, etc.

296. *Ibid.*, Table 7:2, at p. 164.

297. *Ibid.*, Table 10:12, at p. 260.

298. (1975) 30 C.R.N.S. 109. See the discussion of this case, and its implications, at pp. 65-66, above.

299. Shearing and Farnell, 1978, Table 10:7, at p. 257.

300. *Ibid.,* Table 10:9, at p. 258.

301. *Ibid.,* Table 10:10, at p. 259. It will be clear from our review of the law on this subject (see above, at p. 92) that in the great majority of these cases the courts would regard the suspect as having been involuntarily detained for the purposes of the tort of false imprisonment.

302. *Ibid.,* Table 10:11, at p. 259. Section 29 of the *Criminal Code* imposes a duty on persons making an arrest without warrant to give notice to the person being arrested, "where it is feasible to do so", of the reason for the arrest. See also *Christie v. Leachinsky* (1947) 1 All E.R. 567, and *Gamracy v. The Queen* (1972) 12 C.C.C. (2d) 209. In *R. v. Whitfield* (1970) 1 C.C.C. 129, the Supreme Court of Canada held that the mere pronouncing of words such as "you are under arrest" can only constitute an arrest if the person being arrested submits to the process. More recently, see " 'You're under arrest' not enough, judge rules", Toronto *Globe and Mail,* 8th December, 1978.

303. See p. 92, and the cases cited in footnote 234, above.

304. Such a limited power of detention has been recognized both by common law and through statutory provisions in certain states of the United States. For a brief review of these provisions, see Appendix D, at p. 175.

305. For a review of current licensing provisions, see Stenning and Cornish, 1975.

306. One set of "Standing Orders", consulted during the preparation of this study, contained the following instructions: "As security officers, once a warrant to search has been obtained, we do not have the authority to execute the warrant. This must be done by the (name of town) Police Department. We can, with their permission, attend as observers representing the Company." Every member of the in-house security force in this particular company holds a special constable appointment.

307. See Jeffries, 1977, at pages 96-97. One plant security director interviewed during the preparation of this report indicated that in his view management required search procedures to be imposed more vigorously around the time of contract negotiations. This, he felt, was done with the objective of ensuring that management had some "cases" with which to bargain during such collective bargaining. Lenient dispositions of such cases, he explained, could be promised in return for concessions from the negotiating workers on other matters.

308. A somewhat similar concern is commonly expressed by security directors at educational institutions such as colleges and universities.

309. *Garzilli v. Howard Johnson's Motor Lodges Inc.* (1976) 419 F. Supp. 1210.

310. Wallace and Sherry, 1978, at p. 80.

311. *Ibid.*, at p. 85.

312. The recent development of medical malpractice litigation is the most commonly cited example.

313. For an example of this, see the discussion of insurance practices with respect to burglar alarm systems, in Stenning, 1975, at p. 12.

314. See, e.g., *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.* (1972) S.C.R. 769; and *Alliance Assurance Co. Ltd. v. Dominion Electric Protection Co. Ltd.* (1970) S.C.R. 168.

315. See *Re United Electrical Workers, Local 504, and Canadian Westinghouse Co. Ltd.* (1964) 15 L.A.C. 348. The union representative on the board in this case dissented, holding that such inspections "had not been made compulsory, has not been published as a plant rule, and in any event would be a violation of an employee's civil rights (except where there is clear reason to believe the employee to be involved in theft, which was not the case here)."

316. See *Re United Steelworkers, Local 2868, and International Harvester Co. Ltd.* (1962) 12 L.A.C. 285. See also *Re United Electrical Workers, Local 504, and Canadian Westinghouse Co. Ltd.* (1960) 10 L.A.C. 224, which seems to have been decided on the same principles.

317. See *Re United Automobile Workers, Local 444, and Chrysler Corporation of Canada Ltd.* (1961) 11 L.A.C. 152, at p. 153.

318. *Ibid.*, at p. 159.

319. *Ibid.*, at pp. 159-160.

320. *Ibid.*, at p. 160.

321. *Ibid.*, at pp. 160-161.

322. *Ibid.*, at p. 161.

323. *Ibid.*, at p. 162.

324. *Re Inco Metals Co. and United Steelworkers of America,* Sudbury, June 16th, 1978, at pp. 7-8 — as yet unreported. The union nominee on the board dissented from the award.

325. *Ibid.,* at p. 4.

326. At p. 179.

327. A psychological stress evaluator is a form of lie detector which purports to measure truthfulness according to variations in voice-patterns obtained from tape-recordings of the subject answering questions put to him by the examiner.

328. In some Provinces, under certain circumstances, such accommodation is not covered by the landlord and tenant legislation which applies to normal residential tenancies: see e.g., Section 1(c)(iii) of Ontario's *Landlord and Tenant Act,* R.S.O. 1970, c.236, as amended by Section 1 of S.O. 1975 (2nd Sess.), c.13.

329. This section is based on part of an unpublished paper, entitled "Court-Specific Functions and Objectives", prepared by L. Axon and P.C. Stenning for the Alberta Attorney General's Department in June 1978.

330. In practice, however, his choice is likely to be dictated by official company policy.

331. With reference to the recent *Inco* arbitration award, described above (see footnote 324, and pp. 129-30, above), I was told by one union official that the principal motivation of the union in pursuing the matter through arbitration was not so much dissatisfaction over the company's disposition of the individual case, as a desire to have the whole matter of safety and security procedures in relation to explosives at the mines publicly aired, and more effective measures (including search procedures), implemented. The arbitration hearings provided a forum for this, even though such matters were not within the board's official mandate. In its award, the board noted that: "The control over the distribution of explosives from magazines in the mines was criticized in some of the union evidence" (at p. 5 of the award).