



Written by Brian Robertson, on Wed-October-2009

NEW!



In May of this year, a merchant in Toronto's Chinatown district arrested a shoplifter. The shoplifter plead guilty to theft and served a 30-day sentence. The storeowner, David Chen, has been commended by many people, including federal Immigration Minister Jason Kenney, who visited him at his store for a photo op in September.

What made this arrest controversial, however, is that Chen was also charged with various offences, including assault, kidnapping, forcible confinement, and carrying a concealed weapon. This because he chased the shoplifter down, forcibly detained him, tied him up, and put him into the back of a van to hold him for the police. (The "weapon" in question was the boxcutter that he uses for work and had in his fanny pack.) Chen has plead not guilty, and his case is before the courts.

When this case hit the media this spring, the debate in the halls of public opinion suffered a lot from widespread misunderstanding about the concept of citizens' arrest and how it works. But by autumn the central legal issue in the case had become clearer. Chen's mistake was that he failed to arrest the shoplifter at the time of the shoplifting incident. He initiated the arrest only after the perpetrator had committed the theft, gone away to stash the stolen goods, and then subsequently returned to the store.

There are a lot of social issues at play in this case. But the central legal issue isn't whether or not Chen used excessive force, or whether the police made a mistake in judgement, or even whether the police are providing a satisfactory level of protection to Chinatown merchants. The central legal issue is whether or not the wording of Section 494 of the Criminal Code of Canada — which only permits an ordinary person to arrest someone who he or she "finds committing" an offence — is too narrow.

Chen's lawyer is arguing that the wording of Section 494 is "unconstitutional." The victims' rights group which was formed to support Chen is petitioning Federal Attorney-General Rob Nicholson to amend section 494. Minister Kenney told Chinatown merchants that he'd take the issue up with his colleagues in Parliament.

Should the wording of Section 494 be broadened? And if so, should private citizens have the same authority that police do — to arrest anyone who they have reasonable grounds to believe has committed an offence. Or does Chen's case suggest a middle ground? Could a private citizen be given the authority to arrest anyone he or she has reasonable grounds to believe is a person who previously found committed an offence? Or should there be a new sub-section added to 494, creating a more beefed up authority to make arrests, but just for retailers and their representatives?

The correct answer is behind Door No. 2. It would be completely unworkable to extend "reasonable grounds" to every person in the country, and a special arrest authority just for shopkeepers isn't ever going to fly, constitutionally-speaking. But Chen's case points out something that anybody in security who has ever tried to arrest a shoplifter already knows — that it is illogical for the law to say (as it presently does) that you can arrest a suspect as long as you can keep him in your sights continuously from the time of the crime until the time of the arrest, but that your authority to make the arrest evaporates if you lose sight of him for even a short period of time.

There's a lot of confusion and misunderstanding around citizens' arrest. It would be a timely development if the Attorney-General initiated a serious review of Section 494, and asked whether or not it needs to be updated. The answer he would get — from the retail community, from police leadership, from police unions, and from the private security industry — would be a resounding yes.

There will of course be intense differences of opinion about what direction the law on citizens' powers of arrest needs to move in. But it needs to move.



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