# Full Text:Volume 4A

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# Volume 4A - Police Powers and Bail

# Arrest, Detention and Release

# Arrest and Detention

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## Introduction

The police powers of detention and arrest are some of the most important powers available to a peace officer in their investigation of criminal activity. It is also some of the most invasive powers upon a person's liberty. This is a classic issue of procedural law that circumscribes the peace officers authority in these matters.

These chapters cover not only the powers of police to detain or arrest, but also the right a person has when the police engage in such conduct and remedies for breaches of those rights.

The transition from investigative detention to arrest and search is a fluid and dynamic process in situations such a traffic stop. It is not to be segmented into discrete parts.[1]

In general terms, the law should not "unduly hamper" the police in criminal investigations.[2]

**State Agency**

Arrest and detention by private security on the basis of committing a criminal offence and then delivery to the police does not amount to state conduct.[3]

1. see *R v Schrenk (CA)*, 2010 MBCA 38 (CanLII), 255 Man.R. (2d) 12, *per* Steel JA
   *R v Amofa (R.)*, 2011 ONCA 368 (CanLII), 282 OAC 114, *per* Blair JA, at para 19
2. *R v Hart*, 2012 NLCA 61 (CanLII), *per* Barry JA appealed to 2014 SCC 52 (CanLII), *per* Moldaver J
3. *R v Dell*, 2005 ABCA 246 (CanLII), 199 CCC (3d) 110, *per* Fruman JA and Cote JA
   See also Charter Applications#State Agent

## Topics

- Investigative Detention
- Warrant Arrests
- Warrantless Arrests
- Arrest Procedure
- Exclusion of Evidence Under Section 24(2) of the Charter
- Waiver of Charter Rights
- Initial Post-Charge Detention

## See Also

- Release and Attendance

- Screening Device

# Investigative Detention

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## General Principles

The police have a common law right to detain people for investigative purposes. The investigation must be based on a "reasonable suspicion that the particular individual is implicated in the criminal activity under investigation" for it to be considered lawful.[1]

Any detention must be "reasonably necessary" based on the "totality of the of the circumstances". The nature and extent of the interference with liberty must be one that is "necessary" in light of the duties being executed.[2] The suspicion formed must include a "clear nexus" between the detainee and the criminal offence under investigation.[3]

Police are not permitted to detain anyone for the purpose of "ferreting out criminal activity" or to determine if someone is "up to no good". There must be "particularized" suspicion relating to specific criminal activity.[4]

The right against arbitrary detention does not extend to a free-standing right to flee.[5]

#### Detention Defined

A person is detained where their liberty is deprived through "physical constraint" or where "the state assumes control over the movement of a person by demand ord direction which may have a significant legal consequence and which prevents or impedes access to counsel".[6]

#### Requirements for Lawful Detention

The detention must be in relation to a suspected (1) "recent or on-going criminal offence" that is (2) connected to the detainee.[7] The crime must be *known* by the officer. It is not sufficient if the crime is merely suspected.[8]

#### Police Obligations Upon Detention

Where a person is detained, absent statutory exceptions, they are entitled to a right to counsel.

So long as there is no detention, the police are entitled to question a person without advising of any right to counsel, even if they intend to arrest that person. [9]

#### Sufficiency of Belief [10]

An officer's "grounds to believe" an offence has been committed will fall short of being "objectively reasonable and probable" allowing for an arrest. If the officer instead has a "reasonable suspicion" that the suspect was involved in a criminal offence, it may be enough to justify investigative detention.[11]

#### Duration of Power

Investigative detention is permissible only so long as it is "reasonably necessary" in the "totality of the circumstances".[12] What is reasonably necessary will depend on the "nature of the situation" such as:[13]

- intrusiveness of the detention
- Nature or seriousness of the offence,
- complexity of the investigation,
- any immediate public or individual safety concerns,
- the ability of the police to continue the investigation without continuing the detention of the suspect,
- the lack of diligence of the police,
- the lack of immediate availability of investigative tools,
- the information known to the police about the suspect or the crime, and
- the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope.

#### Detention vs Warrantless Arrest

Section 495(2) requires that an officer not arrest a suspect unless there is reason to do so. Reasons include:[14]

- to establishing identity
- reasonable belief that the offence may continue or be repeated if not arrested
- reasonable belief that evidence may be lost if not arrested

#### Appellate Review

Whether someone was unlawfully detained under s. 9 of the Charter is a question of law and is reviewable on a standard of correctness.[15]

The existence of reasonable suspicion is a question of law and reviewed on a correctness standard.[16]

#### History

In earlier cases, the term used was adopted from US law of "articulable cause", which later was changed to "reasonable grounds to detain".[17]

1. *R v Mann*, 2004 SCC 52 (CanLII), [2004] 3 SCR 59, *per* Iacobucci J, at para 34
2. *Mann*, *ibid.*, at para 34 ("The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances...most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test.")
*R v Dedman*, 1985 CanLII 41 (SCC), [1985] 2 SCR 2, *per* Le Dain J, at p. 35 ("The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.")
*R v Clayton*, 2007 SCC 32 (CanLII), [2007] 2 SCR 725, *per* Abella J, at paras 25 to 26
3. *Mann*, *ibid.*, at para 34 ("The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence.")
4. *R v Yeh*, 2009 SKCA 112 (CanLII), 248 CCC (3d) 125, *per* Richards JA, at para 75 ("It is, of course, well established that the police do not enjoy a general power to detain individuals for the purpose of ferreting out possible criminal activity. More particularly, they may not conduct an investigative detention to determine whether an individual is, in some broad way, "up to no good." In order to justify an investigative detention, the police suspicion must be particularized, i.e. it must relate to specific criminal wrongdoing.")
5. *R v Jackson*, 2011 ONSC 5516 (CanLII), OJ No 6394, *per* Code J, at paras 62 to 64
6. *R v Therens*, 1985 CanLII 29 (SCC), [1985] 1 SCR 613, at pp. 503 to 504
*R v Bazinet*, 1986 CanLII 108 (ON CA), 25 CCC (3d) 273, *per* Tarnopolsky JA
7. *Mann*, *supra*, at para 34
*R v Bramley*, 2009 SKCA 49 (CanLII), 67 CR (6th) 293, *per* Richards JA
8. *Bramley*, *ibid.*, at paras 29 to 34
9. *R v Esposito*, 1985 CanLII 118 (ON CA), 49 CR (3d) 193, *per* Martin JA leave refused [1986] 1 SCR viii (SCC)
10. see also Reasonable Suspicion
11. *R v Cunsolo*, 2008 CanLII 48640 (ON SC), [2008] OJ No 3754 (SCJ), *per* Hill J - summary of rules of arrest and detention
*R v DLW*, 2012 BCSC 1700 (CanLII), *per* Romilly J, at para 31
12. *Clayton*, *supra*, at paras 25 to 26, 30 to 31
13. *Clayton*, *ibid.*
*R v Barclay*, 2018 ONCA 114 (CanLII), 44 CR (7th) 134, *per* Hoy ACJ, at para 31
*R v Godoy*, 1999 CanLII 709 (SCC), [1999] 1 SCR 311, *per* Lamer CJ, at para 18 ("[T]he justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.")
*Clayton*, *supra*{, at paras 25 to 26, 30 to 31
14. see Warrantless Arrests
15. *Shepherd*, *supra*, at para 20
16. *R v Chehil*, 2013 SCC 49 (CanLII), [2013] 3 SCR 220, *per* Karakatsanis J, at para 60
17. *R v Buchanan*, 2020 ONCA 245 (CanLII), *per* Fairburn JA, at para 30

## Right Against Arbitrary Detention

Section 9 of the Charter prohibits arbitrary detention. Under the header "Detention or imprisonment" the Charter states:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> – CCRF

#### Purpose of Charter Right

The "purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference"[1] Thus "a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9"[2]

#### Burden of Proof

The burden is upon the applicant to prove that the accused was "detained" within the meaning of s. 9 which must be proven on a balance of probabilities.[3]

#### "Arbitrary"

Detention is "arbitrary" where it "bears no relation to, or is inconsistent with the law which founds the state action" under common law or statute.[4]

The term "arbitrary" should not be considered distinguishable from "unlawful".[5]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 20
2. *Grant*, *ibid.*, at para 55
3. *R v Bush*, 2010 ONCA 554 (CanLII), 259 CCC (3d) 127, *per* Durno J, at para 74
*R v LB*, 2007 ONCA 596 (CanLII), 227 CCC (3d) 70, *per* Moldaver JA, at para 60
4. *R v Whipple*, 2016 ABCA 232 (CanLII), 39 Alta LR (6th) 1, *per curiam* leave refused
*R v Vuozzo*, 2013 ABCA 130 (CanLII), 544 AR 271, *per curiam* leave refused
5. *Grant*, *supra* ("Earlier suggestions that an unlawful detention was not necessarily arbitrary... have been overtaken by Mann")
cf. *Whipple*, *supra*, at para 47 ("...the framers of the Charter can be taken to have understood the distinction between "illegal" and "arbitrary". ... it is hard to believe that the framers of the Charter thought "illegal" and "arbitrary" were identical notions.")

## Types of Detention

A detention is where a "state agent, by way of physical or psychological restraint, takes away an individual's choice simply to walk away." This can include "any form of 'compulsory restraint'".[1]

A person becomes detained where he "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist".[2]

Detention is determined on an objective test: "having regard to the entire interaction, with the actions of the police cause a reasonable person in the position of the suspect to conclude that he or she is not free to go, and must comply with the directions of the police"[3]Factors to consider include the "circumstances of the encounter, the nature of the police conduct in the particular characteristics or circumstances of the individual."[4]

A person can be detained physically or psychologically.

**Psychological Detention**

Psychological detention is where "the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person who conclude ...that he ... had no choice but to comply".[5]

A person who is delayed or kept waiting by police is not necessarily psychologically detained.[6]

**Elements of Psychological Detention**

Psychological detention has three elements:

1. a police direction or demand;
2. the individual's voluntary compliance with the direction or demand resulting in a deprivation of liberty or other serious legal consequences; and
3. the individual's reasonable belief that there is no choice but to comply[7]

Detention by police does not continue subsequent to release on terms of bail, and so entitlements such as the right to silence do not apply.[8]

**Reasonableness**

A personable person is not expected to understand the law of police powers and may be reasonably mistaken as to the police's authority.[9]

**Concurrent Reasons Permitted**

The purpose for detention can have concurrent reasons, such as conducting traffic enquiries while making observations of drug related offences.[10]

**Vague "hunches" are Insufficient**

An officer cannot detain a suspect on the basis of a hunch.[11]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 25
2. *Grant*, *ibid.*, at para 25
   *Therens*, *supra*, at p. 644
   *R v Voss*, 1989 CanLII 7167 (ON CA), 71 CR (3d) 178, *per* Tarnopolsky JA
3. *R v BS*, 2014 BCCA 257 (CanLII), *per* Neilson JA
4. *BS*, *ibid.*
5. *Grant*, *supra*, at para 44
6. *R v Mann*, 2004 SCC 52 (CanLII), [2004] 3 SCR 59, *per* Iacobucci J, at p. 19
   *BS*, *supra*, at paras 16, 31
7. *R v Grant*, 2006 CanLII 18347 (ON CA), 209 CCC (3d) 250, *per* Laskin JA, at paras 8 and 28
   *R v Nesbeth*, 2008 ONCA 579 (CanLII), 238 CCC (3d) 567, *per* Rosenberg JA, at paras 15 to 17
   *R v Harris*, 2007 ONCA 574 (CanLII), 225 CCC (3d) 193, *per* Doherty JA, at para 17
   *R v Suberu*, 2009 SCC 33 (CanLII), [2009] 2 SCR 460, *per* McLachlin CJ and Charron J, at paras 23 to 35
8. *R v Earhart*, 2011 BCCA 490 (CanLII), 313 BCAC 226, *per* Bennett JA
9. *R v Le*, 2019 SCC 34 (CanLII), 375 CCC (3d) 431, *per* Brown and Martin JJ
   *R v Therens*, 1985 CanLII 29 (SCC), [1985] 1 SCR 613, *per* Le Dain J (dissenting) ("most citizens are not aware of the precise limits of police authority" and could reasonably "assume lawful authority and comply with the demand")
10. *R v Harding*, 2010 ABCA 180 (CanLII), 256 CCC (3d) 284, *per curiam*, at para 18
    *R v Yague*, 2005 ABCA 140 (CanLII), 371 AR 286, *per curiam*, at paras 7 to 9
    *R v Nolet*, 2010 SCC 24 (CanLII), [2010] 1 SCR 851, *per* Binnie J
    *R v Hugh*, 2014 BCSC 1426 (CanLII), *per* Schultes J - Police may have dual purpose in performing a lawful stop
11. *R v Mann*, 2004 SCC 52 (CanLII), [2004] 3 SCR 59, *per* Iacobucci J, at paras 34 to 35
    *R v Harrison*, 2009 SCC 34 (CanLII), [2009] 2 SCR 494, *per* McLachlin CJ, at para 20

# Public Encounters

Stopping a person will not always amount to detention. [1] Not "every stop for purposes of identification, or even interview" will be a detention.[2] It is only where there is either physical restraint or police direction. [3]

An officer may only stop a person for "legal reasons". There must be a lawful reason for stopping a person such as in a motor vehicle situation to check their license and insurance, sobriety and fitness of the vehicle.[4]

A "preliminary encounter" between an officer and the public where identification is requested does not amount to a detention.[5] The officer needs no grounds at all to ask such questions.[6]

There is generally a presumption that "preliminary non-coercive questions", such as requests for identification, are not a form of detention.[7] The line will often be crossed once more "coercive" steps are taken.[8]

Detention will arise where there is a "significant deprivation of liberty" that is "focused", as opposed to simply a "delay" arising from "exploratory" questioning.[9]

A simple pat-down will not necessarily amount to a detention.[10]

1. *R v Grafe*, 1987 CanLII 170 (ON CA), 36 CCC (3d) 267, *per* Krever JA
   *R v Hall*, 1995 CanLII 647 (ON CA), 22 OR (3d) 289, *per* Osborne JA
2. *R v Mann*, 2004 SCC 52 (CanLII), [2004] 3 SCR 59, *per* Iacobucci J
3. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 30
4. *R v Ladouceur*, 2002 SKCA 73 (CanLII), 165 CCC (3d) 321, *per* Jackson JA
5. *R v Jackson*, 2011 ONSC 5516 (CanLII), OJ No 6394, *per* Code J, at para 49
   *Grafe*, *supra*
   *Hall*, *supra* at 295 (cited to OR)
   *R v Grant*, 2006 CanLII 18347 (ON CA), 209 CCC (3d) 250, *per* Laskin JA, at paras 13 and 29
   *R v Harris*, 2007 ONCA 574 (CanLII), 225 CCC (3d) 193, *per* Doherty JA, at para 42
6. *Grafe*, *supra*, at pp. 271 and 274
7. *Jackson*, *supra*, at para 51
   *R v Suberu*, 2009 SCC 33 (CanLII), [2009] 2 SCR 460, *per* McLachlin CJ and Charron J, at paras 23 to 35
8. *Jackson*, *supra*, at para 51
9. *Jackson*, *supra*, at para 52
   *Suberu*, *supra*, at paras 23 to 35
10. *R v Simmons*, 1988 CanLII 12 (SCC), [1988] 2 SCR 495, *per* Dickson CJ

## Questioning

An officer may only ask questions that are justifiable in the situation.[1] This would depend on the context of the questioning. In a motor vehicle stop, an officer may only ask questions regarding the legality of the operation of the motor vehicle. Anything beyond that requires reasonable grounds before engaging in the questions.[2] Any evidence obtained by questions that do law relate to the situation and do not have reasonable grounds will violate s. 8 and 9 of the Charter.[3]

Police questioning a young accused for the purpose of forming grounds to administer the roadside screening test need not comply with s. 146 of the YCJA requiring police to wait for counsel or adult to attend.[4]

1. *R v Ladouceur*, 2002 SKCA 73 (CanLII), 165 CCC (3d) 321, *per* Jackson JA
2. Ladouceur
3. *R v Mellenthin*, 1992 CanLII 50 (SCC), [1992] 3 SCR 615, *per* Cory J - an investigation that went beyond issues of highway safety violated Charter
4. *R v PD*, 2009 CanLII 18220 (ONSC), *per* Fuerst J, at para 28

## Answering Questions

There is no legal duty upon a person to identify himself to a police officer in *every* situation.[1]

It is well understood that merely asking for ID alone does not amount to detention.[2]

There should be a questioning of suspected criminal activity that results in a "focused interrogation amounting to detention".[3]

Where the obligation to answer questions, such as those related to identity, then the failure to do so may result in a charge of Obstruction of a Peace Officer under s. 129 of the Criminal Code.

The compelled attendance to the principal's office is not a detention.[4]

1. *R v Moore*, 1978 CanLII 160 (SCC), [1979] 1 SCR 195, *per* Spence J
   see also *Rice v Connelly*, [1966] 2 ALL E.R. 649 (House of Lords)
2. *R v Frank*, 2012 ONSC 6274 (CanLII), OJ No 5242, *per* Code J, at para 47
3. *R v Suberu*, 2009 SCC 33 (CanLII), [2009] 2 SCR 460, *per* McLachlin CJ and Charron J
4. *R v MRM*, 1998 CanLII 770 (SCC), [1998] 3 SCR 393, *per* Cory J (8:1)

## Interview

Whether a request to attend for a formal interview is a detention within the meaning of section 9 of the charter will depend upon the "constellation of circumstances".[1]

Consideration will be upon what was stage of the investigation and what was the objective of questioning.[2]

Detention will be found where the police have decided that "the accused was the perpetrator or involved in its commission" or where "the questioning was conducted for the purpose of obtaining incriminating statements from the accused".[3]

Questions of a "general nature" will lean in favor of there being no detention.[4]

1. *R v Moran*, 1987 CanLII 124 (ON CA), 36 CCC (3d) 225, *per* Martin JA
2. *Moran*, *ibid.*, at p. 259
3. *Moran*, *ibid.*
4. *Moran*, *ibid.*

## International Borders

Routine questioning of a person during secondary screening at an international border is not a detention within the meaning of s. 10(b) of the Charter.[1]

1. *Dehghani v Canada, (M.E.I.)*, 1993 CanLII 128 (SCC), 1 SCR 1053, *per* Iacobucci J, at p. 1074

# Motor Vehicle Stops

A vehicle stop is a form of detention.[1] This includes waiting for a breathalyzer test pursuant to the breathalyzer demand or the taking of blood samples pursuant to a blood sample demand.[2]

There are generally five reasons for which police may be engaged in random stops of vehicles:[3]

- check for fitness to drive
- check ownership of vehicle
- check for valid licence
- check for valid insurance or
- check for impaired driving

All provincial Highway safety Acts authorize police to perform some from of detention.[4] Investigating a Motor Vehicle Act violation does not permit the officer to take the detained person into the police vehicle even where safety may be a concern.[5]

Dual purposes in random traffic stops are permissible in some circumstances.[6]

#### Taking of ID Card

The taking of a government ID card in order to conduct a query of police databases may be a form of psychological detention.[7]

1. *R v Brookwell*, 2008 ABQB 545 (CanLII), 456 AR 343, *per* Romaine J, at para 29, citing *R v Orbanski & Elias*, 2005 SCC 37 (CanLII), *per* Charron J, at para 31
2. *R v Harder*, 1989 CanLII 2857 (BC CA), 49 CCC (3d) 565, *per* Anderson JA
   *R v Greene*, 1991 CanLII 6874 (NL CA), 62 CCC (3d) 344, *per* Goodridge CJ
3. This will depend on the powers granted by the provincial motor vehicle legislation
4. ON: Highway Traffic Act, RSO 1990, c H.8
   QC: Highway Safety Code, CQLR c C-24.2
   SK: The Traffic Safety Act, SS 2004, c T-18.1
   NB: Highway Act, RSNB 1973, c H-5
   NL: Highway Traffic Act, RSNL 1990, c H-3
   PEI: Highway Traffic Act, RSPEI 1988, c H-5
   NS: Motor Vehicle Act, RSNS 1989, c 293
   AB: Traffic Safety Act, RSA 2000, c T-6
   BC: Motor Vehicle Act, RSBC 1996, c 318
   MB: The Highway Traffic Act, CCSM c H60
5. *R v Timmer*, 2011 ABQB 629 (CanLII), 527 AR 315, *per* Acton JA
6. *R v Pham*, 2016 ONCA 258 (CanLII), *per curiam*, at para 7
   *R v Jensen*[2015] OJ No 3761 (CA)(*no CanLII links) , at para 8 leave refused [2015] SCCA No 390
   *R v Shipley*, 2015 ONCA 914 (CanLII), *per curiam*, at paras 3 to 7
   *R v Nolet*, 2010 SCC 24 (CanLII), [2010] 1 SCR 851, *per* Binnie J, at paras 37 to 40
7. *R v Loewen*, 2018 SKCA 69 (CanLII), 365 CCC (3d) 91, *per* Richards CJ

### Safety/Random Traffic Stops

Random traffic check stops are *prima facie* violations of right to be free from arbitrary detention, however, have often been declared justifiable pursuant to s. 1 of the Charter. [1]

Random stops of persons for "reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle"[2]

Random stop programs that are used to investigate for any number of offences, providing for a "comprehensive check for criminal activity", are flawed and cannot permit detention for any purpose at all.[3]

These programs must "not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search".[4] The checks should not extend beyond their primary purpose "to check for sobriety, licenses, ownership, insurance and the mechanical fitness of cars."[5]

Random stops for the purpose of enforcing provincial legislation are suggested as being unconstitutional.[6]

A passenger of a vehicle detained at a traffic stop is not detained within the meaning of s. 9 of the Charter. They are merely a bystander and do not have to comply with the officer's request unless required under the provincial motor vehicle Act.[7]

1. *R v Hufsky*, 1988 CanLII 72 (SCC), [1988] 1 SCR 621, *per* Le Dain J
   *R v Ladouceur*, 1990 CanLII 108 (SCC), [1990] 1 SCR 1257, *per* Sopinka J
   *R v Mellenthin*, 1992 CanLII 50 (SCC), [1992] 3 SCR 615, *per* Cory J
   *R v Simpson*, 1993 CanLII 3379, 79 CCC (3d) 482, *per* Doherty JA
   *R v Nolet*, 2010 SCC 24 (CanLII), [2010] 1 SCR 851, *per* Binnie J (a "random vehicle stop on the highway is, by definition, an arbitrary detention")
2. *Nolet*, *ibid.*, at para 25
3. *Nolet*, *supra* referencing *R v Ladouceur*, 2002 SKCA 73 (CanLII), 165 CCC (3d) 321, *per* Jackson JA
4. *Mellenthin*, *supra* , at para 20
5. *Mellenthin*, *supra*, at para 20
6. *R v Stengler*, 2003 SKPC 119 (CanLII), 111 CRR (2d) 189, *per* Tucker J - detention under the Fisheries Act (Sask)
7. *R v Mooiman and Zahar*, 2016 SKCA 43 (CanLII), 476 Sask R 216, *per* Caldwell JA, at paras 21 to 22
   *R v Hebrada-Walters*, 2013 SKCA 24 (CanLII), 409 Sask R 229, *per* Ottenbreit JA, at paras 19 to 26
   *R v Ramos*, 2011 SKCA 63 (CanLII), 371 Sask R 308, *per* Ottenbreit JA, at para 24

# Perimeters and Checkpoints

It is possible to stop persons at a roadblock set-up after a serious reported crime, even where the person does not match the description.[1]

1. *R v Clayton*, 2007 SCC 32 (CanLII), [2007] 2 SCR 725, *per* Abella J

## Rights Upon Detention

### Right to be Informed of Reasons

- See Right to be Informed of Reasons for Arrest or Detention

### Right to Counsel

*See also Right to Silence and Right to Counsel*

Upon being detained an officer must tell the detainee of their right to counsel.[1]

The obligation is engaged immediately upon detention, subject to any exceptions such as exigent circumstances or officer safety.[2]

1. *R v Manninen*, 1987 CanLII 67 (SCC), [1987] 1 SCR 1233, *per* Lamer J
2. *R v Suberu*, 2009 SCC 33 (CanLII), [2009] 2 SCR 460, *per* McLachlin CJ and Charron J

## Search Incident to Detention

- Search Incident to Detention

## Duration of Detention

An officer who is not detaining or no longer wishes to detain the suspect must clearly communicate to the suspect that they are free to go.[1]There must be both an objective and subjective belief on the part of the suspect that they are still detained for there to be an unlawful detention. [2]

Detention that last beyond what is necessary may violate s. 9 for arbitrary detention.

The decision to detain a person overnight when arrested for impaired driving can result in a violation of section 9 of the charter with the remedy of a stay of proceedings under section 24 (1).[3]

#### Duration in Holding Cells

Police have statutory authority to hold someone after arrest for up to 24 hours.[4] However, holding accused cells after arrest, beyond what would be legitimately necessary has resulted in a violation of s. 9 and may permit a stay of proceedings.[5]

1. *R v Tran*, 2010 ABCA 211 (CanLII), 258 CCC (3d) 19, *per curiam*, at para 30
2. Tran
3. e.g. *R v Holbrook*, 2008 SKPC 133 (CanLII), 76 MVR (5th) 256, *per* Harradence J
4. see Initial Post-Charge Detention
5. e.g. *R v Poletz*, 2014 SKCA 16 (CanLII), 307 CCC (3d) 254, *per* Caldwell JA - holding in cell for 12 hours due to "convenience" or "lack of resources" violated s. 9, but stay order was overturned

### De Facto Arrest

An investigative detention can be of such duration that it becomes a de facto arrest.[1]

1. *R v Greaves*, 2004 BCCA 484 (CanLII), 189 CCC (3d) 305, *per* Lowry JA, at para 37 ("The detention must also be reasonably necessary in all the circumstances. Iacobucci J. indicated that, generally, this means an investigative detention will be “of brief duration” (¶ 22) and cannot become a “de facto” arrest (¶ 35)")

*R v Strilec*, 2010 BCCA 198 (CanLII), [2010] BCJ No 699, *per* Ryan JA
*R v Orr*, 2010 BCCA 513 (CanLII), [2010] BCJ No 2576, *per* Low JA
*R v Madore & Madeira*, 2012 BCCA 160 (CanLII), 320 BCAC 65, *per* Finch CJ
*R v Trieu*, 2010 BCCA 540 (CanLII), 272 CCC (3d) 237, *per* Prowse JA

## See Also

- Warrantless Searches
- Right to Counsel
- Warrantless Searches (Cases)

# Warrantless Arrests

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79568)

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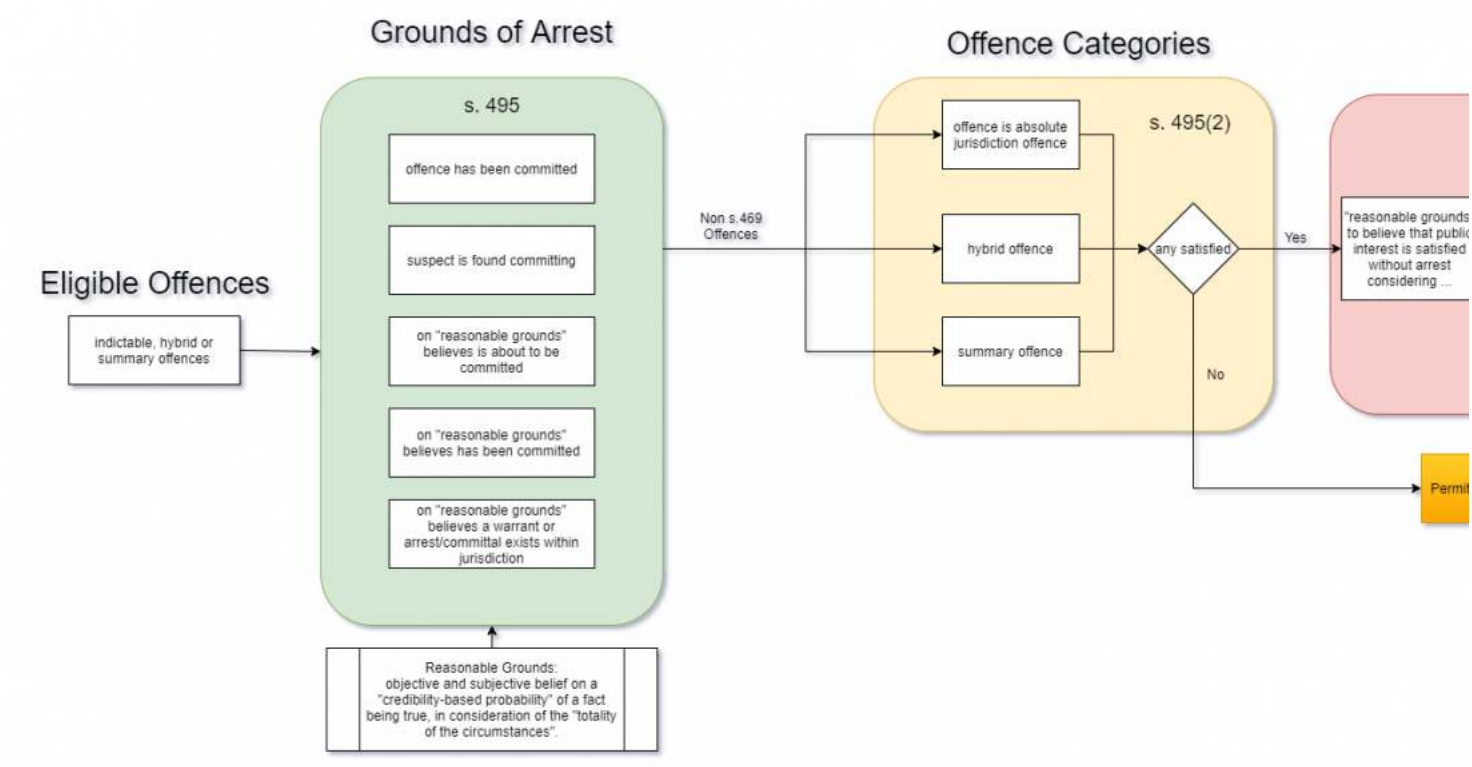
## Introduction

Peace officers are granted authority to perform warrantless arrests where it is authorized by law. The primary source of authority is found in section 495 of the *Criminal Code*.




The validity of any arrest must be determined by reference to what was known to the police officer at the time. A subsequent failure to convict for the offence for which the accused was arrested has no bearing on the analysis.[1]

However, an officer cannot be excused for arresting a person for a law that was previously repealed.[2]

1. *R v Biron*, 1975 CanLII 13 (SCC), [1976] 2 SCR 56, *per* Martland J (5:3)
2. *R v Houle*, 1985 ABCA 275 (CanLII), 24 CCC (3d) 57, *per* Stevenson JA (3:0)

## Power to Arrest

Where there is no warrant for a person's arrest, a peace officer is governed by section 495:

> **Arrest without warrant by peace officer**
>
> 495 (1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable 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 in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII [*Pt. XXVIII – Miscellaneous (s. 841 to 849)*] in relation thereto, is in force within the territorial jurisdiction in which the person is found.
>
> [*omitted (2)*]
>
> **Consequences of arrest without warrant**
>
> (3) Notwithstanding subsection (2) [*public interest exception to arrest power*], a peace officer acting under subsection (1) [*warrantless arrest power*] is deemed to be acting lawfully and in the execution of his duty for the purposes of
>
> (a) any proceedings under this or any other Act of Parliament; and
> (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2) [*public interest exception to arrest power*].
>
> R.S., 1985, c. C-46, s. 495; R.S., 1985, c. 27 (1st Supp.), s. 75.
> [*annotation(s) added*]
>
> – CCC

A police officer can arrest where:

1. there is reasonable grounds a person has committed an indictable offence;
2. there is reasonable grounds a person is about to commit an indictable offence;
3. a person is committing an indictable offence; or
4. a person has a warrant out for his/her arrest.

There is limited power to arrest where the accused is found committing a summary offence *and* it is necessary to establish the accused's identity, among other things.[1]

Section 495 (1)(b) does not require the officer to "rule out potential innocent explanations" to his observations.[2] The formation of reasonable grounds does not require a prima facie case.[3]

1. *Moore v The Queen*, 1978 CanLII 160 (SCC), [1979] 1 SCR 195, *per* Spence J
2. *R v MacCannell*, 2014 BCCA 254 (CanLII), 314 CCC (3d) 514, *per* Garson JA, at para 46
3. *MacCannell*, *ibid.*

### Arrest for Breach of Peace

There is also a common law power for peace officers to arrest without a warrant where the officer has an honest and reasonable belief that there has been a breach of the peace or where there is one that is imminent.[1] This power is limited and cannot permit a "roving commission" to arrest those who the police wish.[2] They must have a "reasonable basis" to invoke this power. This includes the requirement that the conditions pre-exist the officer's attendance rather than being the result of police action.[3]

1. *Hayes v Thompson*, 1985 CanLII 151 (BCCA), 18 CCC (3d) 254, *per* Hutcheon JA
   *Brown v Durham (Regional Municipality) Police Force*, 1998 CanLII 7198 (ON CA), [1998] O.J. No. 5274, *per* Doherty JA
   *R v Collins*, 2012 CanLII 26587 (NL PC), *per* Orr J
   *R v Khatchadorian*, 1998 CanLII 6115 (BC CA), 127 CCC (3d) 565, *per* Hall JA, at para 8 ("It seems to me that there exists clear authority in previous judgments of this court to sustain the proposition that a police officer is entitled to make a lawful arrest of someone who is engaged in a breach of the peace or who it is anticipated may shortly engage in such activity.") *R v Lefebvre*, 1984 CanLII 473 (BCCA), 15 CCC (3d) 503, *per* Craig JA
2. *Khachadorian*, *supra*
3. *Khachadorian*, *supra*

### Arrest for Breach of Conditions

> **Arrest without warrant – application of section 524**
>
> 495.1 Despite any other provision in this Act, if a peace officer has reasonable grounds to believe that an accused has contravened or is about to contravene a summons, appearance notice, undertaking or release order that was issued or given to the accused or entered into by the accused, or has committed an indictable offence while being subject to a summons, appearance notice, undertaking or release order, the peace officer may arrest the accused without a warrant for the purpose of taking them before a judge or justice to be dealt with under section 524 [*procedure relating to breach of conditions*].
>
> 2019, c. 25, s. 211.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

## Duty Not to Arrest on Public Interest Grounds

> 495.
> [*omitted (1)*]
>
> **Limitation**
>
> (2) A peace officer shall not arrest a person without warrant for
>
> (a) an indictable offence mentioned in section 553 [*absolute jurisdiction offences*],
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction [*i.e. hybrid offences*], or
> (c) an offence punishable on summary conviction [*see list of summary offences*],

in any case where

(d) he believes on reasonable grounds 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 grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

[*omitted (3)*]
R.S., 1985, c. C-46, s. 495; R.S., 1985, c. 27 (1st Supp.), s. 75.
[*annotation(s) added*]

– CCC

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The failure to properly consider factors in favour of release may be grounds to find arbitrary detention.[1]

1. see *R v Baker* (1988), 88 NSR (2d) 250 (NSCA)(*no CanLII links) *R v Cayer* (1988), OJ No. 1120 (ONCA)(*no CanLII links)

### Appearance Notice on Public Interest Grounds

**Issue of appearance notice by peace officer**

497 If, by virtue of subsection 495(2) [*public interest exception to arrest power*], a peace officer does not arrest a person, they may issue an appearance notice to the person if the offence is

(a) an indictable offence mentioned in section 553 [*absolute jurisdiction offences*];
(b) an offence for which the person may be prosecuted by indictment or for which they are punishable on summary conviction; or
(c) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 497; 1999, c. 25, s. 3(Preamble); 2019, c. 25, s. 212.
[*annotation(s) added*]

– CCC

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This provision came into force on December 18, 2019.

## Right Against Unlawful Arrest

Section 9 of the Charter prohibits arbitrary detention. Under the header "Detention or imprisonment" the Charter states:

9. Everyone has the right not to be arbitrarily detained or imprisoned.

– CCRF

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**Purpose**

The "purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference"[1] Thus "a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9"[2]

**Burden**

The burden is upon the applicant to prove that the accused was "detained" within the meaning of s. 9 which must be proven on a balance of probabilities.[3]

The burden then moves onto the Crown to establish that a warrantless arrest was legal and not in violation of s. 9 of the Charter.[4]

#### Standing

An accused arrested on grounds that included evidence obtained through the breach of a third party's Charter rights does not have standing to challenge the third party's rights.[5] The only remedy in such a situation would be in an abuse of process application.[6]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ, at para 20
2. *Grant*, *ibid.*, at para 55
3. *R v Bush*, 2010 ONCA 554 (CanLII), 259 CCC (3d) 127, *per* Durno J, at para 74
   *R v B(L)*, 2007 ONCA 596 (CanLII), 227 CCC (3d) 70, *per* Moldaver JA, at para 60
4. *R v Murphy*, 2018 NSSC 191 (CanLII), *per* Rosinski J, at para 4
5. *R v Todd*, 2015 BCSC 680 (CanLII), 121 WCB (2d) 113, *per* Rogers J *R v Tran*, 2016 BCPC 159 (CanLII), *per* Lamperson J, at paras 46 to 49
   cf. *R v Brown*, 2014 BCSC 1665 (CanLII), *per* Funt J
6. *Tran*, *ibid.*, at para 46

## Reasonable and Probable Grounds

An arresting officer must have reasonable and probable grounds to make the arrest. Those grounds must be subjectively held by the officer and must be reasonable.[1] Thus, the analysis considers both an objective and subjective component.[2]

An arresting officer is not required the same scrutiny as a justice of a peace would need to be in considering a search warrant.[3]

#### Objective Requirement

The objective component asks whether the "existence of objectively reasonable grounds for arrest requires that a Court consider whether a reasonable person would find reasonable and probable ground for arrest". This reasonable person must be "in the shoes" of the officer, taking into account "training and experience".[4]

The analysis is "approached as a whole" looking at the "cumulative effect" of all the evidence known at the time.[5]

#### Timing When Grounds are Formed

Police cannot arrest first and then determine after the fact whether the accused had a connection with their investigation.[6]

The reasonableness of an officers actions is based on what was known to them prior to acting, regardless of its accuracy and completeness. The court may take into account the nature of the power being exercised in its context. The dynamics of an arrest will vary in different circumstances and will sometimes need to be decided upon quickly.[7]

#### Sources

The officer may base his belief upon assumptions or secondary sources. However, the belief cannot be only a hunch. The circumstances must be sufficient to convince a reasonably fair-minded person put in the same position as the officer that the grounds for his or her belief are reasonable. The facts must not be considered piecemeal but in a holistic manner.[8]

#### Foundation of Belief

A conclusory statement from one officer to another, such as “a drug transaction has taken place ”, will not support an objective finding of reasonable and probable grounds for an arrest.[9]

#### Sharing of Reasonable Belief Between Officers

The arresting officer can safely assume grounds exist where he is directed by another officer to arrest the accused.[10] It is the officer who has formed the grounds who decides on whether to arrest a person. They do not need to be the one performing the arrest and the arresting officer may rely on the assessment of that officer.[11]

#### Multiplicity of Beliefs

A police office can have more than one believe and objective in doing a search incident to arrest as long as it is objectively justifiable.[12]

#### Sufficiency of Investigation

An arrest may be invalid where the investigator failed to gather sufficient information to form grounds by abbreviating their investigation.[13]

The police observation of two men exchanging an unknown object, without anything more, does not meet the standard of reasonable suspicion to detain or reasonable and probable grounds to arrest.[14]

A mistaken belief that there is a warrant out for arrest does not obligate the police to look into every claim by detainee that there is no warrant, however, the police may not disregard the claim without reason to believe it may be an unreliable claim.[15]

#### Timing at Which Grounds are Formed

Objective reasonableness is determined on the "factual matrix that existed at the time the arrest was made". Other information not known to the arresting officer is not relevant.[16]

1. *R v Storrey*, 1990 CanLII 125 (SCC), [1990] 1 SCR 241, *per* Cory J, at pp. 250-1
2. *Storrey*, *ibid.*
   *R v Grotheim*, 2001 SKCA 116 (CanLII), 161 CCC (3d) 49, *per* Cameron JA
   *R v McClelland*, 1995 ABCA 199 (CanLII), 165 AR 332 (CA), *per*

McFadyen JA (2:1), at para 21
*R v Juan*, 2007 BCCA 351 (CanLII), 222 CCC (3d) 289, *per* Thackray JA, at para 27
*R v Phung*, 2013 ABCA 63 (CanLII), 542 AR 392, *per curiam*

3. see *R v Polashek*, 1999 CanLII 3714 (ON CA), 45 OR (3d) 434, *per* Rosenberg JA *Golub*, *supra*, at p. 750
4. *Phung*, *supra*, at para 10
5. *R v Nolet*, 2010 SCC 24 (CanLII), [2010] 1 SCR 851, *per* Binnie J, at para 48
6. see *R v Whitaker*, 2008 BCCA 174 (CanLII), 254 BCAC 234, *per* Frankel JA
*R v Chaif-Gust*, 2011 BCCA 528 (CanLII), 280 CCC (3d) 548, *per* Finch CJ
7. *R v Golub*, 1997 CanLII 6316 (ON CA), 34 OR (3d) 743, 117 CCC (3d) 193, *per* Doherty JA, at p. 750
8. *R v Chin*, 2003 ABPC 118 (CanLII), 345 AR 157, *per* Allen J, at para 60
9. *R v Lal*, 1998 CanLII 4393 (BCCA), 130 CCC (3d) 413, *per* Ryan JA
10. *R v Chervinski*, 2013 ABQB 29 (CanLII), *per* Hall J, at paras 21, 22
11. *R v Shokar*, 2006 BCSC 770 (CanLII), BCJ No 1163, *per* Joyce J, at para 21
*R v Hall*, 2006 SKCA 19 (CanLII), 206 CCC (3d) 416, *per* Gerwing JA
12. *R v Chubak*, 2009 ABCA 8 (CanLII), 243 CCC (3d) 202, *per* Ritter JA, at para 18
*R v Galye*, 2015 BCSC 1950 (CanLII), *per* Kent J, at para 38(an "arresting officer's subjective belief that he or she has the requisite reasonable grounds is insufficient by itself for an arrest under s. 495(1)(a) of the Code to be lawful. Those grounds must also be justifiable from an objective point of view")
13. e.g. *R v Munoz*, 2006 CanLII 3269 (ONSC), 86 OR (3d) 134, 205 CCC (3d) 70, *per* Ducharme J
14. *R v NO*, 2009 ABCA 75 (CanLII), 186 CRR (2d) 60, *per curiam*
*R v Rahmani-Shirazi*, 2008 ABQB 145 (CanLII), 451 AR 145, *per* Sullivan J
15. *R v Gerson-Foster*, 2019 ONCA 405 (CanLII), *per* Paciocco JA
16. *Galye*, *supra*, at para 38 ("Determining whether the arresting officer's grounds were objectively reasonable involves an assessment of the factual matrix that existed at the time the arrest was made. Whether other information, had it been available, might have strengthened or weakened those grounds is not a relevant consideration")

### "About to Commit"

Under s. 495(1)(a) a peace officer may make a warrantless arrest of a person who is "about to commit" a hybrid or indictable offence.

An inebriated person about to operate a motor vehicle will be "about to commit" an offence of impaired driving.[1]

1. see *R v Beaudette*, 1957 CanLII 502 (ON CA), 118 CCC 295, *per* Schroeder JA

### "Finds Committing"

Under s. 495(1)(b) empowers a peace officer to make a warrantless arrest where a person is "apparently" committing an offence. This must be an honestly held belief and must be reasonable. The officer does not have to be so certain as equate with a conviction.[1]

The requirements of "finds committing" consist of:[2]

1. the officer's knowledge must be contemporaneous with the event;
2. the officer must actually observe or detect the commission of the offence; and
3. there must be an "objective basis for the officer's conclusion that an offence is "being committed". It "must be apparent to a reasonable person placed in the circumstances of an arresting officer".

It has been found that the strong smell of raw marijuana can be sufficient to conclude that the accused was in possession or marijuana and is arrestable under s.495(1)(b).[3] A faint and intermittent smell is not sufficient for arrest.

The person arresting does not mean that he "must be present when the offence is committed". He can "rely on reasonable inferences drawn from what he or she has seen transpire".[4]

1. *The Queen v Biron*, 1975 CanLII 13 (SCC), [1976] 2 SCR 56, *per* Martland J
*R v Roberge*, 1983 CanLII 120 (SCC), 4 CCC (3d) 304, *per* Lamer J
2. *R v STP*, 2009 NSCA 86 (CanLII), 893 APR 1, *per* MacDonald CJ
3. *R v Harding*, 2010 ABCA 180 (CanLII), 482 AR 262, *per curiam*, at para 29
4. *R v McCowan*, 2011 ABPC 79 (CanLII), 509 AR 202, *per* Fradsham J

### Confidential Sources and Informers

- See Confidential Informers

### Procedure

When an accused challenges the grounds of a warrantless arrest, trial fairness requires that the onus is on the Crown to establish the reasonable and probable grounds on direct examination and the defence must be permitted to cross-examine the officer.[1]

1. *R v Besharah*, 2010 SKCA 2 (CanLII), 251 CCC (3d) 516, *per* Smith JA, at para 35

## Types of Observations Forming Grounds of Arrest

An observed "hand to hand" exchange without any suggestive circumstances is no reasonable basis to conclude an illegal activity.[1]

However, certain activities may be interpreted using expertise and experience may be found to be reasonably believed to be connected to illegal activity.[2]

The use of the smell of fresh marijuana as grounds to arrest requires an opinion with "substantial underpinnings and training and/or experience" and still be considered with caution.[3]

In many circumstances, there should be some corroboration by another individual.[4]

Observation of a "very strong smell" alone may in some circumstances be sufficient to arrest.[5]

1. *R v Russell*, 2017 ABQB 298 (CanLII), *per* Goss J, at para 35
   *R v NO*, 2009 ABCA 75 (CanLII), 186 CRR (2d) 60, *per curiam*, at paras 41 and 42
2. *R v Rajaratnam*, 2006 ABCA 333 (CanLII), 214 CCC (3d) 547, *per curiam*, at para 25
3. *R v Quesnel*, 2018 NSSC 221 (CanLII), *per* Scaravelli J, at para 48
4. *Quesnel*, *ibid.*, at para 48
5. *R v Harding*, 2010 ABCA 180 (CanLII), 256 CCC (3d) 284, *per curiam*

## Citizen's Arrest

## See Also

- Release by Police on Undertaking
- Compelling the Accused to Attend Court
- Warrant Arrests
- Warrantless Searches
- Warrantless Searches (Cases)
- Warrantless Arrests (Until December 18, 2019)

# Arrest by a Citizen

This page was last substantively updated or reviewed *January 2015*. (Rev. # 79568)

< Procedure and Practice < Arrest and Detention

## General Principles

> **Arrest without warrant by any person**
>
> 494 (1) Any one may arrest without warrant
>
> (a) a person whom he finds committing an indictable offence; or
> (b) a person who, on reasonable grounds, he believes
>
> (i) has committed a criminal offence, and
> (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.
>
> **Arrest by owner, etc., of property**
>
> (2) The owner or a person in lawful possession of property, or a person authorized by the owner or by a person in lawful possession of property, may arrest a person without a warrant if they find them committing a criminal offence on or in relation to that property and
>
> (a) they make the arrest at that time; or
> (b) they make the arrest within a reasonable time after the offence is committed and they believe on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest.
>
> **Delivery to peace officer**
>
> (3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.
>
> **For greater certainty**
>
> (4) For greater certainty, a person who is authorized to make an arrest under this section is a person who is authorized by law to do so for the purposes of section 25 [*protection of persons acting under authority*].
> R.S., 1985, c. C-46, s. 494; 2012, c. 9, s. 3.
> [*annotation(s) added*]
>
> – CCC

"Finds committing" requires that the arresting person discover the suspect "in the very act of committing an offence".[1]

**"indictable offences"**

Any reference to "indictable offences" in s. 494 include hybrid offences.[2]

**"forthwith"**

The meaning of "forthwith" in the Criminal Code means "as soon as is reasonably practiable under all the circumstances".[3]

**Constitutionality**

An arrest by a private citizen will still enable the accused's Charter rights as the person is exercising a government function.[4]

**Contra**: Where the actions of a private citizens are not at the direction of the state, the Charter does not apply to the conduct of persons operating under s. 494.[5]

1. *R v Abel & Corbett*, 2008 BCCA 54 (CanLII), 229 CCC (3d) 465, *per* Frankel JA, at para 31
2. *R v Huff*, 1979 ABCA 234 (CanLII), 50 CCC (2d) 324, *per* Laycraft JA
3. *R v Cunningham* (1979), 49 CCC (2d) 390(*no CanLII links)
see Forthwith Under Section 254
4. *R v Lerke*, 1986 ABCA 15 (CanLII), CR (3d) 324, 24 CCC (3d) 129, *per* Laycraft CJ
*R v McCowan*, 2011 ABPC 79 (CanLII), 509 AR 202, *per* Fradsham J
5. *R v Skeir*, 2005 NSCA 86 (CanLII), 196 CCC (3d) 353, *per* Fichaud JA
*R v Buhay*, 2003 SCC 30 (CanLII), [2003] 1 SCR 631, *per* Arbour J

# Post-Charge Detention

< Procedure and Practice < Arrest and Detention

## General Principles

Holding a person in custody when it is not prescribed by the provisions of the Criminal Code would be a violation of s. 9 of the Charter.[1]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 54 ("[A] detention not authorized by law is arbitrary and violates s. 9 [of the Charter]")

## Duty to Take Detainee to a Judge

- Duty to Deliver Detainee to a Justice Without Unreasonable Delay

## Out of Province Warrantless Arrests

- Out of Province Warrantless Arrest

## See Also

- Arrest Procedure
- Continued Detention After Appearing Before a Justice
- Initial Post-Charge Detention (Until December 18, 2019)

# Initial Post-Charge Detention

< Procedure and Practice < Arrest and Detention

## General Principles

Holding a person in custody when it is not prescribed by the provisions of the Criminal Code would be a violation of s. 9 of the Charter.[1]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 54 ("[A] detention not authorized by law is arbitrary and violates s. 9 [of the Charter]")

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- Continued Detention After Appearing Before a Justice
- Initial Post-Charge Detention (Until December 18, 2019)

# Detention With Charges Outstanding

< Procedure and Practice < Judicial Interim Release

## General Principles

### Warrant of Remand

A person who has been held in custody to be brought before a judge and justice and there is no decision made to either grant or deny bail, s. 516 (or s. 537 if a preliminary inquiry judge) permits the accused is the held under Remand Order under Form 19 to a fixed date.[1]

#### Remand to Jail or Penetentiary

The court has jurisdiction under s. 516(1) to order remand to a provincial jail or federal penitentiary based on the wording of section 516 which permits remounted to a “prison”.[2]

A person on remand should be held in a provincial jail. Only in “exceptional circumstances” should a judge remand an accused to a federal penitentiary.[3]

1. See Form 19
   List of Criminal Code Forms
2. *R v Melvin*, 2016 NSSC 130 (CanLII), *per* Duncan J
3. *Melvin*, *ibid.*

### Warrant of Committal

A warrant of committal under Form 8 can be issued by a judge or justice pending disposition of outstanding charges on the basis that:

> (a) the prosecutor has shown cause why the detention of the accused in custody is justified [515(5)];
> (b) an order has been made that the accused be released on (giving an undertaking or entering into a recognizance) but the accused has not yet complied with the order [519(1), 520(9), 521(10), 524(12), 525(8)];**
> (c) the application by the prosecutor for a review of the order of a justice in respect of the interim release of the accused has been allowed and that order has been vacated, and the prosecutor has shown cause why the detention of the accused in custody is justified [521];
> (d) the accused has contravened or was about to contravene his (promise to appear or undertaking or recognizance) and the same was cancelled, and the detention of the accused in custody is justified or seems proper in the circumstances [524(4), 524(8)];
> (e) there are reasonable grounds to believe that the accused has after his release from custody on (a promise to appear or an undertaking or a recognizance) committed an indictable offence and the detention of the accused in custody is justified or seems proper in the circumstances [524(4), 524(8)];
> (f) the accused has contravened or was about to contravene the (undertaking or recognizance) on which he was released and the detention of the accused in custody seems proper in the circumstances [525(7), 679(6)];
> (g) there are reasonable grounds to believe that the accused has after his release from custody on (an undertaking or a recognizance) committed an indictable offence and the detention of the accused in custody seems proper in the circumstances [525(7), 679(6)];
>
> – CCC - Forms

The duration of the warrant of committal is described as ending once the accused is "delivered by due course of law".

Section 493 defines warrant:

> 493 In this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*],
> ...
> **"warrant"**, when used in relation to a warrant for the arrest of a person, means a warrant in Form 7 [*forms*] and, when used in relation to a warrant for the committal of a person, means a warrant in Form 8 [*forms*].
> R.S., 1985, c. C-46, s. 493; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 5, c. 17, s. 12; 1992, c. 51, s. 37; 1994, c. 44, s. 39; 1999, c. 3, s. 30; 2002, c. 7, s. 143; 2015, c. 3, s. 51; 2019, c. 25, s. 209.
>
> – CCC

### Taking an Accused Before a Justice

- Initial Post-Charge Detention#Duty to Take Detainee to a Judge

## Adjourning Bail Hearing

On application of the prosecutor, a judge has the discretion to delay a bail hearing by up to three days without the consent of the accused. (s. 516)

> **Remand in custody**
>
> 516 (1) A justice may, before or at any time during the course of any proceedings under section 515 [*judicial interim release provisions*], on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19 [*forms*], but no adjournment shall be for more than three clear days except with the consent of the accused.
> [*omitted (2) and (3)*]
> R.S., 1985, c. C-46, s. 516; 1999, c. 5, s. 22, c. 25, s. 31(Preamble); 2019, c. 25, s. 227.
> [*annotation(s) added*]
>
> – CCC

When requested, a judge "is obliged to grant a reasonable opportunity" for the Crown to show cause.[1]

When an accused adjourns show cause, the judge must issue a Warrant of Remand under s. 516 using Form 19.

A judge may also adjourn show cause under s. 537, which will also require a Warrant of Remand under Form 19.

"Clear days" is defined and calculated under section 27 of the Interpretation Act.

1. *R v CGF*, 2003 NSCA 136 (CanLII), [2003] NSJ No 456 (NSCA), *per* Cromwell JA

### Non-Communication Condition While Remanded

While a person is remanded they may be ordered to have on contact with named persons under s. 516(2). Note this is separate from the forms of in-custody no-contact orders consisting of no contact while serving a sentence (s. 743.21) and while bail-denied detention order (515(12)).

> 516
> [*omitted (1)*]
>
> **Detention pending bail hearing**
>
> (2) A justice who remands an accused to custody under subsection (1) [*three-day remand on adjourning bail*] or subsection 515(11) [*detention in custody for offence listed in section 469*] may order that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any conditions specified in the order that the justice considers necessary.
>
> **Duration of order**
>
> (3) An order made under subsection (2) [*Detention pending bail hearing*] remains in force,
>
> (a) until it is varied or revoked;
> (b) until an order in respect of the accused is made under section 515 [*judicial interim release provisions*];
> (c) until the accused is acquitted of the offence, if applicable; or
> (d) until the time the accused is sentenced, if applicable.
>
> R.S., 1985, c. C-46, s. 516; 1999, c. 5, s. 22, c. 25, s. 31(Preamble); 2019, c. 25, s. 227.
> [*annotation(s) added*]
>
> – CCC

## See Also

- Out of Province Arrest Warrants
- Continued Detention After Appearing Before a Justice (Until December 18, 2019)

# Warrant Arrests

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79568)

## General Principles

A warrant is one among several means of securing a person's attendance at court, usually it is the accused. There are several sections of the Code that address arrest warrant powers depending on the circumstances.

> **Release from custody — arrest with warrant**
>
> 499 If a person who has been arrested with a warrant by a peace officer is taken into custody for an offence other than one listed in section 469 [*exclusive jurisdiction offences*] and the warrant has been endorsed by a justice under subsection 507(6) [*endorsement of warrant by justice*], a peace officer may release the person, if
>
> (a) the peace officer issues an appearance notice to the person; or
> (b) the person gives an undertaking to the peace officer.
>
> R.S., 1985, c. C-46, s. 499; R.S., 1985, c. 27 (1st Supp.), s. 186; 1994, c. 44, s. 40; 1997, c. 18, s. 53; 1999, c. 25, s. 5(Preamble); 2019, c. 25, s. 214.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

**Youth Court Justice**

Any warrant issued by a youth court justice may be executed anywhere in Canada.[1]

1. see s. 145 YCJA: "145 A warrant issued by a youth justice court may be executed anywhere in Canada."

## Issuing Warrant for an Accused at First Instance and Issuing Process

## Issuing Warrant for an Accused After They Failed to Attend Court

- Accused Arrest Warrants for Failing to Attend Court

## Issuing Warrant for Breaches of Orders

- Arrest Warrants for Accused Persons

## Issuing Warrant for Witness

- Arrest Warrants for Witnesses

## Form of Arrest Warrants

> **Contents of warrant to arrest**
>
> 511 (1) A warrant issued under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] shall
>
> (a) name or describe the accused;
> (b) set out briefly the offence in respect of which the accused is charged; and
> (c) order that the accused be forthwith arrested and brought before the judge or justice who issued the warrant or before some other judge or justice having jurisdiction in the same territorial division, to be dealt with according to law.
>
> [*omitted (2), (3) and (4)*]
> R.S., 1985, c. C-46, s. 511; R.S., 1985, c. 27 (1st Supp.), s. 81; 1997, c. 18, s. 57.
> [*annotation(s) added*]
>
> – CCC

511
[*omitted (1)*]

**No return day**

(2) A warrant issued under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] remains in force until it is executed and need not be made returnable at any particular time.
[*omitted (3) and (4)*]
R.S., 1985, c. C-46, s. 511; R.S., 1985, c. 27 (1st Supp.), s. 81; 1997, c. 18, s. 57.
[*annotation(s) added*]

– CCC

---

**Formalities of warrant**

513 A warrant in accordance with this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] shall be directed to the peace officers within the territorial jurisdiction of the justice, judge or court by whom or by which it is issued.
R.S., c. 2(2nd Supp.), s. 5.
[*annotation(s) added*]

– CCC

---

## Execution of Warrant

511
[*omitted (1) and (2)*]

**Discretion to postpone execution**

(3) Notwithstanding paragraph (1)(c) [*contents of arrest warrant – arrest and delivery before judge or justice*], a judge or justice who issues a warrant may specify in the warrant the period before which the warrant shall not be executed, to allow the accused to appear voluntarily before a judge or justice having jurisdiction in the territorial division in which the warrant was issued.

**Deemed execution of warrant**

(4) Where the accused appears voluntarily for the offence in respect of which the accused is charged, the warrant is deemed to be executed.
R.S., 1985, c. C-46, s. 511; R.S., 1985, c. 27 (1st Supp.), s. 81; 1997, c. 18, s. 57.
[*annotation(s) added*]

– CCC

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**Execution of warrant**

514 (1) A warrant in accordance with this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] may be executed by arresting the accused

(a) wherever he is found within the territorial jurisdiction of the justice, judge or court by whom or by which the warrant was issued; or
(b) wherever he is found in Canada, in the case of fresh pursuit.

**By whom warrant may be executed**

(2) A warrant in accordance with this Part may be executed by a person who is one of the peace officers to whom it is directed, whether or not the place in which the warrant is to be executed is within the territory for which the person is a peace officer.

R.S., c. 2(2nd Supp.), s. 5.
[*annotation(s) added*]

– CCC

## Release After Warrant Arrest

Where an accused is arrested under a warrant the officer will not normally have discretion to release the accused before delivering the accused before a justice or judge. An exception exists under s. 503(3) where the warrant is "endorsed" for release.

## Special Issues

### Outside Native Jurisdiction

- Out of Province Arrest Warrants

### Delayed Arrests

The practice of waiting to execute an arrest warrant until the accused has finished serving a previous sentence is considered inappropriate.[1]

Where the accused is easily locatable within the province, with no change of name, listed address, and no efforts to conceal his location, will lean to the side of unacceptable delay.[2]

A lack of effort on the part of the police will support unreasonable delay.[3]

1. *R v Parisien*, 1971 CanLII 1171 (BCCA), (1971) 3 CCC (2d) 433, *per* Branca JA, at p. 437
   *R v Cardinal*, 1985 ABCA 157 (CanLII), 21 CCC (3d) 254, *per* Kerans JA
2. e.g. *Gahan v A.G. Alberta*, 1988 CanLII 3471 (AB QB), , [1988] AJ No 415 (QB), *per* O'Leary J
   *R v Carey*, [1983] BCJ No. 307 (County Ct.)(*no CanLII links)
3. e.g. *R v Yellowhorse*, [1990] AJ No 964 (Prov.Ct.)(*no CanLII links)

### Arresting the Wrong Person

> **Arrest of wrong person**
>
> 28 (1) Where a person who is authorized to execute a warrant to arrest believes, in good faith and on reasonable grounds, that the person whom he arrests is the person named in the warrant, he is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.
>
> **Person assisting**
>
> (2) Where a person is authorized to execute a warrant to arrest,
>
> (a) every one who, being called on to assist him, believes that the person in whose arrest he is called on to assist is the person named in the warrant, and
> (b) every keeper of a prison who is required to receive and detain a person who he believes has been arrested under the warrant,
>
> is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant. R.S., c. C-34, s. 28.
>
> – CCC

## See Also

- Search and Seizure
- Competence and Compellability#Missing Witnesses
- Warrantless Arrests
- Warrant Arrests (Until December 18, 2019)

# Accused Arrest Warrants for Failing to Attend Court

# General Principles

Under s. 511, the execution of a warrant or arrest authorizes 1) the arrest of the accused and 2) the officer to bring the accused before a judge in the territorial division in which the warrant was issued.[1]

A provincial court judge upon issuing an arrest warrant cannot require that the accused only be brought the issuer of the warrant.[2]

1. *Charles*, *supra*

2. *R v Davidson*, 2004 ABCA 337 (CanLII), 193 CCC (3d) 63, *per curiam*

### Warrant for Failing to Attend Under Summons or Appearance Notice

512
[*omitted (1)*]

**Warrant in default of appearance**

(2) Where

(a) service of a summons is proved and the accused fails to attend court in accordance with the summons,
(b) an appearance notice or undertaking has been confirmed under subsection 508(1) [*justice obligation on receiving an information*] and the accused fails to attend court in accordance with it in order to be dealt with according to law, or
(c) it appears that a summons cannot be served because the accused is evading service,

a justice may issue a warrant for the arrest of the accused.
R.S., 1985, c. C-46, s. 511; R.S., 1985, c. 27 (1st Supp.), s. 81; 1997, c. 18, s. 57; 2019, c. 25, s. 223.
[*annotation(s) added*]

– CCC

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**Arrest warrant — failure to appear under summons**

512.1 If an accused who is required by a summons to appear at the time and place stated in it for the purposes of the *Identification of Criminals Act* does not appear at that time and place and, in the case of an offence designated as a contravention under the *Contraventions Act*, the Attorney General, within the meaning of that Act, has not made an election under section 50 of that Act, a justice may issue a warrant for the arrest of the accused for the offence with which the accused is charged.

2019, c. 25, s. 224.

– CCC

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**Arrest warrant — failure to appear under appearance notice or undertaking**

512.2 If an accused who is required by an appearance notice or undertaking to appear at the time and place stated in it for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may, if the appearance notice or undertaking has been confirmed by a justice under section 508 [*justice to hear informant and witnesses*], issue a warrant for the arrest of the accused for the offence with which the accused is charged.

2019, c. 25, s. 224.
[*annotation(s) added*]

– CCC

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**Warrant to appear under section 524**

512.3 If a justice is satisfied that there are reasonable grounds to believe that an accused has contravened or is about to contravene any summons, appearance notice, undertaking or release order that was issued or given to the accused or entered into by the accused or has committed an indictable offence while being subject to any summons, appearance notice, undertaking or release order, the justice may issue a warrant for the purpose of taking them before a justice under section 524 [*procedure relating to breach of conditions*].

2019, c. 25, s. 224.
[*annotation(s) added*]

– CCC

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### Bench Warrant for Failing to Attend Trial

The judge ordering an arrest under s. 475 (absconding during trial), Part XVI (compelling attendance), 597 (bench warrant), 800 (summary trial) or 803 (summary appearance) can issue a warrant using "Form 7", which is the standard arrest warrant.

**Bench warrant**

597 (1) Where an indictment has been preferred against a person who is at large, and that person does not appear or remain in attendance for his trial, the court before which the accused should have appeared or remained in attendance may issue a warrant in Form 7 [*forms*] for his arrest.

**Execution**

(2) A warrant issued under subsection (1) [*bench warrant for failing to attend for indictment*] may be executed anywhere in Canada.

**Interim release**

(3) If an accused is arrested under a warrant issued under subsection (1) [*bench warrant for failing to attend for indictment*], a judge of the court that issued the warrant may make a release order referred to in section 515 [*judicial interim release provisions*].

**Discretion to postpone execution**

(4) A judge who issues a warrant may specify in the warrant the period before which the warrant shall not be executed, to allow the accused to appear voluntarily before a judge having jurisdiction in the territorial division in which the warrant was issued.

**Deemed execution of warrant**

(5) Where the accused appears voluntarily for the offence in respect of which the accused is charged, the warrant is deemed to be executed.
R.S., 1985, c. C-46, s. 597; R.S., 1985, c. 27 (1st Supp.), s. 121; 1997, c. 18, s. 68; 2019, c. 25, s. 266.
[*annotation(s) added*]

– CCC

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s. 800
[*omitted (1)*]

**Counsel or agent**

(2) A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 [*forms*] for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto. [*omitted (2.1) and (3)*]
R.S., 1985, c. C-46, s. 800; 1997, c. 18, s. 111; 2003, c. 21, s. 21.
[*annotation(s) added*]

– CCC

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**Summary Conviction Trial**

803
[*omitted (1)*]

**Non-appearance of defendant**

(2) If a defendant who is tried alone or together with others does not appear at the time and place appointed for the trial after having been notified of that time and place, or does not appear for the resumption of a trial that has been adjourned in accordance with subsection (1) [*summary offences – right to adjourn matters*], the summary conviction court

(a) may proceed ex parte to hear and determine the proceedings in the absence of that defendant as if they had appeared; or
(b) may, if it thinks fit, issue a warrant in Form 7 [*forms*] for the arrest of that defendant and adjourn the trial to await their appearance under the warrant.

[*omitted (3) and (4)*]
(5) to (8) [Repealed, 1991, c. 43, s. 9]
R.S., 1985, c. C-46, s. 803; 1991, c. 43, s. 9; 1994, c. 44, s. 79; 1997, c. 18, s. 112; 2008, c. 18, s. 45.

– CCC

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## Effect of Failure to Attend on Jurisdiction

**Procedural irregularities**

485
[*omitted (1)*]

**When accused not appearing personally**

(1.1) Jurisdiction over an accused is not lost by reason of the failure of the accused to appear personally, so long as the provisions of this Act or a rule made under section 482 [*powers of the superior and appellate court to make rules*] or 482.1 [*powers of the superior and appellate court to make case management rules*] permitting the accused not to appear personally apply.

**Summons or warrant**

(2) Where jurisdiction over an accused or a defendant is lost and has not been regained, a court, judge, provincial court judge or justice may, within three months after the loss of jurisdiction, issue a summons, or if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

**Dismissal for want of prosecution**

(3) Where no summons or warrant is issued under subsection (2) [*procedural irregularities in summons or warrant*] within the period provided therein, the proceedings shall be deemed to be dismissed for want of prosecution and shall not be recommenced except in accordance with section 485.1 [*recommencing dismissed charges*].

**Adjournment and order**

(4) Where, in the opinion of the court, judge, provincial court judge or justice, an accused or a defendant who appears at a proceeding has been misled or prejudiced by reason of any matter referred to in subsection (1) [*procedural irregularities*], the court, judge, provincial court judge or justice may adjourn the proceeding and may make such order as it or he considers appropriate.

**Part XVI to apply**

(5) The provisions of Part XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] apply with such modifications as the circumstances require where a summons or warrant is issued under subsection (2) [*procedural irregularities in summons or warrant*].

R.S., 1985, c. C-46, s. 485 R.S., 1985, c. 27 (1st Supp.), s. 67; 1992, c. 1, s. 60(F); 1997, c. 18, s. 40; 2002, c. 13, s. 19; 2019, c. 25, s. 188.
[*annotation(s) added*]

– CCC

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## Effect of Bench Warrant on Mode of Trial

**Election deemed to be waived**

598 (1) Notwithstanding anything in this Act, where a person to whom subsection 597(1) [*bench warrant for failing to attend for indictment*] applies has elected or is deemed to have elected to be tried by a court composed of a judge and jury and, at the time he failed to appear or to remain in attendance for his trial, he had not re-elected to be tried by a court composed of a judge without a jury

or a provincial court judge without a jury, he shall not be tried by a court composed of a judge and jury unless

(a) he establishes to the satisfaction of a judge of the court in which he is indicted that there was a legitimate excuse for his failure to appear or remain in attendance for his trial; or
(b) the Attorney General requires pursuant to section 568 [*Attorney General override*] or 569 [*Attorney General may require trial by jury — Nunavut*] that the accused be tried by a court composed of a judge and jury.

**Election deemed to be waived**

(2) An accused who, under subsection (1) [*deemed re-election to judge alone if fail to attend trial*], may not be tried by a court composed of a judge and jury is deemed to have elected under section 536 [*trial of absolute jurisdiction offences*] or 536.1 [*trial of absolute jurisdiction offences – Nunavut*] to be tried without a jury by a judge of the court where the accused was indicted and section 561 [*right of re-election*] or 561.1 [*right of re-election - Nunavut*], as the case may be, does not apply in respect of the accused.
R.S., 1985, c. C-46, s. 598; R.S., 1985, c. 27 (1st Supp.), ss. 122, 185(F), 203(E); 1999, c. 3, s. 51; 2002, c. 13, s. 48(E).
[*annotation(s) added*]

– CCC

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While s. 598 does violate s. 11(f) of the Charter it is saved as a reasonable limitation under s. 1 of the Charter.[1]

1. *R v Lee*, 1989 CanLII 21 (SCC), [1989] 2 SCR 1384, *per* Lamer J

# Arrest Warrants for Witnesses

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79568)

< Procedure and Practice < Arrest and Detention

## General Principles

**Subpoena**

698 (1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part [*Pt. XXII – Procuring Attendance (s. 697 to 715.2)*] requiring that person to attend to give evidence.

**Warrant in Form 17 [*forms*]**

(2) Where it is made to appear that a person who is likely to give material evidence

(a) will not attend in response to a subpoena if a subpoena is issued, or
(b) is evading service of a subpoena,

a court, justice or provincial court judge having power to issue a subpoena to require the attendance of that person to give evidence may issue a warrant in Form 17 to cause that person to be arrested and to be brought to give evidence.

**Subpoena issued first**

(3) Except where paragraph (2)(a) [*power to issue witness warrant – belief of evasion of subpoena*] applies, a warrant in Form 17 [*forms*] shall not be issued unless a subpoena has first been issued.
R.S., 1985, c. C-46, s. 698; R.S., 1985, c. 27 (1st Supp.), s. 203.
[*annotation(s) added*]

– CCC

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**Warrant for absconding witness**

704 (1) Where a person is bound by recognizance to give evidence in any proceedings, a justice who is satisfied on information being made before him in writing and under oath that the person is about to abscond or has absconded may issue his warrant in Form 18 directing a peace officer to arrest that person and to bring him before the court, judge, justice or provincial court judge before whom he is bound to appear.

**Endorsement of warrant**

(2) Section 528 applies, with such modifications as the circumstances require, to a warrant issued under this section.

**Copy of information**

(3) A person who is arrested under this section is entitled, on request, to receive a copy of the information on which the warrant for his arrest was issued.
R.S., 1985, c. C-46, s. 704; R.S., 1985, c. 27 (1st Supp.), s. 203.

– CCC

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**Warrant when witness does not attend**

705 (1) If a person who has been served with a subpoena to give evidence in a proceeding does not attend or remain in attendance, the court, judge, justice or provincial court judge before whom that person was required to attend may issue a warrant in Form 17 for the arrest of that person if it is established

(a) that the subpoena has been served in accordance with this Part [*Pt. XXII – Procuring Attendance (s. 697 to 715.2)*], and
(b) that the person is likely to give material evidence.

**Warrant if witness bound by recognizance**

(2) If a person who has been bound by a recognizance to attend to give evidence in any proceeding does not attend or does not remain in attendance, the court, judge, justice or provincial court judge before whom that person was bound to attend may issue a warrant in Form 17 for the arrest of that person.

**Warrant effective throughout Canada**

(3) A warrant that is issued by a justice or provincial court judge pursuant to subsection (1) [*warrant if witness does not attend*] or (2) [*warrant if witness bound by recognizance*] may be executed anywhere in Canada.
R.S., 1985, c. C-46, s. 705; R.S., 1985, c. 27 (1st Supp.), s. 203; 2019, c. 25, s. 286
[*annotation(s) added*]

– CCC

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**If witness arrested under warrant**

706 If a person is brought before a court, judge, provincial court judge or justice under a warrant issued under subsection 698(2) [*power to issue witness warrant – grounds*] or section 704 [*warrant for absconding witness*] or 705 [*warrant if witness does not attend*], the court, judge, provincial court judge or justice may, so that the person will appear and give evidence when required, order that the person be detained in custody or be released on recognizance, with or without sureties.

R.S., 1985, c. C-46, s. 706; R.S., 1985, c. 27 (1st Supp.), s. 203; 2019, c. 25, s. 287.
[*annotation(s) added*]

– CCC

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Where the applicant fails to establish how the witness' evidence is material the judge should not issue a witness warrant.[1]

1. *R v Kinzie*, [1956] O.W.N. 896 (Ont. C.A.)(*no CanLII links)
*R v Darville*, 1956 CanLII 463 (SCC), 116 CCC 113 (SCC), *per* Taschereau J
*Foley v Gares*, 1989 CanLII 5134 (SK CA), 53 CCC (3d) 82, *per* Bayda CJ
*R v Singh*, 1990 CanLII 5684 (AB QB), 108 AR 233 (Alta. Q.B.), *per* Medhurst J

# Arrest Warrants for Accused Persons

This page was last substantively updated or reviewed *August 2021*. (Rev. # 79568)

< Procedure and Practice < Arrest and Detention

## General Principles

Provincial and superior courts may issue a summons or a warrant to arrest accused persons who is already released on some form of bail. Once the accused is arrested under the warrant, s. 524 governs whether they are to be detained or released.

# Provincial Court Warrant

A justice of the provincial court may issue a warrant to arrest an accused under s. 512 (or more typically under s. 524).[1]

#### Timing

Warrants under s. 512 can be issued at any point in the proceedings.[2]

#### Procedure

A warrant under s. 512 is available even where the process is defective.[3]

There is no need for a written charge before the justice before they can seek a warrant under s. 524.[4]

#### Forms

A summons under s. 508 or 512 should use Form 6.

1. Ed - the reliance on s. 524 for authority to issue warrants is a bit odd. The progenitor s. 458 contemplated issuing a warrant however it was modified to remove the language referencing warrants and yet it is still used in that manner. If anyone can explain this, please let me know.
2. *Ex Parte Chung*, 1975 CanLII 1231 (BC CA), 26 CCC (2d) 497, *per* McFarlane JA, at p. 509 ("The jurisdiction of the Justice is not, therefore, limited to acting upon the initial receipt of the information, and he can receive and consider the information a second time even after the unconditional release of the accused. … There are no words limiting the exercise of the powers of a Justice to any particular stage of the proceedings.")
*R v Anderson*, 1983 ABCA 264 (CanLII), 9 CCC (3d) 539, *per* Kerans JA, at paras 48 to 51
3. *R v Gougeon*, 1980 CanLII 2842 (ON CA), 55 CCC (2d) 218, *per* Morden JA
4. *Fulton v The Queen*, 1972 CanLII 861 (SK QB), 10 CCC (2d) 120, *per* Tucker J - re s. 458 [now s. 524]

### "Public Interest" Warrant for Accused

Section 512(1) accords a provincial court justice discretion to issue either (a) a summons or (b) a warrant of arrest. The issuance of either of these orders under s. 512(1) requires that the justice believe that it is "necessary in the public interest".

> **Certain actions not to preclude issue of warrant**
>
> 512 (1) A justice may, where the justice has reasonable and probable grounds to believe that it is necessary in the public interest to issue a summons or a warrant for the arrest of the accused, issue a summons or warrant, notwithstanding that
>
> > (a) an appearance notice or undertaking has been confirmed or cancelled under subsection 508(1) [*justice obligation on receiving an information*];
> > (b) a summons has previously been issued under subsection 507(4) [*summons to be issued except in certain cases*]; or
> > (c) the accused has been released without conditions or with the intention of compelling their appearance by way of summons.
>
> [*omitted (2)*]
> R.S., 1985, c. C-46, s. 512; R.S., 1985, c. 27 (1st Supp.), s. 82; 1997, c. 18, s. 58; 2019, c. 25, s. 223.
> [*annotation(s) added*]
>
> – CCC

Where the justice has "reasonable grounds to believe that it is necessary in the public interest to issue a summons rather than a warrant, then it would be within his discretion to so proceed."[1] This would include information as to the whereabouts or medical condition of the accused.[2]

1. *R v Demelo*, 1994 CanLII 1368 (ON CA), 92 CCC (3d) 52, *per* Austin JA
2. *Demelo*, *ibid.*

### "Attendance" Warrant for Accused

Section 512(2)(a) and (b) accords a provincial court justice discretion to issue a warrant of arrest where an accused fails to attend pursuant to a served summons (512(2)(a)) or a *confirmed* appearance notice or undertaking (512(2)(b)). Section 512(2)(c) provides the ability to issue a warrant where the court is satisfied the accused is evading service of a summons.

> 512
> [*omitted (1)*]

**Warrant in default of appearance**

(2) Where

(a) service of a summons is proved and the accused fails to attend court in accordance with the summons,
(b) an appearance notice or undertaking has been confirmed under subsection 508(1) [*justice obligation on receiving an information*] and the accused fails to attend court in accordance with it in order to be dealt with according to law, or
(c) it appears that a summons cannot be served because the accused is evading service,

a justice may issue a warrant for the arrest of the accused.

R.S., 1985, c. C-46, s. 512; R.S., 1985, c. 27 (1st Supp.), s. 82; 1997, c. 18, s. 58; 2019, c. 25, s. 223.
[*annotation(s) added*]

– CCC

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### Superior Court Warrant

Where the accused is directed to attend superior court, the superior court justice may order a warrant under s. 597.

**Bench warrant**

597 (1) Where an indictment has been preferred against a person who is at large, and that person does not appear or remain in attendance for his trial, the court before which the accused should have appeared or remained in attendance may issue a warrant in Form 7 [*forms*] for his arrest.

**Execution**

(2) A warrant issued under subsection (1) [*bench warrant for failing to attend for indictment*] may be executed anywhere in Canada.

**Interim release**

(3) If an accused is arrested under a warrant issued under subsection (1) [*bench warrant for failing to attend for indictment*], a judge of the court that issued the warrant may make a release order referred to in section 515 [*judicial interim release provisions*].

**Discretion to postpone execution**

(4) A judge who issues a warrant may specify in the warrant the period before which the warrant shall not be executed, to allow the accused to appear voluntarily before a judge having jurisdiction in the territorial division in which the warrant was issued.

**Deemed execution of warrant**

(5) Where the accused appears voluntarily for the offence in respect of which the accused is charged, the warrant is deemed to be executed.
R.S., 1985, c. C-46, s. 597; R.S., 1985, c. 27 (1st Supp.), s. 121; 1997, c. 18, s. 68; 2019, c. 25, s. 266.
[*annotation(s) added*]

– CCC

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## Process Once Arrested

Section 524 governs the process to be followed by the provincial court when a person is arrested on a warrant for failing to attend court at either the provincial or superior court level.

Section 524(1) authorizes the issuance of a warrant of arrest.

The justice considers the following:

- if the accused had previously been released under a s. 522(3) order of a superior court, the justice should send the matter to that court (s. 524(1)(a)). Otherwise, the justice may determine the issue of release.

- whether the Crown seeks to cancel the original attendance instrument on account of failing to attend or due to the commission of another indictable offence (s. 524(2))
- if the justice is satisfied that the accused failed to attend or committed another indictable offence, the justice must cancel the original attendance instrument
- if the attendance instrument is cancelled the justice must order the detention of the accused unless they can show cause for release (s. 524)
- if the justice does not cancel the previous instrument, the justice must release the accused

**Hearing**

524 (1) When an accused is taken before a justice in any of the circumstances described in subsection (2) [*power of justice to hear breach allegations – circumstances*], the justice shall

(a) if the accused was released from custody under an order made under subsection 522(3) [*release of accused on s. 469 offences*] by a judge of the superior court of criminal jurisdiction of any province, order that the accused be taken before a judge of that court so that the judge may hear the matter; or
(b) in any other case, hear the matter.

**Circumstances**

(2) The circumstances referred to in subsection (1) [*power of justice to hear breach allegations*] are the following:

(a) the accused has been arrested for the contravention of or having been about to contravene, a summons, appearance notice, undertaking or release order and the prosecutor seeks to have it cancelled under this section; or
(b) the accused has been arrested for having committed an indictable offence while being subject to a summons, appearance notice, undertaking or release order and the prosecutor seeks to have it cancelled under this section.

**Cancellation**

(3) The judge or justice who hears the matter shall cancel a summons, appearance notice, undertaking or release order in respect of the accused if the judge or justice finds that

(a) the accused has contravened or had been about to contravene the summons, appearance notice, undertaking or release order; or
(b) there are reasonable grounds to believe that the accused has committed an indictable offence while being subject to the summons, appearance notice, undertaking or release order.

**Detention**

(4) If the judge or justice cancels the summons, appearance notice, undertaking or release order, the judge or justice shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why their detention in custody is not justified under subsection 515(10) [*justification for detention in custody*].

**Release order**

(5) If the judge or justice does not order that the accused be detained in custody under subsection (4) [*breach allegations – remand after cancellation*], the judge or justice shall make a release order referred to in section 515 [*judicial interim release provisions*].

**Reasons**

(6) If the judge or justice makes a release order under subsection (5) [*breach allegations – release after showing cause*], the judge or justice shall include in the record a statement of the reasons for making the order, and subsection 515(9) [*sufficiency of record*] applies with any modifications that the circumstances require.

**Release**

(7) If the judge or justice does not cancel the summons, appearance notice, undertaking or release order under subsection (3) [*breach allegations – cancellation of prior order*], the judge or justice shall order that the accused be released from custody.

**Provisions applicable to proceedings under this section**

(8) The provisions of sections 516 to 519 [*select provisions relating to bail process*] apply with any modifications that the circumstances require in respect of any proceedings under this section, except that subsection 518(2) [*release on guilty plea pending sentence*] does not apply in respect of an accused who is charged with an offence mentioned in section 469 [*exclusive jurisdiction offences*].

[*omitted (9) and (10)*]
R.S., 1985, c. C-46, s. 524; 1999, c. 3, s. 33; 2019, c. 25, s. 234.
[*annotation(s) added*]

– CCC

**Review**

524 ...

**Review — order by judge**

(9) An order made under subsection (4) [*breach allegations – remand after cancellation*] or (5) [*breach allegations – release after showing cause*] respecting an accused referred to in paragraph (1)(a) [*power of justice to hear breach allegations – where released on 469 offence*] is not subject to review except as provided in section 680 .

**Review — order of justice**

(10) An order made under subsection (4) [*breach allegations – remand after cancellation*] or (5) [*breach allegations – release after showing cause*] respecting an accused other than the accused referred to in paragraph (1)(a), is subject to review under sections 520 [*accused-requested bail review*] and 521 [*crown-requested bail review*] as if the order were made under section 515 [*judicial interim release provisions*].
R.S., 1985, c. C-46, s. 524; 1999, c. 3, s. 33; 2019, c. 25, s. 234.
[*annotation(s) added*]

– CCC

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## Warrant for Breaching the Identification of Criminals Act

**Failure to appear**

502 Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge or another peace officer to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 508 [*justice to hear informant and witnesses*], issue a warrant for the arrest of the accused for the offence with which the accused is charged.
R.S., 1985, c. C-46, s. 502; 1992, c. 47, s. 70; 1996, c. 7, s. 38; 1997, c. 18, s. 54.
[*annotation(s) added*]

– CCC

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## History

### Section 512

On June 16, 1997 s. 512 was amended with S.C. 1997, c. 18, s. 58(1).

Section 512 was substantially re-written by Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.).

Section 456.1 was re-enacted as s. 512 under the Criminal Code RSC 1985, c. C-46. It initially read as follows:

**Certain actions not to preclude issue of warrant**

512 (1) A justice may, where he has reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of an accused, issue a warrant under section 507 for the arrest of the accused notwithstanding that

(a) an appearance notice or a promise to appear or a recognizance entered into before an officer in charge has been confirmed or cancelled under subsection 508(1);
(b) a summons has previously been issued under subsection 507(4); or
(c) the accused has been released unconditionally or with the intention of compelling his appearance by way of summons.

**Warrant in default of appearance**

(2) Where

(a) service of a summons is proved and the accused fails to attend court in accordance with the summons,
(b) an appearance notice or a promise to appear or a recognizance entered into before an officer in charge has been confirmed under subsection 508(1) and the accused fails to attend court in accordance therewith in order to be dealt with according to law, or
(c) it appears that a summons cannot be served because the accused is evading service,

a justice may issue a warrant for the arrest of the accused.

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Under the Bail Reform Act, R.S.C. 1970, c. 2 (2nd Supp.) section 456.1 was created:

**Certain actions not to preclude issue of warrant**

456.1 (1) A justice may, where he has reasonable and probable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of an accused, issue a warrant under section 455.3 for the arrest of the accused notwithstanding that

(a) an appearance notice or promise to appear or a recognizance entered into before an officer in charge has been confirmed or cancelled under subsection 455.4(1);
(b) a summons has previously been issued under subsection 455.3(4); or
(c) the accused has been released unconditionally or with the intention of compelling his appearance by way of summons.

**Warrant in default of appearance**

(2) Where

(a) service of a summons is proved and the accused fails to attend court in accordance with the summons,
(b) an appearance notice or promise to appear or a recognizance entered into before an officer in charge has been confirmed under subsection 455.4(1) and the accused fails to attend court in accordance therewith in order to be dealt with according to law, or
(c) it appears that a summons cannot be served because the accused is evading service,

a justice may issue a warrant for the arrest of the accused.

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## Section 524

Criminal Code, R.S.C. 1985, c. C-46 re-enacted s. 458 as s. 524.

Section 458 was amended by the Criminal Law Amendment Act, S.C. 1974-75-76, c. 93.

The passing of the *Bail Reform Act*, R.S.C. 1970, c. 2 (2nd Supp.) created s. 458:

**Issue of warrant for arrest of accused**

458 (1) Where a justice is satisfied that there are reasonable and probable grounds to believe that an accused

(a) has violated or is about to violate the promise to appear, undertaking or recognizance upon which he has been released, or
(b) has, after his release from custody on a promise to appear, undertaking or recognizance, committed an indictable offence,

he may issue a warrant for the arrest of the accused.

**Arrest of accused without warrant**

(2) Notwithstanding anything in this Act, a peace officer who has reasonable and probable grounds to believe that an accused

(a) has violated or is about to violate the promise to appear, undertaking or recognizance upon which he has been released, or
(b) has, after his release from custody on a promise to appear, undertaking or recognizance, committed an indictable offence,

may arrest the accused without warrant.

**Hearing**

(3) Where an accused who has been arrested with a warrant issued under subsection (1), or who has been arrested under subsection (2), is taken before a justice, the justice shall

(a) where the accused was released from custody pursuant to an order made under subsection 457.7(2) by a judge of the superior court of criminal jurisdiction of any province, order that the accused be taken before a judge of that court, or
(b) in any other case, hear the prosecutor and his witnesses, if any, and the accused and his witnesses, if any.

**Hearing by judge**

(4) A judge before whom an accused is taken pursuant to an order of a justice under paragraph (3)(a) shall hear the prosecutor and his witnesses, if any, and the accused and his witnesses, if any, and thereafter may make any order that to him seems proper in the circumstances.

**Powers of justice after hearing**

(5) Where the justice before whom an accused described in subsection (3) is taken, other than an accused to whom paragraph (a) of that subsection applies, finds

(a) that the accused has violated or had been about to violate his promise to appear, undertaking or recognizance, or

(b) that there are reasonable and probable grounds to believe that the accused has, after his release from custody on a promise to appear, undertaking or recognizance, committed an indictable offence, he may cancel the promise to appear, undertaking or recognizance and either (c) order that the accused be released upon his giving an undertaking or entering into a recognizance described in any of paragraphs 457(2)(a) to (d), with such conditions or additional conditions described in subsection 457(4) as the justice considers desirable, or (d) where the prosecutor shows cause why the detention of the accused in custody is justified within the meaning of subsection 457(7), order that the accused be detained in custody until he is dealt with according to law.

**Reasons to be stated for order of detention**

(6) Where the justice makes an order under paragraph (5)(d), he shall include in the record a statement of his reasons for making the order, and subsection 457(6) is applicable mutatis mutandis in respect thereof.

**Where justice to order that accused be released**

(7) Where the justice does not make a finding under paragraph (5)(a) or (b), he shall order that the accused be released from custody.

**Provisions applicable to proceedings under this section**

(8) The provisions of sections 457.2, 457.3 and 457.4 apply mutatis mutandis in respect of any proceedings under this section, except that subsection 457.3(2) does not apply in respect of all accused who is charged with an offence mentioned in section 457.7.

**Certain provisions applicable to order under this section**

(9) Section 457.5 applies in respect of any order made under subsection (5) as though the order were an order made by a justice under subsection 457(2) or (5), and section 457.6 applies in respect of any order made under subsection (5) as though the order were an order made by a justice under subsection 457(2).

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## See Also

- Arrest Warrant for Breach of Court Orders (Until December 18, 2019)

# Out of Province Arrest Warrants

This page was last substantively updated or reviewed *January 2014*. (Rev. # 79568)

< Procedure and Practice < Arrest and Detention

## General Principles

It has been said that all types of warrants can have application in any province. A provincial judge in any jurisdiction may validate a warrant from another jurisdiction under s. 461.[1]

**"Canada-wide" Warrants**

Canada-wide warrants are warrants that are not attached to particular jurisdictions. This typically refers to warrants issued under s. 703, which can only be ordered by a judge of a superior court or appellate court.

Section 703 states:

**Warrant effective throughout Canada**

703 (1) Notwithstanding any other provision of this Act, a warrant of arrest or committal that is issued out of a superior court of criminal jurisdiction, a court of appeal, an appeal court within the meaning of section 812 [*definition of appeal court*] or a court of criminal jurisdiction other than a provincial court judge acting under Part XIX [*Pt. XIX – Indictable Offences – Trial Without a Jury (s. 552 to 572)*] may be executed anywhere in Canada.

**Warrant effective in a province**

(2) Despite any other provision of this Act but subject to subsections 487.0551(2) [*warrant jurisdiction on breach of DNA order*] and 705(3) [*warrant effective throughout Canada*], a warrant of arrest or committal that is issued by a justice or provincial court judge may be executed anywhere in the province in which it is issued.

R.S., 1985, c. C-46, s. 703; R.S., 1985, c. 27 (1st Supp.), s. 149; 2007, c. 22, s. 22.
[*annotation(s) added*]

– CCC

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1. *R v Cardinal*, 1985 ABCA 157 (CanLII), 21 CCC (3d) 254, *per* Kerans JA, at para 8

## Transferring Local Warrants to Different Provinces

Where no Canada-wide warrant is issued and a regular 514 warrant has been issued in another jurisdiction, under s. 528 the local court may endorse the foreign warrant (sometimes referred to as "backing" a warrant):

> **Endorsement of Warrant**
> **Endorsing warrant**
>
> 528 (1) Where a warrant for the arrest or committal of an accused, in any form set out in Part XXVIII [*Pt. XXVIII – Miscellaneous (s. 841 to 849)*] in relation thereto, cannot be executed in accordance with section 514 [*execution of warrant*] or 703 [*territorial scope of warrant*], a justice within whose jurisdiction the accused is or is believed to be shall, on application and proof on oath or by affidavit of the signature of the justice who issued the warrant, authorize the arrest of the accused within his jurisdiction by making an endorsement, which may be in Form 28 [*forms*], on the warrant.
>
> **Copy of affidavit or warrant**
>
> (1.1) A copy of an affidavit or warrant submitted by a means of telecommunication that produces a writing has the same probative force as the original for the purposes of subsection (1) [*endorsing warrant – grounds to issue warrant*].
>
> **Effect of endorsement**
>
> (2) An endorsement that is made upon a warrant pursuant to subsection (1) [*endorsing warrant – grounds to issue warrant*] is sufficient authority to the peace officers to whom it was originally directed, and to all peace officers within the territorial jurisdiction of the justice by whom it is endorsed, to execute the warrant and to take the accused before the justice who issued the warrant or before any other justice for the same territorial division.
> R.S., 1985, c. C-46, s. 528; R.S., 1985, c. 27 (1st Supp.), s. 93; 1994, c. 44, s. 51.
> [*annotation(s) added*]
>
> – CCC
>
> ---

This section allows either local police or the police of the other jurisdiction to arrest the accused, who is located locally, and be transported to the jurisdiction of the original warrant.

The application should use Form 28.[1]

1. e.g. see *R v Charles*, 2012 SKCA 34 (CanLII), 289 CCC (3d) 168, *per* Smith JA, at para 11

see List of Criminal Code Forms

## See Also

- Transfer of Matters to Other Provinces or Territories

# Reasonable Suspicion

This page was last substantively updated or reviewed *January 2021*. (Rev. # 79568)

< Search and Seizure < Warrant Searches
< Search and Seizure < Warrantless Searches

## General Principles

A "suspicion" refers to an expectation that a person is "possibly engaged in some criminal activity."[1]

A suspicion must be reasonable to be lawful, which requires "more than a mere suspicion and something less than a belief based upon reasonable and probable grounds". It must be supported by factual elements that can be independently assessed.[2]

**Lower Than "Probable"**

Reasonable suspicion is a standard lower than "reasonable and probable grounds".[3] The main distinction is "merely the degree of probability demonstrating that a person is involved in criminal activity, not the existence of objectively ascertainable facts".[4] It refers to the "**possibility** of uncovering criminality, not the probability of doing so".[5]

It follows that the "degree of reliability and the amount of information to establish that lower threshold is lower" than RPG.[6]

**"Reasonable"**

The presumption of reasonable suspicion should "not be disturbed unless it is unreasonable or not rationally capable of supporting an inference of suspicion." [7]

**Taking Account of Realities of Policing**

In evaluating police decision-making, the reviewing judge must "take into account that the police at the scene are often required to make quick decisions based on available information, some of which may not be complete or exact, in situations that are rapidly changing and potentially volatile."[8]

The judge should also account for an officer's experience in the particular type of investigation. The officer's experience may allow him to draw inferences and deductions that regular people would fail to make.[9]

1. *R v Kang-Brown*, 2008 SCC 18 (CanLII), [2008] 1 SCR 456, *per* LeBel J, at para 75
2. *Kang-Brown*, *ibid.*, at para 75
3. *R v Xuan Nguyen*, 2013 SKQB 36 (CanLII), 412 Sask R 284, *per* Popescul CJ, at para 27
4. *Kang-Brown*, *supra*, at para 75
5. *R v Navales*, 2014 ABCA 70 (CanLII), 569 AR 203, *per* Paperny JA, at para 18
6. *Xuan Nguyen*, *supra*, at para 27
7. *Xuan Nguyen*, *supra*, at para 29 citing *R v Gunn*
   See *R v Gunn*, 2012 SKCA 80 (CanLII), 399 Sask.R. 170, *per* Caldwell JA, at paras 15 to 23
8. *Xuan Nguyen*, *supra*, at para 30
9. *Xuan Nguyen*, *supra*, at para 31

## Reasonable Suspicion Test

A reasonable suspicion lies between a **mere** suspicion and reasonable and probable grounds. [1]

**Multitude of Conclusions Possible**

Reasonable suspicion does not require that it be the only possibility, but merely one possible conclusion based on supported facts.[2] It also means that reasonable suspicion does not need to be the *only* inference from a particular constellation of factors.[3]

Where suspicion deals with possibilities rather than probabilities it necessarily means that it is possible to reasonably suspect that innocent people are involved in crime.[4]

**Reliability and Specificity of Evidence**

Reasonable suspicion can rely on information that is less reliable than for establishing "reasonable and probable grounds".[5]

The evidence forming reasonable suspicion need to indicate the "possibility of criminal behavour". The evidence itself need not include unlawful behaviour or evidence of a specific criminal act.[6]

**Assessed on Totality of Evidence**

The assessment is based on the totality of the evidence-all surrounding circumstances-rather than piece by piece consideration of whether the evidence is consistent with the factors. [7] The inquiry must consider "the constellation of objectively discernible facts said to give the investigating officer reasonable cause to suspect that the individual is involved in criminal activity".[8]

**No Obligation to Make Inquiry**

The obligation of police to consider all factors does not require them to make inquiry into exculpatory factors or rule out innocent explanations.[9]

**Relevant Factors**

The suspicion must be "sufficiently particularized" as an overly "generalized suspicion" would capture too many innocent persons.[10] Accordingly, factors that may "go both ways" are not sufficient on their own to support reasonable suspicion.[11] Such factors do not preclude reasonable suspicion arising when they are part of the constellation of factors.[12]

Any factors that are favourable or unfavourable (including "exculpatory, neutral or equivocal") must still be considered as part of the totality of circumstances.[13]

**Standard of Review**

Determination of whether factors amount to a reasonable suspicion is question of law reviewable on a standard of correctness.[14]

1. *R v Kang-Brown*, 2008 SCC 18 (CanLII), [2008] 1 SCR 456, *per* LeBel J, at para 75
   see *R v Monteyne*, 2008 SKPC 20 (CanLII), 312 Sask R 242, *per* Kovatch J (re suspicion)
   *R v Donald*, 2010 SKPC 123 (CanLII), [2010] S.J. No 564, *per* Kalmakoff J, at para 18
2. *R v Chipchar*, 2009 ABQB 562 (CanLII), (2009) AJ No 1058, *per* Shelley J
3. *R v Chehil*, 2013 SCC 49 (CanLII), [2013] 3 SCR 220, *per* Karakatsanis J, at para 32
4. *Chehil*, *ibid.*, at para 28

5. *R v Kang-Brown*, 2008 SCC 18 (CanLII), [2008] 1 SCR 456, [2008] SCJ No 18, *per* LeBel J, at para 75
6. *Chehil*, *supra*, at para 35
7. *R v Todd*, 2007 BCCA 176 (CanLII), 239 BCAC 154, *per* Chiasson JA
   *R v Wong*, 2001 BCCA 13 (CanLII), 151 CCC (3d) 155, *per* Braidwood JA
   *R v Usher*, 2011 BCCA 271 (CanLII), 307 BCAC 80, *per* Neilson JA
   *R v Nahorniak*, 2010 SKPC 68 (CanLII), 256 CCC (3d) 147, *per* Ottenbreit J, at para 23
   *R v Cuthbertson*, 2003 ABPC 83 (CanLII), 58 WCB (2d) 150, *per* Allen J at 46
8. *R v Navales*, 2014 ABCA 70 (CanLII), 569 AR 203, *per* Paperny JA, at para 19
   *Chehil*, *supra*, at paras 29, 31
9. *Chehil*, *supra*, at para 34
10. *Navales*, *supra*, at para 19
    *Chehil*, *supra*, at paras 30 to 31
11. *Navales*, *supra*, at para 19
    *Chehil*, *supra*, at para 31
12. *Chehil*, *supra*, at para 31
13. *Navales*, *supra*, at para 19
    *Chehil*, *supra*, at para 33
14. *R v Wunderlich*, 2014 ABCA 94 (CanLII), 572 AR 174, *per curiam*, at para 8
    *R v MacKenzie*, 2013 SCC 50 (CanLII), 303 CCC (3d) 281, *per* Moldaver J, at para 54

### Subjective Component

The subjective belief for the demand is a question of fact.[1]

1. *R v Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 SCR 254, *per* Sopinka J
   *R v MAL*, 2003 CanLII 21523 (ON CA), [2003] OJ No 1050, *per curiam*
   *R v Shepherd*, 2009 SCC 35 (CanLII), [2009] 2 SCR 527, [2009] SCJ 35, *per* McLachlin CJ and Charron J, at paras 18 to 20
   *R v Biccum*, 2012 ABCA 80 (CanLII), [2012] AJ No 234 (CA), *per curiam*, at paras 9 to 10

### Objective Component

Reasonable suspicion must include objective reasonableness.[1]

The judge is permitted to consider the police officer's training and personal experience in determining objective reasonableness.[2]However, the evidence of a police officer is no less worthy of scrutiny.

The officer himself cannot dictate what is reasonable and what is not. [3]

Observations of a suspect running away from police, on its own, is not enough to allow for police to detain or search.[4]

1. *R v Smith*, 2011 SKPC 149 (CanLII), [2011] S.J. No 650 (Sask. Prov. Ct.), *per* Bobowski J, at para 44
   *R v Ajula*, 2011 ONCJ 10 (CanLII), *per* Zisman J
2. *R v Rajaratnam*, 2006 ABCA 333 (CanLII), 214 CCC (3d) 547, *per curiam*, at para 25
   *R v Juan*, 2007 BCCA 351 (CanLII), 222 CCC (3d) 289, *per* Thackray JA, at paras 18 to 21, 222 CCC (3d) 289.
   *R v MacKenzie*, 2011 SKCA 64 (CanLII), 86 CR (6th) 78, *per* Caldwell JA
3. *R v Payette*, 2010 BCCA 392 (CanLII), 259 CCC (3d) 178, *per* Neilson JA, at para 29
4. e.g. *R v N(N)*, 2009 ONCJ 508 (CanLII), *per* Cohen J - police see suspect running away from them in high crime area, no reason to believe crime had occurred

### Compared to Reasonable Grounds

Reasonable suspicion "involves possibilities, not probabilities".[1] Courts must be careful not to conflate the two standards.[2]

1. *R v Williams*, 2013 ONCA 772 (CanLII), 111 WCB (2d) 574, *per curiam*, at para 22
   *R v MacKenzie*, 2013 SCC 50 (CanLII), 303 CCC (3d) 281, *per* Moldaver J, at para 38
   *R v Chehil*, 2013 SCC 49 (CanLII), [2013] 3 SCR 220, *per* Karakatsanis J, at para 27
2. *Williams*, *supra*, at para 22
   *MacKenzie*, *supra*, at para 84
   *Chehil*, *supra*, at para 27

## Impaired Driving

A police officer may demand that a person who is found in care and control or in operation of a vehicle undergo a roadside screening test for alcohol. The officer must have "reasonable grounds" to suspect (or "reasonable suspicion") that alcohol is in their body to make a roadside test demand.[1] The quantity of alcohol and the level of impairment is irrelevant.

#### Burden of Proof

The burden is on the Crown to prove that there were grounds to administer the test on a balance of probabilities.

#### Failure to For Grounds

Where an officer administers an ASD without reasonable suspicion, a Charter violation under s. 8 and 9 result. [2]

#### Sufficiency of Grounds

The standard required for the ASD test under 254(3)(a)(i) is not a “standard of proof” as understood in judicial proceedings.[3]

An admission of having consumed alcohol without mention of when and how much can be considered sufficient to form a reasonable suspicion.[4]

#### Compelled Statements or Participation

Evidence that was obtained from the accused through his compelled participation can only be used to establish grounds of suspicion and cannot be used to incriminate the accused.[5]

1. *R v Maslanko*, 2011 ABPC 202 (CanLII), *per* Groves J
   *R v Haas*, 2005 CanLII 26440 (ON CA), 200 CCC (3d) 81, *per* Goudge JA
   *R v Church*, 2008 BCSC 686 (CanLII), *per* Curtis J, at para 6
   *R v Gaudaur*, 2008 BCSC 981 (CanLII), *per* Romilly J, at paras 40 to 42
   *R v Lemma*, 2011 ABPC 312 (CanLII), *per* Sully J (no grounds)
   *R v Beechinor*, 2004 SKPC 49 (CanLII), [2004] S.J. No 187 (SKPC), *per* Jackson J
2. e.g. *R v Zoravkovic*, 1998 CanLII 3202 (ON CA), [1997] OJ No 1010 (Ont. C.J.), *per curiam*
   *R v Hendel*, [1997] OJ No 2849 (Ont. C.J.)(*no CanLII links)
   *R v Smith*, [1997] OJ No 3677 (Ont. C.J.)(*no CanLII links)
   *R v O'Flanagan*, 2009 SKPC 14 (CanLII), [2009] S.J. No 55, *per* R Green J
   *R v Thompson*, 2003 SKPC 56 (CanLII), [2003] S.J. No 240, *per* Jackson J
3. *R v Loewen*, 2010 ABCA 255 (CanLII), 260 CCC (3d) 296, *per* Slatter JA (2:1), at para 13
4. *R v Flight*, 2014 ABCA 185 (CanLII), 313 CCC (3d) 442, *per* Veldhuis JA, at paras 39 to 61
5. *R v Orbanski; R v Elias*, 2005 SCC 37 (CanLII), [2005] 2 SCR 3, *per* Charron J, at para 58

### Reasonable Suspicion Test

The standard only requires a belief on the presence of alcohol and not the amount consumed, the effects or degree of impairment.[1]

The suspicion is of the "consumption alone and not its amount or behavioural consequences".[2]

#### Multiple Officers Involved

The officer who makes the demand does not need to be the officer who had initial contact with the accused.[3] However, the officer making the demand must be the one who formed a reasonable suspicion that the accused has alcohol in his system.[4] This basis can be based on information received from another officer.

#### Totality

The requirement of considering the totality of circumstances requires considering not only evidence suggestive of alcohol in the body but also evidence suggesting otherwise as well as the absence of evidence.

The objectively verifiable evidence should not be dissected and individually tested.[5]

#### Source of Alcohol

An officer should be able to describe the origin of the alcoholic smell, by indicating whether other people were in the car, or otherwise suggesting where the source of the odor could be from.[6]

It is not necessary that the crown eliminate all other possible sources of the odor of alcohol to form reasonable suspicion.[7]

#### Requirements for Reasonable Suspicion

For the peace officer to form reasonable suspicion, the officer must:[8]

- subjectively and honestly suspect the driver who had alcohol in his body; and,
- The subject of suspicion must be based on "objectively verifiable circumstances"

Reviewing the grounds requires the application of the Mackenzie test: "what a reasonable person, standing in the shoes of the investigating police officer and aware of all the objectively verifiable evidence, reasonably suspect the driver had alcohol in his or her body?"[9]

1. *R v Gilroy*, 1987 ABCA 185 (CanLII), 3 WCB (2d) 79, *per* McClung JA
   *R v Thomas*, 2008 ABQB 610 (CanLII), 461 AR 216, *per* McDonald J
2. *Gilroy*, *supra*, at para 8
3. *R v Telford*, 1979 ABCA 244 (CanLII), 50 CCC (2d) 322, *per* Morrow JA
4. *R v Sahota*, [2000] OJ No 3943 (ONCJ)(*no CanLII links)
   *Telford*, *supra*
5. *R v Yates*, 2014 SKCA 52 (CanLII), 311 CCC (3d) 437, *per* Klebuc JA, at para 34
6. E.g. *Yates*, *ibid.*
7. *Yates*, *ibid.*
8. *Yates*, *ibid.*
9. *Yates*, *ibid.*

### Subjective Component

There should not simply be signs of consumption of alcohol, but also signs of impaired driving skills. Once both are established, the analysis must consider the degree of each and the totality of the circumstances. [1]

Impairment to driving skills requires that on an objective basis there is impairment "such as coordination, comprehension and a poor (but not simply illegal) driving pattern." If any one of these is found as well as evidence of alcohol consumption, then there is an objective basis to conclude the driver's ability to drive is impaired by alcohol.[2]

Alternate explanations or imprecise descriptions do little to reduce the value of the observations. This is because the observations to not need to meet a formal burden of proof. Also, most any signs can be explained by something other than alcohol.[3]

An admission of "two drinks", without any indication of the time of these drinks, was enough to support a reasonable suspicion.[4]

An admission of “two drinks” is not relevant to establishing impairment. It is only where there is an admission of many drinks, that the inference of impairment can be made.[5]

Evidence of an amount of consumption can also be enough to create a reasonable suspicion.[6]

Grounds should include more than simply an admission of the accused that they had drank alcohol within the past three hours. [7]

1. *R v Baltzer*, 2011 ABQB 84 (CanLII), 9 MVR (6th) 203, *per* Graesser J, at paras 40 to 41
   e.g. *R v Spiry*, 2010 ABPC 61 (CanLII), 25 Alta LR (5th) 181, *per* LeGrandeur J, at para 19 - evidence of consumption only is not likely sufficient to form reasonable grounds
2. *Baltzer*, *supra*, at para 38
3. *Baltzer*, *supra*, at paras 36 to 37
4. *R v Kimmel*, 2008 ABQB 594 (CanLII), 459 AR 95, *per* Marceau J
   *R v Thomas*, 2008 ABQB 610 (CanLII), 461 AR 216, *per* J.D.B. McDonald J
   *R v Ross*, 2011 ABPC 173 (CanLII), AJ No 598, *per* Henderson J
   cf. *R v Dyer*, 2007 ABPC 116 (CanLII), 419 AR 296, *per* Fradsham J
5. *Baltzer*, *supra* at 36-37
6. *R v Gilroy*, 1987 ABCA 185 (CanLII), 79 AR 318 (CA), *per* McClung JA, leave to appeal to SCC refused
   *R v Stauch*, 2007 ABQB 85 (CanLII), 414 AR 34, *per* Kent J
7. *R v Mowat*, 2010 BCPC 430 (CanLII), *per* Ellan J
   *R v Baker*, 2004 ABPC 218 (CanLII), [2004] AJ No 1355, *per* Allen J
   *R v Hnetka*, 2007 ABPC 197 (CanLII), [2007] AJ No 806, *per* Allen J
   *R v Klontz*, 2007 ABPC 311 (CanLII), [2007] AJ No 1283, *per* Anderson J
   *R v Hemery*, 2008 ABPC 209 (CanLII), 174 CRR (2d) 373, *per* Stevens-Guille J

### Objective Component

The grounds need not be proven a on balance of probabilities.[1]

To be reasonable it does not need to be the **only** conclusion derived from the circumstances. The court considers whether a reasonable person in the circumstances would have a suspicion that the person was impaired by alcohol.

The smell of alcohol on the breath of the driver, by itself, is sufficient to support the suspicion that the driver was operating the vehicle while impaired.[2] Or the suspicion that there was alcohol in their body.[3]

However, the smell of acohol in the vehicle does satisfy the objective grounds to use the screening device.[4]

It is not necessary to consider the timing at which the suspected alcoholic beverage was consumed.[5]

The lack of evidence of consumption can weigh against the formation of a reasonable suspicion.[6]

An officer need not spell out his subjective suspicion that there is alcohol in the accused’ body using the words of s. 254(2). The court may infer the suspicion based on all of the evidence.[7]

It is generally considered that the “point in time” for the issue of reasonable grounds is at the time of the arrest. Certain cases have concerned the moment being at the time at the time of the demand.[8]

If the accused had drank alcohol within 15 minutes of the first test may render the ASD test unreliable. The mere possibility of consuming alcohol within 15 minutes does not affect the reliability of the ASD.[9] The main issue is whether there was any evidence which may have caused the officer to investigate when the accused had his last drink. If "credible evidence" exists the officer should delay test for 15 minutes to ensure reliability.[10]

1. *R v Loewen*, 2010 ABCA 255 (CanLII), 260 CCC (3d) 296, *per* Slatter JA (2:1), at para 18
2. *R v Stauch*, 2007 ABQB 85 (CanLII), AJ No 142 (QB), *per* Kent J
   *R v Carson*, 2009 ONCA 157 (CanLII), OJ No 660, *per curiam*
   *R v Gannon*, 2007 ABPC 65 (CanLII), 419 AR 137, *per* Semenuk J
   *R v Redstar*, 2009 ABPC 79 (CanLII), *per* Rosborough J
   *R v Tellefson*, 2009 ABPC 159 (CanLII), *per* Barley J
3. *R v Lindsay*, 1999 CanLII 4301 (ON CA), [1999] OJ No 870, 134 CCC (3d) 159, *per curiam*
   *R v Butchko*, 2004 SKCA 159 (CanLII), [2004] SJ No 735, 192 CCC (3d) 552, *per* Cameron JA
4. *R v Rasheed*, 2009 ONCJ 41 (CanLII), OJ No 631, *per* Bovard J, at para 20
5. *R v Aujla*, 2011 ONCJ 10 (CanLII), *per* Zisman J, at para 36
6. *R v Zoravkovic*, 1998 CanLII 3202 (ON CA), 112 OAC 119, *per curiam*
7. *R v Imanse*, 2010 BCSC 446 (CanLII), *per* Crawford J
   *R v Dietz*, [1993] AJ No 45 (CA)(*no CanLII links)
   *R v Church*, 2008 BCSC 686 (CanLII), *per* Curtis J
   *R v Donald (No.2)*, 2010 SKPC 123 (CanLII), 79 CR (6th) 93, *per* Kalmakoff J
8. *R v Shaw*, 2011 SKQB 425 (CanLII), 386 Sask R 195, *per* Gabrielson J
9. *R v Einarson*, 2004 CanLII 19570 (ON CA), 183 CCC (3d), *per* Doherty JA, at para 35
10. *R v Szybunka*, 2005 ABCA 422 (CanLII), 380 AR 387, *per* Berger JA, at para 8

## Sniffer Dogs

"Sniffer dog" searches, most typically seen at border-crossings including airports, can be permitted on the standard of reasonable suspicion.[1]

For a sniffer dog search to be valid, the court must ask itself:[2]

1. did the officer subjectively believe that there were reasonable grounds to suspect that the accused was in possession of the drugs?
2. were there sufficient grounds to reasonably suspect the accused was in possession of drugs?

Reasonable suspicion in this circumstances requires an "expectation" that the accused is "possibly engaged in some criminal activity. As well, the suspicion must be supported by facts that can be subject to review."

As part of the determination of reasonable suspicion it includes the presence of a "masking agent" such as perfumes, colognes or other odour producing products. [3]

See also: *R v Navales*, 2011 ABQB 404 (CanLII), 520 AR 110, *per* Hughes J
*R v Loewen*, 2010 ABCA 255 (CanLII), 260 CCC (3d) 296, *per* Slatter JA (2:1)
*R v Calderon*, 2004 CanLII 7569 (ON CA), 188 CCC (3d) 481, *per* Laskin JA (2:1)

1. *R v Kang-Brown*, 2008 SCC 18 (CanLII), [2008] 1 SCR 456, *per* LeBel J
2. *Kang-Brown*, *ibid.*
3. *R v Nguyen*, 2012 ABQB 199 (CanLII), 537 AR 299, *per* Michalyshyn J, at para 97

## Drug Trafficking

Observation of someone stopping at a suspected drug house, by itself, is not sufficient to form a reasonable suspicion authorizing detention.[1] However, where the status of the house as a drug house is well-founded, a reasonable suspicion standard is sufficient.[2] Indeed, with the right circumstances, there may even be sufficient grounds to arrest.[3]

A observed hand-to-hand exchange in isolation can only amount to a suspicion and nothing more as it may equally be an innocent exchange of small objects.[4]

1. *R v Simpson*, 1993 CanLII 3379 (ON CA), 79 CCC (3d) 482, *per* Doherty JA
2. *R v Buchanan*, 2020 ONCA 245 (CanLII), *per* Fairburn JA, at para 31
3. *R v Rover*, 2018 ONCA 745 (CanLII), 145 OR (3d) 135, *per* Doherty JA, at paras 11 to 13
   *Buchanan*, *supra*, at para 32
4. *R v NO*, 2009 ABCA 75 (CanLII), 186 CRR (2d) 60, *per curiam*, at para 41
   *R v Celestin*, 2013 ABPC 242 (CanLII), *per* Fradsham J, at para 55
   *R v Fares*, 2014 ABQB 160 (CanLII), *per* Tilleman J

## See Also

- Entrapment

# Procedural Rights

# Arrest Procedure

This page was last substantively updated or reviewed *January 2019*. (Rev. # 79568)

< Procedure and Practice < Arrest and Detention

## Introduction

At the time of arrest, an officer must typically inform the accused of the following and confirm that they understand:

1. inform of reason for arrest
2. Charter of Rights caution / Right to Silence
3. right to speak to a lawyer
4. access to legal aid
5. secondary police cautions

### Validity of Arrest

An arrest consists of two elements:[1]

1. the actual seizure or touching of a person's body with a view towards his detention *or*
2. the pronouncing of "words of arrest" to a person who submits to the arresting officer.

An arrest will only be lawful if:[2]

1. police have a subjective belief that there are reasonable and probable grounds to arrest the accused.
2. the grounds must be objectively justifiable

Previously an arrest would no longer be considered valid if the accused was ultimately acquitted of the charges. Now the consideration is only on what is apparent to the officer at the time of arrest.[3]

Where the officer is honestly mistaken as the existence of a law that does not exist, it cannot be objectively justifiable.[4]

1. *R v Whitfield*, 1969 CanLII 4 (SCC), [1970] SCR 46, *per* Judson J
   *R v Lo*, 1997 CanLII 1908 (BC SC), *per* Romilly J, at paras 6 to 10
   *R v Latimer*, 1997 CanLII 405 (SCC), 112 CCC (3d) 193, *per* Lamer CJ, at paras 24 to 5
   *R v Biron*, 1975 CanLII 13 (SCC), [1976] 2 SCR 56
2. *Lo*, *supra*, at paras 6 to 10
   See also *R v Storrey*, 1990 CanLII 125 (SCC), 53 CCC (3d) 316, *per* Cory J, at pp. 322-4 (SCC)
   *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at paras 54 to 56
3. *Biron*, *supra*

4. *R v Houle*, 1985 ABCA 275 (CanLII), 24 CCC (3d) 57, *per* Stevenson JA

### Identification

Once a person is lawfully arrested they have an obligation to identify themselves.[1] Failure to do so may result in an offence of obstruction.[2]

1. *R v Pauli*, 2014 SKQB 246 (CanLII), 2 WWR 402, *per* Dawson J
2. e.g. *Pauli*, *ibid.*

### Notice Upon Arrest

> **Duty of person arresting**
>
> 29 (1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.
>
> **Notice**
>
> (2) It is the duty of every one who arrests a person, whether with or without a warrant, to give notice to that person, where it is feasible to do so, of
>
> (a) the process or warrant under which he makes the arrest; or
> (b) the reason for the arrest.
>
> **Failure to comply**
>
> (3) Failure to comply with subsection (1) [*duty of person arresting – possession of copy*] or (2) [*duty of person arresting – notice*] does not of itself deprive a person who executes a process or warrant, or a person who makes an arrest, or those who assist them, of protection from criminal responsibility.
> R.S., c. C-34, s. 29.
> [*annotation(s) added*]
>
> – CCC

### Use of Force

It has been suggested that there is a constitutional obligation for police to make a "contemporaneous complete record of the circumstances of, and reasons for, their use of force during an arrest".[1]

1. *R v Acheampong*, 2018 ONCJ 798 (CanLII), *per* Burstein J, at para 59

## Topics

- Alternatives to Charging
  - Extrajudicial Measures for Young Offenders
- Warrantless Arrests and Warrant Arrests
  - Reasonable and Probable Grounds to Arrest
- Right to be Informed of Reasons for Arrest or Detention (s. 10(a))
- Right to Counsel (s. 10(b))
- Right of Youth to Notify Parents
- Right Against Self-Crimination
- Voluntariness
- Taking Photographs and Fingerprints of Accused Persons
- Initial Post-Charge Detention
  - Duty to Deliver Detainee to a Justice Without Unreasonable Delay
- Release
  - Release by Police on Undertaking
  - Judicial Interim Release
- Acting in Authority - Immunity for Use of Force

# Right to be Informed of Charges

# General Principles

Section 11(a) of the Charter guarantees to right to be informed of the specific charges against the accused. It states:

> **Proceedings in criminal and penal matters**
>
> 11. Any person charged with an offence has the right
>
> (a) to be informed without unreasonable delay of the specific offence;
>
> – CCRF

This right has two components. "The primary protection is notice of the specific offence. Without notice of the specific offence an accused may be deprived of the ability to make full answer and defence. Accused have the right to know with what they are charged so they can make decisions about their defence, assemble evidence and prepare to meet the prosecution case."[1] This right protects the rule of law that "an accused can only be charged with an offence known to law".[2] The second component is the right against unreasonable delay in being informed. This right is designed to protect the right to full answer and defence.[3]

1. *R v Cisar*, 2014 ONCA 151 (CanLII), 307 CCC (3d) 336, *per* Rosenberg JA, at para 11
2. *Cisar*, *ibid.*, at para 11
3. *Cisar*, *ibid.*, at para 12

## Sufficiency

Section 581 largely codifies the requirements of sufficiency for the purpose of s. 11(a).[1]

> **Substance of offence**
>
> 581 (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.
>
> **Form of statement**
>
> (2) The statement referred to in subsection (1) [*substance of offence – single transaction and specific*] may be
>
> (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
> (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
> (c) in words that are sufficient to give to the accused notice of the offence with which he is charged.
>
> [*omitted (3) and (4)*]
>
> **Reference to section**
>
> (5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.
> [*omitted (6)*]
> R.S., 1985, c. C-46, s. 581; R.S., 1985, c. 27 (1st Supp.), s. 118; 2018, c. 29, s. 63.
> [*annotation(s) added*]
>
> – CCC

1. *R v Cisar*, 2014 ONCA 151 (CanLII), 307 CCC (3d) 336, *per* Rosenberg JA, at para 11
   *R v Cancor Software Corp.*, 1990 CanLII 6817 (ON CA), , 74 OR (2d) 65 (CA), *per* McKinlay JA
   *R v Lucas*, 1983 CanLII 2948 (NS SC), 57 NSR (2d) 159 (S.C. App. Div.), *per* Jones JA

## Unreasonable Delay

This right prohibits "unreasonable delay". The analysis of delay considers the same factors as delay under s. 11(b):[1]

1. length of delay;
2. reasons for delay;
3. waiver of any time periods; and

4. prejudice to the accused.

1. *R v Cisar*, 2014 ONCA 151 (CanLII), 307 CCC (3d) 336, *per* Rosenberg JA, at paras 12 to 27

*R v Delaronde*, 1997 CanLII 404 (SCC), [1997] 1 SCR 213, *per* Lamer CJ

## See Also

- Right to Counsel

# Right to be Informed of Reasons for Arrest or Detention

< Procedure and Practice < Arrest and Detention

## General Principles

Section 10(a) of the Charter creates a constitutional right for those detained or arrested. The section states:

> **Arrest or detention**
>
> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;...
>
> – CCRF

At point of detention the detainee must be "advised, in clear and simple language, of the reasons for the detention."[1]

Section 10(a) of the Charter entitles all people "the right on arrest or detention ... to be informed promptly of the reasons therefore". It is generally expected that the arresting officer, upon making the arrest, will inform the person of the reason for the arrest. However, where the reason is obvious and the person is well aware of the reason, it is not necessary.[2]

The rights under s.10(a) have been met where the substance of what the accused has been explained is what he is reasonably "supposed to understand in the context and circumstances of the case".[3] As well, the accused should understand the basis for his apprehension, detention or arrest and the extent of his jeopardy.[4]

1. *R v Mann*, 2004 SCC 52 (CanLII), [2004] 3 SCR 59, *per* Iacobucci J, at para 21
   *R v Kelly*, 1985 CanLII 3483 (ON CA), 7 OAC 46, [1985] OJ No 2, *per* Morden JA, at para 14
2. *Koechlin v Waugh & Hamilton*, 1957 CanLII 359 (ON CA), [1957] OJ No 105, 118 CCC 24, *per* Laidlaw JA
3. *R v Evans*, 1991 CanLII 98 (SCC), [1991] 1 SCR 869, *per* McLachlin J, at para 35

   *R v SEV*, 2009 ABCA 108 (CanLII), 448 AR 351, *per curiam*, at paras 22, 23
4. *R v Latimer*, 1997 CanLII 405 (SCC), [1997] 1 SCR 217, *per* Lamer CJ, at para 31
   *R v Black*, 1989 CanLII 75 (SCC), [1989] 2 SCR 138, 50 CCC (3d) 1, *per* Wilson J, at para 24

### Purpose

One of the primary purposes of this right is "so that person may make an informed choice whether to exercise the right to counsel, and if so, to obtain sound advice based on an understanding of the extent of his or her jeopardy".[1] Accordingly, a person can only exercise his right to counsel under s. 10(b) in a meaningful way if he knows the extent of his jeopardy.[2]

The purpose of s. 10(a) is to allow the detainee to immediately undertake his defence, including whether to respond to any accusations.[3]

1. *R v Borden*, 1994 CanLII 63 (SCC), [1994] 3 SCR 145, *per* Iacobucci J, at p. 419
2. *R v SEV*, 2009 ABCA 108 (CanLII), 448 AR 351, *per curiam*, at para 22
   *R v Black*, 1989 CanLII 75 (SCC), [1989] 2 SCR 138, 50 CCC (3d) 1, *per* Wilson J, at para 24
3. *R v Evans*, 1991 CanLII 98 (SCC), [1991] 1 SCR 869, *per* McLachlin J, at para 2

### Sufficiency of Information

The primary point of inquiry is whether the accused can reasonably be supposed to have understood the reason or basis for the investigation.[1]

There is no obligation to provide "precise or technical language" as long as the officer provided clear notice that "conveys the substance of the reason(s) for the detention".[2]

Failure to inform the accused that he is "arrested" and charged with a specific offence may not be fatal where the accused understood the basis for his apprehension and the extent of his jeopardy.[3]

To understand the extent of jeopardy it is not necessary to be aware of the precise charge face or the full extent of the details of the case.[4]

It is not necessary to always inform the accused of the circumstances of the offence. In a murder case it is not necessary to reveal the victim's identity.[5]

1. *R v Evans*, 1991 CanLII 98 (SCC), [1991] 1 SCR 869, *per* McLachlin J, at para 35
   *R v Carrier*, 2008 ABCA 134 (CanLII), 429 AR 107, *per* Hunt JA, at para 7
   *R v Lund*, 2008 ABCA 373 (CanLII), 440 AR 362, *per* Paperny JA, at paras 11 and 16 ("The inquiry must be whether, substantively, the accused can reasonably be supposed to have understood the basis for the investigation. ")
2. *R v Richards*, 2016 ONSC 3556 (CanLII), *per* Hill J, at para 29
   *R v Mann*, 2004 SCC 52 (CanLII), [2004] 3 SCR 59, *per* Iacobucci J, at para 21
   *Evans*, *supra*, at para 35
   *R v Nguyen*, 2008 ONCA 49 (CanLII), 231 CCC (3d) 541, *per curiam*, at paras 16 to 20
3. *R v Latimer*, 1997 CanLII 405 (SCC), [1997] 1 SCR 217, 112 CCC (3d) 193, *per* Lamer CJ, at para 31
4. *R v Smith*, 1991 CanLII 91 (SCC), [1991] 1 SCR 714, 63 CCC (3d) 313, *per* McLachlin J, at para 28
5. *R v Jackson*, 2005 ABCA 430 (CanLII), 204 CCC (3d) 127, *per curiam*

### Promptly

This duty must be done "promptly".[1] What amounts to being promptly will turn on the specifics of the case.[2]

1. In *R v Borden*, 1994 CanLII 63 (SCC), 92 CCC (3d) 404, *per* Iacobucci J
2. *R v Eatman* (1982) 45 NBR (2d) 163 (NBQB)(*no CanLII links) at 165

### Change in Circumstances

Any change in jeopardy may require a further caution and right to counsel. It must be a change that is discrete and fundamental to the purpose of the investigation. This includes new offences or more serious offences.[1]

The change in jeopardy does not include new evidence coming to light of the original offence being investigated.[2]

1. *R v Black*, 1989 CanLII 75 (SCC), [1989] 2 SCR 138, *per* Wilson J, at para 25
   *R v Evans*, 1991 CanLII 98 (SCC), [1991] 1 SCR 869, *per* McLachlin J, at para 48
2. *R v SEV*, 2009 ABCA 108 (CanLII), 448 AR 351, *per curiam*, at para 27

### Specific Circumstances

In an impaired driving investigation, a suspect who is asked to attend the officer's vehicle for a screening test must first be advised of the reasons.[1]

There is some suggestion that a general warrant could permit police not to inform the detainee of the complete reason for detention.[2]

1. *R v Anderson*, 2010 SKQB 70 (CanLII), 347 Sask R 283, *per* McIntyre J, at para 36
2. *R v Whipple*, 2016 ABCA 232 (CanLII), 39 Alta LR (6th) 1, *per curiam*

## Right to be Informed of Charges

- Right to be Informed of Charges

## See Also

- Right to Counsel

# Right to Counsel

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79568)

< Procedure and Practice < Arrest and Detention < Right to Counsel on Detention or Arrest

## General Principles

Upon arrest or detention, an accused has a constitutional right to counsel under s. 10(b) of the Charter.

> 10. Everyone has the right on arrest or detention...
>
> b) to retain and instruct counsel without delay and to be informed of that right; ...
>
> – CCRF

Section 10(b) is engaged any time where an individual is "deprived of liberty and in control of the state", consequently are "vulnerable to the exercise of its power and in a position of legal jeopardy". This right attempts to "mitigate this legal disadvantage" and promote "principles of adjudicative fairness".[1]

#### Obligations Imposed by Right

Section 10(b), when invoked, imposes several obligations:[2]

1. the officer must inform the detainee of his right to instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel;
2. if the detainee has indicated a desire to exercise this right, the officer must provide the detainee with a reasonable opportunity to exercise that right, except in urgent and dangerous circumstances;
3. the officer must refrain from eliciting evidence from the detainee until he has had that reasonable opportunity to contact counsel, except in urgent and dangerous circumstances.

The first two obligations are known as the informational component and implementation component.[3] These components impose a duty on the detaining or arresting officer to inform the accused that they have the right to counsel and to ensure that they have the opportunity to exercise the right.

#### Onus or Burden

The onus is upon the accused to establish the right s. 10(b) Charter rights were violated. This includes the burden to show that the detainee acted diligently.[4]

Where the detainee has invoked the right to counsel, the Crown has the onus of establishing that the detainee was provided with a reasonable opportunity to exercise that right.[5]

#### Purpose

The purpose of the right to counsel is to permit a detainee "to be informed of his rights and obligations" and "to obtain advice as to how to exercise those rights".[6] It is intended to "ensure a level legal terrain for the detainee".[7]

It is also to assist the detainee to determine whether to cooperate or not.[8] For this reason there should only be access to counsel once.[9]

#### No Right to Counsel to be Present at Interview

The right to counsel does not include the right to have counsel to be present in the room while being subject to questioning. This does not prohibit the police from consenting to counsel being present, if requested.[10]

1. *R v Willier*, 2010 SCC 37 (CanLII), [2010] 2 SCR 429, *per* McLachlin CJ and Charron J, at para 28
   *R v Clarkson*, 1986 CanLII 61 (SCC), [1986] 1 SCR 383, *per* Wilson J
   *R v Brydges*, 1990 CanLII 123 (SCC), [1990] 1 SCR 190, *per* Lamer J
2. *R v Prosper*, 1994 CanLII 65 (SCC), [1994] 3 SCR 236, *per* Lamer CJ, at para 34
   *R v Bartle*, 1994 CanLII 64 (SCC), [1994] 3 SCR 173, *per* Lamer CJ, at para 17
   *R v MacLean*, 2013 ABQB 60 (CanLII), 551 AR 274, *per* Ouellette J summarizing, at para 18
3. *R v Luong*, 2000 ABCA 301 (CanLII), 149 CCC (3d) 571, *per* Berger JA (3:0), at para 12
4. *Luong*, *ibid.*, at para 12
   *R v Willier*, 2010 SCC 37 (CanLII), [2010] 2 SCR 429, *per* McLachlin CJ and Charron J (the onus is on applicant to show access to counsel did not correct "power imbalance")
5. *Luong*, *supra*, at para 12
6. *R v Manninen*, 1987 CanLII 67 (SCC), [1987] 1 SCR 1233, *per* Lamer J, at pp. 1242 to 43
   *Brydges*, *supra*
7. *R v Briscoe*, 2015 ABCA 2 (CanLII), 593 AR 102, *per* Watson JA, at para 47
8. *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, *per* McLachlin CJ and Charron J
9. *Sinclair*, *ibid.*
10. *Sinclair*, *ibid.*

## Exceptions to Right to Counsel

Section 254(2) provides a statutory exemption to the right to counsel where an officer forms grounds to believe a conveyance offence has been committed.[1]

The advent of cellphones and 24 hour duty counsel does not render the suspension of the right to counsel under s. 254(2) unreasonable.[2]

1. see *R v Thomsen*, 1988 CanLII 73 (SCC), [1988] 1 SCR 640, *per* Le Dain J
2. *R v Jaycox*, 2012 BCCA 365 (CanLII), *per* Hinkson JA

## Effect of Right Once Engaged

The police must inform the detainee of their right to counsel without delay and the availability of legal aid and duty counsel.[1] The police must advise the detainee "of whatever system for free and immediate, preliminary legal advice exists in the jurisdiction at the time of detention and of how such advice can be accessed".[2]

#### Request for Counsel

If the detainee wishes to access counsel, the police must provide a reasonable opportunity to exercise that right and stop from taking any statements. [3]

The detained person must be reasonably diligent in exercising their right. [4]

The detainee or accused does not need to "make an express request to use the telephone"[5]

It is suggested that in "most cases" where the detainee invokes their 10(b) rights, a caution followed by an opportunity to consult counsel will be sufficient.[6]

#### Obligation to Cease Questioning

Police must cease questioning while under the obligation to facilitate access to counsel unless in the case of urgency.[7]

After the right has been invoked, police cannot include as part of any of their rights recitation the question: "Do you wish to say anything?".[8]

#### No Obligation for Police to Disclose Evidence to Counsel or Detainee

The right does not extend to guaranteeing a "right of the detainee to appreciate the evidential situation when he intersects with the police."[9]

#### Answers to Non-Charter-Compliant Questions

Answering questions that are asked in violation of s. 10(b) cannot be held to be a waiver of those rights.[10]

#### Process of Analysis

The judge must first determine whether, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel.[11]

1. *R v Brydges*, 1990 CanLII 123 (SCC), [1990] 1 SCR 190, *per* Lamer J
2. *R v Pozniak*, 1994 CanLII 66 (SCC), [1994] 3 SCR 310, *per* Lamer CJ
3. *R v Manninen*, 1987 CanLII 67 (SCC), [1987] 1 SCR 1233, *per* Lamer J
4. *R v Basko*, 2007 SKCA 111 (CanLII), 226 CCC (3d) 425, *per* Wilkinson JA, at para 21
5. *Manninen*, *supra*
6. *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, *per* McLachlin CJ and Charron J, at para 2
7. *Manninen*, *supra*
8. *R v GTD*, 2017 ABCA 274 (CanLII), 355 CCC (3d) 431, *per curiam* (2:1) aff'd at 2018 SCC 7 (CanLII), *per* Brown J
9. *Briscoe*, *supra*, at para 48
10. *Manninen*, *supra*
11. *R v Luong*, 2000 ABCA 301 (CanLII), 149 CCC (3d) 571, *per* Berger JA, at para 12

### Without Delay

As soon as the right is properly asserted, the police have an obligation to assist the detainee in exercising that right without delay.[1] The police must also cease questioning or otherwise attempting to elicit evidence until the detainee has been given a reasonable opportunity to retain and instruct counsel.[2] The only exception to this is where there has been a clear waiver.[3]

Where the arresting officer is in the process of executing a search warrant, they are not permitted to use that as an excuse to delay access that would otherwise be immediate.[4]

The police are obliged to comply with s. 10(b) "immediately" subject to officer safety or other necessary limitations justifiable under s. 1 of the Charter.[5]

1. *R v Manninen*, 1987 CanLII 67 (SCC), [1987] 1 SCR 1233, *per* Lamer J, at para 22
2. *R v Burlingham*, 1995 CanLII 88 (SCC), [1995] 2 SCR 206, *per* Iacobucci J, at para 13
   *Manninen*, *supra*, at para 23
3. *Manninen*, *supra*, at para 23
4. e.g. *R v Do*, 2019 ONCA 482 (CanLII), OJ No 3018
5. *R v Suberu*, 2009 SCC 33 (CanLII), [2009] 2 SCR 460, *per* McLachlin CJ and Charron J, at paras 2, 37, 39, 41 to 42

## Requirements of Caution Without Detention or Arrest

Anytime where a peace officer is interviewing a person for whom "there are reasonable grounds to suspect that the person ... has committed an offence", the officer should caution them.[1]

The basis of suspicion must be based on more than "mere speculation...or...even...reliable information that may warrant further inquiry".[2] The threshold exists where the officer has information "that would alert any reasonably competent investigator to the realistic prospect" that any utterance may implicate the witness in an unlawful act.[3]

Determination of whether the person is a witness, a person of interest, or a suspect depends on the "totality of the facts" and not simply the subjective belief of the officer.[4]

1. *R v Singh*, 2007 SCC 48 (CanLII), [2007] 3 SCR 405, *per* Charron J, at para 32
2. *R v AD*, [2003] OJ No 4901 (SCJ)(*no CanLII links) , at para 75
   *R v Chui*, 2015 ONSC 552 (CanLII), OJ No 382, *per* Clark J
3. *R v Hutt*, 2013 ONSC 2267 (CanLII), *per* Watt J, at paras 10 to 11
   *R v Worral*, [2002] OJ No 2711(*no CanLII links) , *per* Dambrot J
4. *R v Teng*, 2017 ONSC 567 (CanLII), *per* MacDonnell J
   *R v Hoyeck*, 2018 NSSC 59 (CanLII), *per* Chipman J, at para 47

## Informational Component

- Informational Component to Right to Counsel

## Implementation Component

- Implementation Component to Right to Counsel

- Right to Choice of Counsel
- Right to Additional Opportunities to Consult with Counsel

## Post-Fulfillment

Once the right to speak with counsel has been fulfilled, the officer need not cease the interview simply because the accused does not want to speak with them.[1]

Once the obligations have been fulfilled the police may undertake questioning at will and do not need to stop by further requests for a chance to speak with a lawyer.[2] However, if counsel is on the way, they must wait for counsel to arrive.[3]

The police do not need to cease a lawful search while the accused seeks counsel.[4]

Once the suspect has been given access to counsel, the police may interview him *even after* he has been remanded under a detention order without any need to provide him with counsel again.[5]

The exercise of the right to silence in response to any question, unless justified another rule of evidence, cannot be admitted against the accused for any purpose.[6]

1. *R v Baidwan*, 2001 BCSC 1889 (CanLII), *per* Holmes J
   *R v Singh*, 2007 SCC 48 (CanLII), [2007] 3 SCR 405, *per* Charron J
   *R v Bohnet*, 2003 ABCA 207 (CanLII), 111 CRR (2d) 131, *per* Hunt JA
   *R v Gormley*, 1999 CanLII 4160 (PE SCAD), 140 CCC (3d) 110, *per* Carruthers CJ
   *R v Reddick* (1987), 77 NSR (2d) 439 (NSCA)(*no CanLII links)
2. *R v Wood*, 1994 CanLII 3976 (NS CA), 94 CCC (3d) 193, *per* Chipman JA
3. *R v Howard*, 1983 CanLII 3507 (ON CA), 3 CCC (3d) 399, *per* Howland CJ
4. *R v Borden*, 1994 CanLII 63 (SCC), [1994] 3 SCR 145, *per* Iacobucci J
5. *R v Bhander*, 2012 BCCA 441 (CanLII), 292 CCC (3d) 545, *per* Saunders JA
   cf. *R v Precourt*, 1976 CanLII 692 (ON CA), 39 CCC (2d) 311, *per* Martin JA (1976), 39 CCC (2d) 311 (Ont. C.A.)
6. *R v Chambers*, 1990 CanLII 47 (SCC), [1990] 2 SCR 1293, *per* Cory J

### Additional Access to Counsel

- Right to Additional Opportunities to Consult with Counsel

## Waiver of Right to Counsel

The onus is on the Crown to prove that there was a valid waiver of Charter rights.[1]

A line of cases suggests that answers along the line of “no, not right now” is a equivocal answer due to its ambiguity of interpretation.[2]

Answers such as “what will they do for me?” was equivocal and so was not sufficient.[3] Other equivocal answers include:

- "no, what for?"[4]
- "I don't have a lawyer, it's just a waste of time, I'm fine to drive" [5]

However, several answers have been found to be unequivocal and so amount to a waiver:

- “No, I have no use to call one”[6]
- “No, I’ll talk to one tomorrow”[7]

In response to a comment such as “not right now”, if the officer explains how to engage the right at a later point--such as stating, “if you change your mind at any time tonight during this whole process”--then the waiver will be considered valid.[8]

Wording such as “no, I don’t think so” will often turn on the wording used, including whether it was confidently said, quickly said, or subjectively showed some doubt to the officer.[9]

#### Waiver Applies Only to Relevant Subjects

Where a suspect agrees to speak to the police after being notified of their rights, this only permits the police to question concerning the relevant investigation. It does not presume the accused waived rights in relation to unrelated criminal activity.[10]

1. *R v Luong*, 2000 ABCA 301 (CanLII), 149 CCC (3d) 571, *per* Berger JA, at para 12
2. e.g. *R v Jackman*, 2008 ABPC 201 (CanLII), 174 CRR (2d) 224, *per* Anderson J
   *R v Turcott*, 2008 ABPC 16 (CanLII), 172 CRR (2d) 52, *per* Bascom J
   *R v Bruno*, 2009 ABPC 232 (CanLII), *per* Henderson J
3. *R v Shaw*, 2001 ABPC 84 (CanLII), 288 AR 87, *per* Lefever J
4. *R v Wycislak*, 2011 BCPC 175 (CanLII), *per* Pendleton J
5. *R v Watt*, 2009 MBQB 297 (CanLII), 249 Man R (2d) 3, *per* McKelvey J
6. *R v Moore*, 2007 ABQB 638 (CanLII), 435 AR 342, *per* Greckol J
7. *R v Mwangi*, 2010 ABPC 243 (CanLII), AJ No 896, *per* Henderson J - court said it was unequivocal because there was only one interpretation of wording
8. *R v MacGregor*, 2012 NSCA 18 (CanLII), 289 CCC (3d) 512, *per* Bryson JA, at para 31
   *R v Seehra*, 2009 BCPC 194 (CanLII), *per* Gulbransen J
9. e.g. *R v Korn*, 2012 ABPC 20 (CanLII), *per* Henderson J, at para 46
10. *R v Young*, 1992 CanLII 7607 (ON CA), 73 CCC (3d) 289, *per* Finlayson JA leave refused (1993), 78 CCC (3d) vi

### Prosper Warning

Where an accused is detained and asserts the right to counsel in a diligent manner and then changes their mind, the police must administer a "Prosper Warning". This warning requires the officer to tell the detainee that he still has a right to a reasonable opportunity to contact a lawyer, and that during this time the police cannot take any statements until he had had a reasonable opportunity to contact a lawyer.[1] If the officer fails to give the Prosper warning, there will be a Charter violation.

1. *R v Prosper*, 1994 CanLII 65 (SCC), [1994] 3 SCR 236, *per* Lamer CJ, at pp. 378-79

## Special Issues in Right to Counsel

- Special Issues with Right to Counsel

## Consequences of Finding a Charter Breach

- Exclusion of Evidence Under Section 24(2) of the Charter

## See Also

- Right to Counsel (Cases)
- Charter Applications
- Representation at Trial

# Informational Component to Right to Counsel

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< Procedure and Practice < Arrest and Detention < Right to Counsel

## General Principles

The informational duty component to the right to counsel requires the peace officer to inform the detainee of his right to retain and instruct counsel without delay. This includes clear and unambiguous information that conveys that:

- access to counsel is immediate
- access to counsel will be facilitated by police
- access to counsel is free if they do not have a lawyer of choice

### Purpose of Informational Component

The right to counsel can only be properly realized where the accused is given an opportunity to fully understand the jeopardy that they are in and appreciate the consequences of the decision to speak to counsel. Thus, they must be informed of the offence as part of the informational component.[1]

### Burden of Proof

Absent proof of circumstances showing that the accused did not understand his right to counsel when he was informed of it, then the onus is on the detainee to prove that he was denied an opportunity to ask for counsel at the time of detention.[2]

The language used should be clear to discharge the informational obligation to the right. Wording that has multiple reasonable interpretations, not all of which comply with the obligation, may result in a breach.[3]

### Notice of Availability of Legal Aid

The police must inform the detainee of the availability of duty counsel and legal aid.[4] The police must provide details on accessing 24 hours duty counsel phone by giving a toll-free number to call.[5] The failure to provide a specific telephone number to Legal Aid is fatal to the fulfillment of the right.[6]

### No Obligation to Ensure Comprehension

The police are under no positive duty to ensure that the detainee understands all what their rights under s. 10(b) entail.[7] Unless shown otherwise, it is presumed that a properly spoken notice to the detainee is understood.[8] Only if there are "special circumstances" such as "language difficulties or a known or obvious mental disability" does the officer need to do anything more.[9]

Where the detainee "positively indicates a failure to understand" their rights, determination of the information duty of the right to counsel may be complicated.[10] When such an indication exists "police cannot rely on a mechanical recitation of those rights". Instead, the officer "must make a reasonable effort to explain those rights to the detainee".[11]

### Choice of Counsel

There is a right to an opportunity to contact counsel of choice.[12]

If the accused asks for a specific lawyer but that lawyer is not available, then they are expected to choose someone else.

### Consequence of Invoking the Right

The police have an obligation to hold off from questioning while the accused is given reasonable opportunity to contact a lawyer.[13]

1. *R v Black*, 1989 CanLII 75 (SCC), [1989] 2 SCR 138, *per* Wilson J
   *R v O'Donnell*, 1991 CanLII 2695 (NB CA), 66 CCC (3d) 56, *per* Angers JA
2. *R v Baig*, 1987 CanLII 40 (SCC), 37 CCC (3d) 181, *per curiam*
3. e.g. *R v Chisholm*, 2001 NSCA 32 (CanLII), 42 CR (5th) 121, *per* Saunders JA
4. *R v Brydges*, 1990 CanLII 123 (SCC), [1990] 1 SCR 190, *per* Lamer J
   *R v Luong*, 2000 ABCA 31 (CanLII), 250 AR 264, *per curiam*
5. *R v Bartle*, 1994 CanLII 64 (SCC), [1994] 3 SCR 173, *per* Lamer CJ
   *R v Pozniak*, 1994 CanLII 66 (SCC), [1994] 3 SCR 310, *per* Lamer CJ
   *R v Cobham*, 1994 CanLII 69 (SCC), [1994] 3 SCR 360, *per* Lamer CJ
   *R v Matheson*, 1994 CanLII 67 (SCC), [1994] 3 SCR 328, *per* Lamer CJ
6. *R v Deabreu*, 1994 CanLII 1186 (ON CA), *per curiam*
7. *R v Culotta*, 2018 ONCA 665 (CanLII), 364 CCC (3d) 191, *per* Nordheimer JA, at para 38 ("police do not have a duty to positively ensure that a detainee understands what the rights under s. 10(b) entail. Officers are only required to communicate those rights to the detainee.") upheld at 2018 SCC 57 (CanLII), *per* Moldaver J
8. *R v Anderson*, 1984 CanLII 2197 (ON CA), 10 CCC (3d) 417, *per* Tarnopolsky JA
   *R v Reyat*, 1993 CanLII 2312 (BC CA), 80 CCC (3d) 210, *per* McEachern CJ
9. *Culotta*, *ibid.*, at para 38
   *Bartle*, *supra*, at p. 193 (“absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution”)
   See also *R v Baig*, 1987 CanLII 40 (SCC), [1987] 2 SCR 537, *per curiam*, at p. 540
   *R v Evans*, 1991 CanLII 98 (SCC), [1991] 1 SCR 869, *per* McLachlin J, at p. 891
   *R v Feeney*, 1997 CanLII 342 (SCC), [1997] 2 SCR 13, *per* L’Heureux-Dubé (dissenting), at paras 108 to 109
   *R v Willier*, 2010 SCC 37 (CanLII), [2010] 2 SCR 429, *per* McLachlin CJ and Charron J, at para 31
10. *Culotta*, *supra*, at para 29 ("Satisfaction of the informational duty may be complicated in certain cases where the detainee positively indicates a failure to understand his or her rights to counsel")
11. *Culotta*, *supra*, at para 29 *Evans*, *supra*, at p. 892
12. *R v Kowalchuk*, 1999 CanLII 12437 (SK QB), 67 CRR (2d) 307, *per* Matheson J
    *R v Keagan*, 2003 NLSCTD 48 (CanLII), 106 CRR (2d) 54, *per* Fowler J
    Template:CAnLIIRP, *per* Cote JA
    *R v Nelson*, 1991 CanLII 1446 (BC CA), *per* MacFarlane JA
    *R v Tremblay*, 1987 CanLII 28 (SCC), [1987] 2 SCR 435, *per* Lamer J
    *R v Playford*, 1987 CanLII 125 (ON CA), 40 CCC (3d) 142, *per* Goodman JA
13. *R v Cutknife*, 2000 ABQB 641 (CanLII), 272 AR 172, *per* Marceau J
    *R v Russell*, 2000 NBCA 53 (CanLII), 150 CCC (3d) 243, *per* Deschênes JA

**Secondary Caution**

## When Detainee Changes Their Mind (Prosper Warning)

If a detainee initially expresses a desire to access counsel and then changes their mind after being "diligent but unsuccessful", the police have an obligation to to "inform the detainee of his or her right to a reasonable opportunity to contact counsel".[1] The police also have an obligation to hold off on questioning until after they have informed the detainee of this additional right.[2]

The purpose behind the warning is to ensure the detainee is properly informed that they are giving up they waive their right to counsel.[3]

1. *R v Willier*, 2010 SCC 37 (CanLII), [2010] 2 SCR 429, *per* McLachlin CJ and Charron J ("[W]hen a detainee, diligent but unsuccessful in contacting counsel, changes his or her mind and decides not to pursue contact with a lawyer, s. 10(b) mandates that the police explicitly inform the detainee of his or her right to a reasonable opportunity to contact counsel and of the police obligation to hold off in their questioning until then.")
   *R v Fountain*, 2017 ONCA 596 (CanLII), 136 OR (3d) 625, at para 27 ("It is needed only if a detainee has asserted the right [to counsel] and then apparently change[s] his mind after reasonable efforts to contact counsel have been frustrated:" [*quotation marks removed*])
2. *Prosper*, *ibid.*
3. *Fountain*, *supra*, at para 27 ("The “Prosper warning” is meant to equip detainees with the information required to know what they are giving up if they waive their right to counsel.")

## Other Consequences

Police are not obliged to notify the detainee that the access to counsel will occur at the police station.[1]

The instructions asking whether they want to speak to counsel "now" does not oblige on-site access to counsel.[2]

It does not necessarily result in a breach if the officer fails to re-advise the detainee of the right to counsel once they are at the station. However, it is generally preferable that officers do so.[3]

1. *R v Devries*, 2009 ONCA 477 (CanLII), 244 CCC (3d) 354, *per* Doherty JA
2. *Devries*, *ibid.*
3. *Devries*, *ibid.*

## Procedure

Typically, the officer will read from a script such as this:

> I am arresting you for [name of offence(s)].
>
> You have the right to retain and instruct counsel without delay. You also have the right to free and immediate legal advice from duty

> counsel by making free telephone calls to [toll-free phone number(s)] during business hours and [toll-free phone number(s)] during non-business hours.
>
> Do you understand?
>
> Do you wish to call a lawyer?
>
> You also have the right to apply for legal assistance through the provincial legal aid program.
>
> Do you understand?
>
> – N/A

## See Also

- Implementation Component to Right to Counsel

# Implementation Component to Right to Counsel

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< Procedure and Practice < Arrest and Detention < Right to Counsel

## General Principles

The implementation component is engaged once the detainee indicates a desire to exercise the right to counsel.[1]

The implementation component involves two aspects: [2]

1. the officer must provide the detainee with reasonable opportunity to exercise the right to retain counsel without delay except in urgent or dangerous circumstances.[3]
2. refrain from attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel except in urgent or dangerous circumstances.[4]

Consideration of the elements of the implementation component, particularly the "reasonableness", requires the court to consider the "totality of circumstances".[5] There should be no clear line drawn between "reasonable opportunity" and "reasonable diligence".[6]

If the implementational component was not satisfied then there is a breach of the Charter right.[7]

The right to counsel does not include a right to use of a specific phone that is available. It also does not impose an obligation upon police to give access to their own cell phones or those of others in order to facilitate access to counsel.[8]

#### Application of Implementation Component

The implementation component does not arise until there is an expressed desire to exercise those rights.[9]

Once the accused has been informed of his rights, he has an obligation to pursue them. [10]

Engagement of the right does not require the detainee to specifically ask for access to a phone.[11]

The right to be informed of the right to counsel does not go so far as to guarantee the appreciation of all the information given.[12]

#### Burden of Proof

The burden is upon the accused to establish on a balance of probabilities that the accused was denied his right to counsel.[13] However, where the Crown is relying upon waiver of the right, it is the Crown's burden to prove such waiver.[14]

#### Form of Access to Counsel

The accused is not entitled to counsel to be present in person during an interrogation.[15]

There is nothing preventing the accused from having counsel present with the consent of the police.[16]

#### Choice of Counsel

The right to counsel includes the right to *counsel of choice* and that the counsel represents the accused throughout. This right is limited to counsel who are competent to undertake the retainer; willing to act; available to represent the accused within a reasonable time; and free of any conflicts.[17]

If the chosen lawyer is not available within a reasonable amount of time, the detainee is expected to call another lawyer or else the police duty to hold off questioning.[18] What amount to reasonable time depends on the circumstances.[19]

#### Mental State of Detainee

The detainee must possess an operating mind for the right to be properly exercised.[20]

#### Physical State of Detainee

Where an accused is brought to hospital due to injuries and detained by police, they still have an obligation to provide access to counsel.[21] The burden is upon the police to prove that there are any "logical or medical barriers" to get the accused in contact with a lawyer.[22]

The police should in all cases make inquiries into the ability of the hospital to facilitate access and the accused health to satisfy himself whether there are barriers to access.[23]

1. *R v Luong*, 2000 ABCA 301 (CanLII), 149 CCC (3d) 571, *per* Berger JA, at para 12
2. *R v Ross*, 1989 CanLII 134 (SCC), [1989] 1 SCR 3, *per* Lamer J
3. *R v Bartle*, 1994 CanLII 64 (SCC), 92 CCC (3d) 289, *per* Lamer CJ at 301
4. *Bartle*, *supra*, at p. 301
5. *R v Brown*, 2009 NBCA 27 (CanLII), 889 APR 1, *per* Richard JA , at para 23
6. *Brown*, *ibid.*
7. *Luong*, *supra*, at para 12
8. *R v Taylor*, 2014 SCC 50 (CanLII), [2014] 2 SCR 495, *per* Abella J
9. *R v Baig*, 1987 CanLII 40 (SCC), [1987] 2 SCR 537, *per curiam*, at para 6
   *Bartle*, *supra*, at pp. 151-192
10. *R v Tremblay*, 1987 CanLII 28 (SCC), [1987] 2 SCR 435, *per* Lamer J
    *R v McCrimmon*, 2010 SCC 36 (CanLII), [2010] 2 SCR 402, *per* McLachlin CJ and Charron J, at para 18
    *R v Willier*, 2010 SCC 37 (CanLII), [2010] 2 SCR 429, *per* McLachlin CJ and Charron J, at para 33
11. *R v Manninen*, 1987 CanLII 67 (SCC), [1987] 1 SCR 1233, *per* Lamer J
12. *R v Kennedy*, 1995 CanLII 9863 (NL CA), [1995] NJ No 340, 135 Nfld. & PEIR 271 (Nfld. C.A.), *per* Marshall JA at 28 to 31
13. *R v Baig*, 1987 CanLII 40 (SCC), [1987] 2 SCR 537, *per curiam*
14. *R v Prosper*, 1994 CanLII 65 (SCC), [1994] 3 SCR 236, *per* Lamer CJ
15. *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, *per* MacLachlin CJ and Charron J
    *McCrimmon*, *supra*
16. *Sinclair*, *supra*
17. *R v McCallen*, 1999 CanLII 3685 (ON CA), 131 CCC 518, *per* C'Connor JA
18. *Willier*, *supra*
    *R v LeClair*, 1989 CanLII 134 (SCC), [1989] 1 SCR 3, *per* Lamer J
19. *R v Whitford*, 1997 ABCA 85 (CanLII), (1997) 196 AR 97 (CA), *per* Berger JA
20. *R v Whittle*, 1994 CanLII 55 (SCC), [1994] 2 SCR 914, *per* Sopinka J
21. *R v Taylor*, 2014 SCC 50 (CanLII), [2014] 2 SCR 495, *per* Abella J
22. *Taylor*, *ibid.*
23. *Taylor*, *ibid.*

## Duty to Holding Off on Questioning

Once the detainee indicates they wish to speak to counsel, the police have an obligation to cease all question until access to counsel has been facilitated.[1]

The obligation to hold off on questioning does not include questions that are not "about the offence", "to gather evidence", or for "investigative purpose[s]". [2] Questions that are to "assist the accused to exercise his rights, preserve his property, provide care for his family, or protect his health and safety or the health and safety of others" are valid at any time.[3]

A proactive request for counsel before the completion of the informational script may police to change their script to not include anything that may seek to elicit evidence, such as the question “do you wish to say anything?”[4]

1. *R v Manninen*, 1983 CanLII 1726 (ON CA), 37 CR (3d) 162 aff'd [1987] 1 SCR 1233, 1987 CanLII 67 (SCC), *per* Lamer J
   R v Prosper 1994 CanLII 65 (SCC), [1994] 3 S.C.R. 236, at p. 269 (SCR)(*complete citation pending*)
2. *R v Sinclair*, 2003 BCSC 2040 (CanLII), [2003] BCJ No 3258, *per* Powers J, aff'd 2008 BCCA 127 (CanLII), 169 CRR (2d) 232, *per* Frankel JA, aff'd 2010 SCC 35 (CanLII), 259 CCC (3d) 443, *per* McLachlin CJ and Charron J
   *R v Dupe*, 2010 ONSC 6594 (CanLII), OJ No 5757, *per* Dambrot J, at para 24 (must hold off on "questioning intended to elicit evidence, sometimes referred to as investigative questioning")
3. *Dupe*, *ibid.*, at para 24
4. *R v GTD*, 2018 SCC 7 (CanLII), [2018] 1 SCR 220 per Brown J at para 2

## Reasonable Opportunity to Access Counsel

The police must give the accused a reasonable opportunity to contact counsel on arrest in order to foster fair his fair treatment.[1]

The police obligation does not extend to arranging for lawyers to be available for free advice at any time or place.[2]

#### Failed Attempts to Contact Counsel

Where the accused fails to reach the lawyer of choice, leaves a voicemail and expects to get a call back but does not tell the officer, and then refuses other counsel, he cannot claim that he was not given reasonable access to counsel.[3]

Facilitating a single failed attempt to call counsel of choice of an accused may or may not be sufficient.[4]

#### Satisfaction of Accused

Where an accused accesses the phone to speak to counsel and then afterwards states that he will not answer questions until he speaks with legal aid, the officer must make inquiry into whether they were satisfied with their advice or else they will be required to give access to counsel again.[5]

#### Urgency or Danger

A reasonable opportunity is not needed in circumstances where there is urgency or danger.[6]

The expiry of the two-hour evidentiary presumption under s. 258(1)(c)(ii) is not by itself an urgency to cancel the right to counsel.[7]

**Facilitating Internet Access**

There has been some suggestion that the access right should include the ability to access the internet to find a lawyer.[8]

1. *R v Brydges*, 1990 CanLII 123 (SCC), 53 CCC (3d) 330, *per* Lamer J
2. *R v Cobham* (1993), 80 CCC (3d) 449(*no CanLII links) reversed on other grounds at 1994 CanLII 69 (SCC), [1994] 3 SCR 360
3. *R v Top*, 1989 ABCA 98 (CanLII), 48 CCC (3d) 493, *per* Cote JA
4. *R v Richfield*, 2003 CanLII 52164 (ON CA), [2003] OJ No 3230, *per* Weiler JA, at paras 11 to 12 - left voice mail with counsel of choice, waited an hour. Refused to accept duty counsel. Police found diligent. cf. *R v Millar*, 2008 ONCJ 685 (CanLII), *per* Reinhardt J, at paras 23 to 24 - single phone call insufficient
5. *R v Whitford*, 1997 ABCA 85 (CanLII), 115 CCC (3d) 52, *per* Berger JA
6. *R v Bartle*, 1994 CanLII 64 (SCC), [1994] 3 SCR 173, *per* Lamer CJ
   *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, *per* McLachlin CJ ("The existence of exigent or urgent circumstances that militate against any delay in the interrogation")
   *R v Taylor*, 2014 SCC 50 (CanLII), [2014] 2 SCR 495, *per* Abella J, at para 31 ("a police officer's implementational duties under s. 10(b) are necessarily limited in urgent or dangerous circumstances")
7. *R v Prosper*, 1994 CanLII 65 (SCC), [1994] 3 SCR 236
8. *R v McKay*, 2013 ABPC 13 (CanLII), *per* Lamoureux J

## Contacting a Non-Lawyers/Third Parties

Certain courts state there is no absolute right to an accused to contact family members such as wife, even if it were for the purpose of contacting a lawyer.[1] It is only where the accused informs the police that the purpose of the call is to assist in contacting a specific lawyer that the police should permit the phone call.[2] However, the phone call would not be private or privileged.[3]

There is also no violation for refusing an unexplained request to contact a friend in the police force.[4]

Police should generally allow the detainee to contact a third-party such as spouse, parent, neighbour, friend, etc., if it is for the purpose of facilitating contact with legal counsel.[5]

The request to contact counsel through a third party must be reasonable.[6] A request will be unreasonable where it may compromise the investigation, such as where the 3rd party could be an accomplice of some sort or may assist in destroying evidence or intimidating witnesses.[7] It may also be unreasonable where the time to contact the third party is too long.[8]

However, an officer can be the intermediary in this contact and does not need to allow the accused to speak to the third-party directly, so long as the accused can properly exercise their right to contact counsel.

1. *R v KWJ*, 2012 NWTCA 3 (CanLII), 252 CRR (2d) 141, *per curiam* - no violation of 10(b) where police did not allow accused to contact wife during interrogation
   *R v Magalong*, 2013 BCCA 478 (CanLII), *per* Saunders JA, at para 33
   cf. *R v Hughes*, 2014 ABQB 166 (CanLII), 583 AR 192, *per* Bast J, at paras 6 to 8
2. *R v Crossman*, 1991 CanLII 471 (BC CA), *per* Lambert JA
   *R v Underhill*, 1992 CanLII 7709 (ONSC), , 10 OR (3d) 625
   *KWJ*, *supra*
3. *KWJ*, *supra*
4. *R v Webber*, 2002 BCCA 692 (CanLII), 180 BCAC 178, *per* Huddart JA (3:0)
5. *R v Menard*, 2010 BCSC 1416 (CanLII), 11 BCLR (5th) 162, *per* Ehrcke J
   *Tremblay*, *supra*
   *R v Kumarasamy*, [2002] OJ No 303 (SCJ)(*no CanLII links)
6. *Menard*, *supra* ("the request to contact a third party for assistance in retaining counsel must be a reasonable request")
7. *Menard*, *supra*
8. *Menard*, *supra*

## Diligence of the Detainee

The right to counsel is not an absolute right. The accused must be reasonably diligent to exercise it.[1] Where the accused is not diligent, the duties of the police are suspended.[2]

If the first part of the implementational duty is satisfied, the judge will only then consider whether the detainee has been reasonably diligent in exercising the right. The onus is on the accused to establish reasonable diligence.[3]

If the detainee failed to be reasonably diligent in exercising their right, the implementational duties do not arise or are suspended and so there cannot be a violation.[4]

1. *R v Bartle*, 1994 CanLII 64 (SCC), [1994] 3 SCR 173, *per* Lamer CJ
2. *R v Brydges*, 1990 CanLII 123 (SCC), [1990] 1 SCR 190, *per* Lamer J, at para 14
3. *R v Smith*, 1989 CanLII 27 (SCC), [1989] 2 SCR 368, 50 CCC (3d) 308 (SCC) at 315-16 and 323
4. *R v Tremblay*, 1987 CanLII 28 (SCC), 37 CCC (3d) 565, *per* Lamer J (7:0) at 568

   *R v Leclair*, 1989 CanLII 134 (SCC), 46 CCC (3d) 129 at 135
   , *per* Lamer J (4:2) *R v Black*, 1989 CanLII 75 (SCC), 50 CCC (3d) 1, *per* Wilson J (5:0) at 13
   *Smith*, *supra* at 314
   *Bartle*, *supra* at 301
   *R v Prosper*, 1994 CanLII 65 (SCC), [1994] 3 SCR 236, *per* Lamer CJ at 375-381 and 400-401 (cited to CCC)

## Choice of Counsel

## Police Comments to Detainee

The police have a right to try to persuade a person to speak to them.[1]

**Disparaging Counsel**

It is not permissible for a police officer to make inappropriate comments regarding defence counsel that attack their integrity.[2] Where police do so, it has the effect of nullifying the reliance the advice given. To rebut this nullification, it would be necessary to have the detainee be given a further opportunity to contact a lawyer.[3]

It is potentially inappropriate anytime police make "comments" on the legal advice given to detainees.[4]

Inappropriate attacks on the integrity of counsel consist of comments are those that are "repeated disparaging comments made about defence counsel's loyalty, commitment, availability, as well as the amount of his legal fees".[5]

Making comments about duty counsel such as "they are not the ones sitting in jail" or "they're the ones at home taking a phone call from you", may be sufficient to amount to disparagement of counsel contrary to s. 10(b).[6]

However, not all negative comments will amount to a breach of s. 10(b).[7]

Police should not attempt to say anything that may cause the accused to be "talked out" or otherwise persuaded not to call legal aid duty counsel.[8]

1. *R v Hebert*, 1990 CanLII 118 (SCC), (1990), *per* McLachlin J
   *R v Ekman*, 1999 CanLII 6732 (BC SC), *per* Stromberg-Stein J
2. *R v Burlingham*, 1995 CanLII 88 (SCC), [1995] 2 SCR 206, *per* Iacobucci J
   *R v McKinnon*, 2005 ABQB 303 (CanLII), 383 AR 147, *per* Sullivan J
   *R v Timmons*, 2002 NSSC 113 (CanLII), [2002] NSJ 209, *per* Edwards J
3. See *Burlingham*, *supra*
4. *R v Mujku*, 2011 ONCA 64 (CanLII), 278 CCC (3d) 299, *per curiam*, at para 36 ("the police tread on dangerous ground when they comment on the legal advice tendered to detainees.")
5. *Burlingham*, *supra*, at para 4
6. *R v Al-Adhami*, 2020 ONSC 6421 (CanLII), *per* Harris J
7. e.g. see *R v Mujku*, 2011 ONCA 64 (CanLII), 278 CCC (3d) 299, *per* MacPherson JA
8. *R v Balgobin*, 2011 ONCJ 108 (CanLII), *per* Libman J - officer stated it could take anywhere from 2 minutes to two hours for duty counsel to call back.

## Delay in Contacting Counsel

Urgent circumstances may warrant delay in facilitating access to counsel.[1]

The degree of delay permitted is a matter of context.[2]

The police wait of 10 minutes after a second failed attempt to contact counsel to conduct breath test breached s. 10(b) rights.[3]

#### Examples

Evidence obtained from a motorist's involvement in screening tests, without being given their right to counsel, should be excluded from evidence incriminating the driver. [4]

1. *R v Manninen*, 1987 CanLII 67 (SCC), [1987] 1 SCR 1233, *per* Lamer J, at para 22 ("...there may be circumstances in which it is particularly urgent that the police continue with an investigation before it is possible to facilitate a detainee's communication with counsel.")
2. *R v Smith*, 1986 CanLII 103 (MB CA), 25 CCC (3d) 361, *per* Huband JA
3. *R v Samatar*, 2011 ONCJ 520 (CanLII), *per* Knazan J
4. *R v Orbanski*, 2005 SCC 37 (CanLII), [2005] 2 SCR 3, *per* Charron J

## Privacy While in Contact with Lawyer

The right to counsel includes the corollary right to consult in private.[1] This means that at a "bare minimum" the detainee must be able to consult with counsel without the conversation being overheard and the detainee should not be required to request privacy for the purpose of making the phone call.[2]

A violation will exist where the accused reasonably believes that the police may be overhearing the conversation with counsel regardless of whether police are actually listening.[3]

There is no obligation on the part of the detainee to request privacy in making their phone call.[4]

The informational component of the right to counsel does not require the police to inform the detainee of the privacy right as it would be expected to be self-evident.[5] But if the detainee is exhibiting a belief that the call to counsel would not be private, the police have an obligation to inform the detainee of the right to privacy.[6]

1. *R v Young*, 1987 CanLII 108 (NB CA), , 81 NBR (2d) 233 (N.B. C.A.), *per* Stratton CJ
   *R v LePage*, 1986 CanLII 119 (NSCA), 32 CCC (3d) 171, *per* Jones JA
   *R v McKane*, 1987 CanLII 6794, , 35 CCC (3d) 481, *per* Martin JA
   *R v Playford*, 1987 CanLII 125 (ON CA), 40 CCC (3d) 142, *per* Goodman JA
   *R v O'Donnell*, 2004 NBCA 26 (CanLII), 185 CCC (3d) 367, *per* Robertson JA, at para 4 ("...the right to retain and instruct counsel, under s. 10(b) of the Charter, includes a corollary right to consult in private. Without the requisite degree of privacy, the constitutional right to counsel becomes illusory. ...")
2. *O'Donnell*, *ibid.*, at para 4 ("While the amount of privacy need not be great, at a minimum, an accused must be able to converse with his or her lawyer without the conversation being overheard. Moreover, those who exercise their right to counsel are not required to request privacy or greater privacy than what the police are willing to provide. ")
3. *R v Banks*, 2009 ONCJ 604 (CanLII), *per* Perkins-McVey J
4. *O'Donnell*, *supra*, at para 4
5. *R v Parrill*, 1998 CanLII 18014 (NL CA), 58 CRR (2d) 56, *per* Wells JA
6. *R v Jackson*, 1993 CanLII 8667 (ON CA), 25 CR (4th) 265 (ONCA), *per* Goodman JA

## Quality of Advice

The "police have no obligation under s. 10(b) to monitor the quality of the legal advice received by a detainee from duty counsel".[1]

It is also not proper to speculate on how legal advice would have changed the ultimate decisions on the part of the accused.[2]

1. *R v Beierl*, 2010 ONCA 697 (CanLII), *per curiam*
2. *R v Black*, 1989 CanLII 75 (SCC), [1989] 2 SCR 138, *per* Wilson J, at para 24 (" It is improper for a court to speculate about the type of legal advice which would have been given had the accused actually succeeded in contacting counsel after the charge was changed.")

## Fulfillment of Obligation

The advice received in privileged and so police do not need to inquire about the adequacy of the legal advice the detainee received.[1] If there is any issue with the advice given that is for the detainee to raise.

If the detainee is unsuccessful in reaching a lawyer, for example, if he receives a busy signal, no answer, disconnected phone, recorded message, or someone other than the lawyer, it is for the accused to inform the police about so that they can fulfill their duty. It is not for the police to "play twenty questions".[2]

The judge must take an objective view of the circumstances to determine if the implementational component was fulfilled.[3] This must take into account the "totality of the circumstances".[4]

The police are entitled to act on what the accused tells them about the access to counsel. The are not expected to be "mind-readers".[5]

The police may be able to infer that the accused is ready to move on to the next step where he knocks on the door to retrieve the officer.[6]

1. *R v Willier*, 2010 SCC 37 (CanLII), [2010] 2 SCR 429, *per* McLachlin CJ and Charron J
2. *R v Top*, 1989 ABCA 98 (CanLII), 48 CCC (3d) 493, *per* Cote JA, at p. 497
3. *Top*, *ibid.*
4. *R v Adamiak*, 2013 ABCA 199 (CanLII), 553 AR 178, *per curiam*, at para 27 ("...whether his section 10(b) rights were breached required an examination of the totality of the circumstances ...")
5. *Top*, *ibid.*
   *R v Liew*, 1998 ABCA 98 (CanLII), (1998) 212 AR 381, *per* Veit J, at para 18 ("He did not tell them of his difficulty. The police are not mind-readers and, as this Court has said in the past, they are not there to play "Twenty Questions".")
6. *R v Jones*, 2005 ABCA 289 (CanLII), 201 CCC (3d) 268, *per curiam* (2:1), at para 11 ("On the only evidence, the appellant knocked on the door because he had terminated his efforts and was ready to proceed to the next step. The police officer reasonably concluded from the appellant's actions that the appellant had terminated his efforts to try to call his own lawyer.")

## Additional Contact with Counsel

- Right to Additional Opportunities to Consult with Counsel

## See Also

- Special Issues with Right to Counsel

# Right to Choice of Counsel

This page was last substantively updated or reviewed *January 2019*. (Rev. # 79568)

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## General Principles

The right to counsel includes a limited right to a choice of counsel. Where detainee requests a specific lawyer, they are entitled "to a reasonable opportunity to contact their chosen counsel prior to the police questioning".[1]

#### Limitation to Choice of Counsel

This right extends only to the point where the lawyer chosen cannot be made available after a reasonable delay at which time the detainee is expected to call another lawyer, including duty counsel.[2]

#### Engaging Right to Choice of Counsel

The right to choice of counsel is engaged when the "accused asks for a particular lawyer on arrest or detention".[3] The officer is then obliged to provide the accused with a "reasonable opportunity to exercise" his right to counsel of choice, during which time all questioning must cease.[4]

#### Rights When Counsel Unavailable

The right to choice of counsel includes a reasonable opportunity to contact that chosen counsel. The detainee has a right to leave a message with chosen counsel and wait a reasonable period of time for the counsel to call back.[5] Where good faith efforts are made by the police, there cannot be a violation simply because the officer failed to do more where there was some feasible step the officer failed to take to arrange contact with counsel of choice.[6]

**Detainee Diligence**

A detained person must be reasonably diligent in exercising his right to choose counsel.[7] If he fails to do so, then the related duties are suspended.[8]

**Officer Diligence**

The issue at all times is whether the officer provided the detainee with the necessary information and assistance to allow the detainee a reasonable opportunity to exercise his rights.[9]

The officer must be diligent in ensuring that a reasonable opportunity has been given. The officer may not rely upon "answers to ambiguous questions as a basis for assuming the accused has exercised his ... rights".[10]

**Choice for Counsel**

Where the chosen lawyer is not available, the accused has the right to "refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond".[11]

Once a reasonable amount of time is expired waiting for counsel of choice, the detainee is expected to exercise their right to counsel by contacting another lawyer.[12]

An accused who waits an hour after a failed attempt to contact a lawyer of choice and refuses to speak with duty counsel may have failed to be reasonably diligent.[13]

**Police Do Not Select**

Police may not select a lawyer for the accused nor may they push the detainee towards legal aid as a way to expedite the contacting of counsel.[14]

**Stages of Analysis**

The three stages of analysis in fulfilling the right to counsel consist of:[15]

1. Did the police fulfill their duty to act diligently in facilitating the right of the accused to consult counsel of choice? If the trial judge finds they fulfilled their duty then there is no breach of s. 10(b).
2. If the police did not fulfill their duty then there are two possibilities:
    1. If the police breached their duty because they took no step to facilitate the right to counsel, then a breach of s. 10(b) is established...
    2. If the police breached their duty because they made some effort but it is found not to constitute “reasonable diligence”, the trial judge must next decide whether the accused fulfilled his or her duty to act diligently to exercise the right to counsel. If the answer is yes, then a s. 10(b) breach is made out. If the answer is no, then this trumps the breach of duty by the police and there is no breach of s. 10(b)...
3. If a breach of s. 10(b) is established the court must then go on to consider whether or not to exclude the consequent evidence under s. 24(2). The conduct of the accused is a factor which the court can consider...

There will be a breach whenever the police attempt to suggest or "stream" the accused towards a particular lawyer or the Legal Aid system.[16]

**Counsel Must be Available**

The right to counsel is a right to the counsel who are available to proceed on the date set for the trial.[17]

**Joint Trials**

The right to choice of counsel will defer to the requirements of a joint trial.[18]

The right to a choice of counsel must be weighed against the co-accused's right to a speedy trial.[19]

**Right to Counsel of Chosen Ethnicity**

There is no special obligations upon police to identify and locate counsel of a chosen ethnicity.[20]

1. *R v Willier*, 2010 SCC 37 (CanLII), [2010] 2 SCR 429, *per* McLachlin CJ and Charron J
2. *R v Leclair and Ross*, 1989 CanLII 134 (SCC), 46 CCC (3d) 129, *per* Lamer J, at p. 135
   *R v Littleford*, 2001 CanLII 8559 (ON CA), [2001] OJ No 2437 (CA), *per curiam*
   *R v Richfield*, 2003 CanLII 52164 (ON CA), 178 CCC (3d) 23, *per* Weiler JA
   *R v Van Binnendyk*, 2007 ONCA 537 (CanLII), [2007] OJ No 2899 (CA), *per curiam*
   *R v Brown*, 2009 NBCA 27 (CanLII), [2009] NBJ No 143 (CA), *per* Ricard JA, at #par20 paras 20 to 27
   *Willier*, *supra*
3. *R v Connelly*, 2009 ONCA 416 (CanLII), 190 CRR (2d) 54, *per* Rosenberg JA
4. *Connelly*, *ibid.*
5. e.g. *R v Jary*, 2009 BCPC 226 (CanLII), *per* Hicks J
6. *R v Blackett*, 2006 CanLII 25269 (ONSC), [2006] OJ No 2999 (SCJ), *per* Ferguson J
7. *Ross*, *supra* at 135
8. *Ross*, *supra* at 135
9. *R v Gentile*, 2008 CanLII 47475 (ONSC), [2008] OJ No 3664 (SCJ), *per* Durno J, at para 24
10. *Connelly*, *supra*
11. *Willier*, *supra*
12. *Willier*, *supra*
13. *Richfield*, *supra*
14. *R v MacLaren*, 2001 SKQB 493 (CanLII), 212 Sask R 204, *per* Foley J
    *R v Trueman*, 2008 SKQB 335 (CanLII), 325 Sask R 252, *per* Mills J
15. *R v Blackett*, 2006 CanLII 25269 (ONSC), *per* Ferguson J, at para 29
16. *R v Brouillette*, 2007 SKPC 67 (CanLII), 297 Sask R 113, *per* Morgan J, at paras 37 to 38
17. see *Re Chimienti* [1980] OJ No 400 (HCJ)(*no CanLII links) , at para 7
    *R v Hart*, 2002 BCSC 1174 (CanLII), BCTC 1174, *per* Parrett J, at para 17
18. *R v Agarwal*, 2007 ABQB 775 (CanLII), 434 AR 170, *per* Bielby J, at para 47
19. *R v Millard*, 2017 ONSC 4548 (CanLII), [2010] 2 SCR 429, *per* Code J, at para 9

20. *R v Wright*, 2018 ONSC 1011 (CanLII), *per* Del Frate J

# Right to Additional Opportunities to Consult with Counsel

< Procedure and Practice < Arrest and Detention < Right to Counsel on Detention or Arrest

## General Principles

Generally, once a detainee has finished exercising their right to counsel they have no further ability to access counsel again.[1] The right to counsel is "essentially a one time matter", unless it falls into one of the exceptions.[2]

Absent one of the exceptions, further access to counsel beyond the first consultation is entirely discretionary.[3] This applies even where the police may have promised further access.[4]

The rule against additional access applies to a single period of detention and cannot extend to subsequent encounters by police concerning the same investigation.[5]

1. *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, *per* McLachlin CJ and Charron J
2. *Sinclair*, *ibid.*, at para 64
3. *R v Briscoe*, 2012 ABQB 111 (CanLII), 255 CRR (2d) 37, *per* Yamauchi J, at para 113
4. *Briscoe*, *ibid.*, at paras 114, 119
5. *R v TGH*, 2014 ONCA 460 (CanLII), 314 CCC (3d) 473, *per* Doherty JA (3:0)

### Exceptions

Several exceptions exist:[1]

- Where during the investigation "new or non-routine procedures involving the detainee" are being applied, the accused should be permitted counsel.[2]
- where the jeopardy increases due to new evidence rendering the offence more serious or new, more serious charges arise.[3]
- if it is learned that the previous waiver of rights was not done properly.[4]
- the previous caution was insufficient or defective
- "change in circumstances results from new procedures involving the detainee"
- "developments in the investigation" such that they accuse must chose "whether they should ... cooperate with the investigation or not"

The categories of circumstances that require additional access to counsel is not a "closed" list.[5]

#### Change in Circumstances Exception

The detainee will get an additional chance to consult with counsel where there had been a "change in circumstances" that are objectively observable that renders access "necessary to fulfill s. 10(b)'s purpose of providing the detainee with advice in the new or emergent situation".[6]

1. *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, *per* McLachlin CJ and Charron J, at para 2
   *R v MacLean*, 2013 ABQB 60 (CanLII), 551 AR 274, *per* Ouellette J, at para 24
   *R v M(AR)*, 2011 ABCA 98 (CanLII), 283 CCC (3d) 89, *per curiam*, at para 38 leave denied
2. *Sinclair*, *supra*, at paras 50 to 52
   *R v Ross*, 1989 CanLII 134 (SCC), [1989] 1 SCR 3, *per* Lamer J
3. *Sinclair*, *supra*, at paras 50 to 52
   See *R v Evans*, 1991 CanLII 98 (SCC), [1991] 1 SCR 869, *per* McLachlin J
   *R v Black*, 1989 CanLII 75 (SCC), [1989] 2 SCR 138, *per* Wilson J
4. See *R v Burlingham*, 1995 CanLII 88 (SCC), [1995] 2 SCR 206, *per* Iacobucci J
5. *Sinclair*, *supra*
6. *Sinclair*, *supra*, at para 54

## Procedure

Where new or non-routine procedures involving the detainee arise, the detainee should be permitted new access to counsel.[1]

The applicable procedures will not be those that are part of "predictable police questioning".[2]

The procedure will arise where the detainee's participation is "essential" and they have a right to decline participation or a right to understand the procedure.[3]

"Non-routine" procedures will include participation in a line-up or submitting to a polygraph.[4]

A "re-enactment" is not considered a non-routine procedure. It is merely a "statement by conduct".[5]

1. *R v ARM*, 2011 ABCA 98 (CanLII), 283 CCC (3d) 89, *per curiam*
2. *R v Briscoe*, 2015 ABCA 2 (CanLII), 593 AR 102, *per* Watson JA, at para 48
3. *Biscoe*, *ibid.*, at para 48
4. *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, *per* McLachlin CJ and Charron J, at para 50
5. *R v Ashmore*, 2011 BCCA 18 (CanLII), 267 CCC (3d) 108, *per* Frankel JA

## Change of Jeopardy

While a detainee is in custody on charges and has received access to counsel, but at some point later the circumstances of the detainment change and further charges are being investigated resulting in a change in jeopardy in the detainee, the accused must be given a further opportunity to consult with counsel on the new situation.[1]

A change in circumstances "must be objectively observable in order to trigger additional implementational duties for the police".[2] The change in circumstances must suggest "that the choice faced by the accused has been significantly altered" requiring advice in order to fill the purposes of the charter right.[3]

There will only be a breach when "it becomes clear, as a result of changed circumstances or new developments, that the initial advice, viewed contextually, is no longer sufficient or correct".[4]

Where a person was given access to counsel on arrest, a laying of the charge on the offence for which he was arrested is not a change of circumstances.[5]

Police may assume that the initial legal advice received was sufficient and correct in relation to how the detainee should exercise his rights in the context of the police investigation.[6]

A change in the identity of the victim does not change the jeopardy of the detainee.[7]

1. *R v Black*, 1989 CanLII 75 (SCC), [1989] 2 SCR 138, *per* Wilson J
   *R v Sinclair*, 2010 SCC 35 (CanLII), [2010] 2 SCR 310, *per* McLachlin CJ and Charron J
2. *Sinclair*, *ibid.*
3. *Sinclair*, *ibid.*
4. *Sinclair*, *ibid.*
5. *R v Bhander*, 2012 BCCA 441 (CanLII), 292 CCC (3d) 545, *per* Saunders JA, at paras 40 to 46
6. *Sinclair*, *ibid.*
7. *R v Thomas*, 2013 ABQB 223 (CanLII), *per* Jerke J

# Special Issues with Right to Counsel

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## General Principles

Where there has been a breach of s. 10(b) right for a statement and then a later statement was taken that on its face may not be an independent breach, the subsequent breach may still be "tainted" by the earlier breach allowing for a potential remedy under s. 24(2).[1]

The court have adopted a "purposive and generous approach" when considering tainting by earlier Charter breaches. The accused does not need to establish a strict causal relationship between the breach and subsequent statement. The statement is tainted where the breach and subsequent statement were "part of the same transaction or course of conduct.[2] The connection is "temporal, contextual, causal, or combination of the three."[3]

A "remote" or "tenuous" connection is not sufficient.[4]

1. *R v Wittwer*, 2008 SCC 33 (CanLII), [2008] 2 SCR 235, *per* Fish J, at para 21
2. *Strachan*, *supra*, at p. 1005
3. *R v Plaha*, 2004 CanLII 21043 (ON CA), 188 CCC (3d) 289, *per* Doherty JA, at para 45
4. *R v Goldhart*, 1996 CanLII 214 (SCC), [1996] 2 SCR 463, *per* Sopinka J, at para 40
   *Plaha*, *supra*, at para 45

## Communication Difficulties

Where a detainee may not understand the information being told to them, it cannot be resolved by simply reading the standard text.[1]

Limited signs of comprehension of English can be enough for the court to find that the accused did not understand his rights.[2]

Where the officer is aware that the person's first language is not English, then they should be cautious and slow when going through the instructions.[3]

It should only be in exceptional circumstances where the officer is under an obligation to arrange for an interpreter to ensure that they understand their rights.[4]

1. *R v Evans*, 1991 CanLII 98 (SCC), [1991] 1 SCR 869, *per* McLachlin J, at para 21
2. See *R v Brissonnet*, 2006 ONCJ 31 (CanLII), 205 CCC (3d) 139, *per* Harris J
3. *R v Prodan*, 2007 ONCJ 551 (CanLII), OJ No 4567, *per* Armstrong J - officer heard accent, went very fast through caution
4. *R v Liagon*, 2012 ABPC 56 (CanLII), 541 AR 16, *per* Shriar J

## "Fresh Start" to Correct Errors

Where police realize that they made a "constitutional mis-step" in their procedure comply with s. 10(a) or (b) Charter rights, the police can engage in a "fresh start" to rehabilitate the process. [1] This process can have the effect of "severing" the link between the original tainted evidence and the new evidence obtained after the fresh start.[2] This severance will come into play at the s. 24(2) contextual Charter analysis.[3]

The "fresh start" principle applies not only to successive statements to persons in authority.[4]

1. *R v Manchulenko*, 2013 ONCA 543 (CanLII), 301 CCC (3d) 182, *per* Watt JA
   *R v ET*, 1993 CanLII 51 (SCC), 86 CCC (3d) 289, *per* Sopinka J
   *R v Karafa*, 2014 ONSC 2901 (CanLII), 311 CRR (2d) 30, *per* Trotter J
2. *Manchulenko*, *supra*
3. *Manchulenko*, *supra*
4. *Mancheulenko*, *supra* ("No principled reason exists to confine the "fresh start" jurisprudence to cases involving successive statements made to persons in authority. The rationale that underpins the "fresh start" principle is the same irrespective of the specific form the evidence proposed for admission takes.")

## Young Persons

Section 25(1) of the YCJA gives the youth a right to retain and instruct counsel without delay.[1]

**Right to counsel**

25 (1) A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and before and during any consideration of whether, instead of starting or continuing judicial proceedings against the young person under this Act, to use an extrajudicial sanction to deal with the young person.

**Arresting officer to advise young person of right to counsel**

(2) Every young person who is arrested or detained shall, on being arrested or detained, be advised without delay by the arresting officer or the officer in charge, as the case may be, of the right to retain and instruct counsel, and be given an opportunity to obtain counsel.

**Justice, youth justice court or review board to advise young person of right to counsel**

(3) When a young person is not represented by counsel

(a) at a hearing at which it will be determined whether to release the young person or detain the young person in custody prior to sentencing,
(b) at a hearing held under section 71 (hearing — adult sentences),
(c) at trial,
(d) at any proceedings held under subsection 98(3) (continuation of custody), 103(1) (review by youth justice court), 104(1) (continuation of custody), 105(1) (conditional supervision) or 109(1) (review of decision),
(e) at a review of a youth sentence held before a youth justice court under this Act, or
(f) at a review of the level of custody under section 87,

the justice or youth justice court before which the hearing, trial or review is held, or the review board before which the review is held, shall advise the young person of the right to retain and instruct counsel and shall give the young person a reasonable opportunity to obtain counsel.

**Trial, hearing or review before youth justice court or review board**

(4) When a young person at trial or at a hearing or review referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth justice court before which the hearing, trial or review is held or the review board before which the review is held

(a) shall, if there is a legal aid program or an assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or
(b) if no legal aid program or assistance program is available or the young person is unable to obtain counsel through the program, may, and on the request of the young person shall, direct that the young person be represented by counsel.

**Appointment of counsel**

(5) When a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General shall appoint counsel, or cause counsel to be appointed, to represent the young person.

**Release hearing before justice**

(6) When a young person, at a hearing referred to in paragraph (3)(a) that is held before a justice who is not a youth justice court judge, wishes to obtain counsel but is unable to do so, the justice shall

(a) if there is a legal aid program or an assistance program available in the province where the hearing is held,

(i) refer the young person to that program for the appointment of counsel, or
(ii) refer the matter to a youth justice court to be dealt with in accordance with paragraph (4)(a) or (b); or

(b) if no legal aid program or assistance program is available or the young person is unable to obtain counsel through the program, refer the matter without delay to a youth justice court to be dealt with in accordance with paragraph (4)(b).

**Young person may be assisted by adult**

(7) When a young person is not represented by counsel at trial or at a hearing or review referred to in subsection (3), the justice before whom or the youth justice court or review board before which the proceedings are held may, on the request of the young person, allow the young person to be assisted by an adult whom the justice, court or review board considers to be suitable.

**Counsel independent of parents**

(8) If it appears to a youth justice court judge or a justice that the interests of a young person and the interests of a parent are in conflict or that it would be in the best interests of the young person to be represented by his or her own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of the parent.

**Statement of right to counsel**

(9) A statement that a young person has the right to be represented by counsel shall be included in

(a) any appearance notice or summons issued to the young person;
(b) any warrant to arrest the young person;
(c) any promise to appear given by the young person;
(d) any undertaking or recognizance entered into before an officer in charge by the young person;
(e) any notice given to the young person in relation to any proceedings held under subsection 98(3) (continuation of custody), 103(1) (review by youth justice court), 104(1) (continuation of custody), 105(1) (conditional supervision) or 109(1) (review of decision); or
(f) any notice of a review of a youth sentence given to the young person.

**Recovery of costs of counsel**

(10) Nothing in this Act prevents the lieutenant governor in council of a province or his or her delegate from establishing a program to authorize the recovery of the costs of a young person's counsel from the young person or the parents of the young person. The costs may be recovered only after the proceedings are completed and the time allowed for the taking of an appeal has expired or, if an appeal is taken, all proceedings in respect of the appeal have been completed.

**Exception for persons over the age of twenty**

(11) Subsections (4) to (9) do not apply to a person who is alleged to have committed an offence while a young person, if the person has attained the age of twenty years at the time of his or her first appearance before a youth justice court in respect of the offence; however, this does not restrict any rights that a person has under the law applicable to adults.

– YCJA

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The basic adult rights regarding counsel are still in effect for a youth. However, section 146 creates additional benefits upon the young accused and obligations upon the police when providing the right to counsel. The additional rights not otherwise available to adults include:

- the youth will be given a reasonable opportunity to consult with a parent or responsible adult
- any statement *must* be given in front of a lawyer and parent or responsible adult unless the right is waived;
- the waiver of this right must be audio or video taped or be in writing.

Proof of compliance with these standards is proof beyond a reasonble doubt.[2]

The reason for these additional protections and high standard of proof on the Crown is because of the constitutional requirement of a separate system arising from the youth's reduced moral blameworthiness and culpability.[3] More to the point, youths are "far more easily impressed and influenced by authoritarian figures".[4]

1. YCJA
2. *R v LTH*, 2008 SCC 49 (CanLII), [2008] 2 SCR 739, *per* Fish J
3. *R v DB*, 2008 SCC 25 (CanLII), [2008] 2 SCR 3, *per* Abella J
4. *R v JTJ*, 1990 CanLII 85 (SCC), [1990] 2 SCR 755, *per* Corey J and Sopinka J, at p. 766

## Detained Foreign Nationals

Upon arrest of a foreign national, the accused has a right to contact the consul of his native country pursuant to Article 36 of the Vienna Convention which states:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

– VC

#### When Obligation Exists

The police are under an obligation to notify the detainee of their consular right at the point where they become aware or *ought to* have been aware the at the detainee is a foregin national.[1]

The policy manual for CBSA agents requires that upon arrest the agent provide the detainee with in a right to access their consulate and to notify Citizen and Immigration Canada.[2]

#### Consequence of Breach of Duty

A breach of the Vienna Convention does not necessarily amount to a breach of the *Charter of Rights and Freedoms*.[3]

It has generally been found that there must be proven "serious prejudice" for there to be a remedy for the breach of the *Vienna Convention*.[4]

1. *R v Partak*, 2001 CanLII 28411 (ON SC), 160 CCC (3d) 553, *per* Epstein J, at para 28(" In my view, a foreign national's entitlement to be advised of his or her consular rights arises at the time that the authorities know or reasonably ought to be aware that the detainee is a foreign national.")
2. *Brown v Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 2 (CanLII) per Jaworski (board member), at para 33
3. *R v Walters*, 2013 ABCA 204 (CanLII), *per* Slatter JA, at para 11 ("The Vienna Convention is not, however, a part of the Constitution. Not every breach of duty engages the Charter. For example, there are many procedural protections in the Criminal Code, the breach of which may result in a new trial or another remedy. But not every breach of the Criminal Code is a breach of the Charter, and there is no basis on which international treaties should be given higher status. International obligations may inform the content of the Charter, but they are not independent sources of Charter rights:...")
4. *Walters*, *supra*, at para 12 ("There is binding authority that "serious prejudice" must be shown in order to warrant a remedy for a breach of the Vienna Convention: .... The trial judge found that the appellant had not demonstrated any prejudice to his position: ... . This conclusion demonstrates no reviewable error.")
*R v Van Bergen*, 2000 ABCA 216 (CanLII), 261 AR 387, *per* Wittmann JA, at paras 16 to 17, leave refused [2000] 2 SCR xiv

# Waiver of Charter Rights

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< Procedure and Practice

## General Principles

#### General Requirements of Waiver

It is generally required that the Crown show that the waiver included the following:[1]

1. the accused gave express or implied consent to waive the rights
2. the giver of the consent had the authority to give consent
3. the consent was voluntary in the sense that that word is used in Goldman, supra, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
4. the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
5. the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
6. the giver of the consent was aware of the potential consequences of giving the consent.

#### Burden

The burden is upon the Crown to prove that the waiver on a balance of probabilities.[2]

#### Waiver Must be Clear and Fully Informed

The waiver of any *Charter* right must be done clearly and unequivocally with full knowledge of the scope of the right and effect of the waiver.[3] The person must be "fully and properly informed" in order for the waiver to be valid.[4]

This requirement equally applies to any procedural right as well as Charter right, which can be waived where the waiver is "waiver is informed, clear, and unequivocal".[5]

#### Impairments of Accused

Where the accused is intoxicated there is an increased onus on the Crown to prove valid waiver given that they may not readily have a "true appreciation of the consequences" of waiving their right.[6] This may require that police delay the continuation of the investigation until the person is sober enough to understand their rights enough to waive them.[7]

#### Section 8 of Charter

It is necessary for the Crown to prove waiver of an accused right under s. 8 of the *Charter of Rights and Freedoms*.[8]

#### Entrance onto Property

An express or implied invitation, such as at the attendance of police at the door of a residence or being invited into the house, results in the waiving of privacy.[9]

1. *R v Wills*, 1npnl, 1992 CanLII 2780 (ON CA), *per* Doherty JA
2. *Wills*, *supra*
3. *Korponay v Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 SCR 41, *per* Lamer J, at p. 49 ("the validity of such a waiver, and I should add that that is so of any waiver, is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.")
4. *R v Edwardsen*, 2019 BCCA 259 (CanLII), *per* Harris JA, at para 9 ("A person waiving a procedural right must be fully and properly informed of their rights in order for the waiver to be valid")
   *R v Bartle*, 1994 CanLII 64 (SCC), [1994] 3 SCR 173, at pp. 203–04 (SCR)
5. *Edwardsen*, *supra*, at para 9 ("an accused can waive procedural rights for their benefit, as long as the waiver is informed, clear, and unequivocal")
   *R v Tran*, 1994 CanLII 56 (SCC), [1994] 2 SCR 951, *per* Lamer CJ, at pp. 996–97 (SCR)
6. *R v Clarkson*, 1986 CanLII 61 (SCC), [1986] 1 SCR 383, *per* Wilson J, at p. 303
7. e.g. *Clarkson*, *ibid.*
8. See *R v Neilson*, 1988 CanLII 213 (1988), 43 CCC (3d) 548, *per* Bayda CJ
9. See *R v Evans*, 1996 CanLII 248 (SCC), [1996] 1 SCR 8, *per* Sopinka J at 12-13 implied invitation
   *R v Roy*, 2010 BCCA 448 (CanLII), 261 CCC (3d) 62, *per* Lowry JA express invitation

## See Also

- Consent Search
- Solicitor-Client Privilege#Waiver of Solicitor-Client Privilege

# Exclusion of Evidence Under Section 24(2) of the Charter

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< Procedure and Practice

## General Principles

Where there has been a finding of a breach of any right under the *Charter*, the applicant may apply to have evidence that is connected with the breach excluded from the trial under s. 24(2) of the *Charter* which states:

> 24...
>
> **Exclusion of evidence bringing administration of justice into disrepute**
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
>
> – CCRF

#### Necessary Elements to Invoke s. 24(2) of the Charter

In order to invoke section 24(2) to exclude evidence, there must be a (1) infringement of Charter rights, (2) nexus between the in infringement and the evidence to be excluded, (3) the effects of the breach warrant the exclusion of evidence.[1]

#### Standing

Only a person whose Charter right have been infringed may claim relief under s. 24(2) of the Charter.[2]

#### Burden and Standard of Proof

Section 24(2) analysis assumes that a breach has already been established and that the breach will bring the administration of justice into disrepute. The burden then shifts to the Crown to prove that in fact the administration of justice will not be brought into disrepute.[3]

The standard of proof is on the balance of probabilities.[4]

#### Purpose

The purpose of s. 24(2) is to ensure the admission of evidence obtained by a Charter breach will not further damage the repute of the justice system beyond what has already been caused by the breach itself.[5]

The section primarily intends to "maintain the good repute of the administration of justice", which relates to "the processes by which those who break the law are investigated, charged and tried". It also includes "maintaining the rule of law and upholding Charter rights".[6]

Breach of Charter rights "affects not only the accused, but also the entire reputation of the criminal justice system". It follows that the "the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying" s. 24(2).[7]

The section is *not* intended to "punis[h] the police or provid[e] compensation to the accused".[8]

The purpose too cannot be for deterring the police. The consequence of exclusion may have a deterrent effect, but the court should not be using that as a basis to exclude.[9]

#### Interpretation

Like other parts of the Charter, s. 24(2) is to be interpreted in a "purposive" manner.[10]

The use of the word "would" is interpreted as equivalent to "could". This is due to the interpretive relevance of the french version of the section which is more generous to the accused.[11]

#### Types of Evidence

The types of evidence that can be excluded can include observational evidence made by police officers after the Charter breach.[12]

#### "Court of Competent Jurisdiction"

The Court must be a "court of competent jurisdiction" in order to have the power to exclude evidence under s. 24(2) of the Charter.[13]

#### No Alternative Remedy

The court, when considering an application to exclude evidence under s. 24(2), must only decide whether the evidence should be excluded or not. There is no alternative option of ordering a remedy under s. 24(1). [14]

1. *R v Spackman*, 2012 ONCA 905 (CanLII), 295 CCC (3d) 177, *per* Watt JA, at para 100
2. Charter Applications#Standing
3. *R v Simpenzwe*, 2009 ABQB 579 (CanLII), 512 AR 49, *per* Yamauchi J, at para 48
4. *R v Collins*, 1987 CanLII 84 (SCC), [1987] 1 SCR 265, *per* Lamer CJ, at pp. 276-277
   see also *R v Therens*, 1985 CanLII 29 (SCC), [1985] 1 SCR 613, *per* Dickson CJ
   *R v Strachan*, 1988 CanLII 25 (SCC), [1988] 2 SCR 980, *per* Dickson CJ
5. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachln CJ and Charron J, at para 69
6. *Grant*, *ibid.*, at para 67
7. *R v Burlingham*, 1995 CanLII 88 (SCC), [1995] 2 SCR 206, *per* Iacobucci J, at para 50 ("Short-cutting or short circuiting [Charter] rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques, are of fundamental importance in applying s. 24(2)")
8. *Grant*, *supra*, at para 70
9. *Grant*, *supra*, *per* McLachlin CJ and Charron J, at para 73( "The concern of this inquiry is not to punish the police or to deter Charter breaches, although deterrence of Charter breaches may be a happy consequence.")
10. *Collins*, *supra*, at p. 287
11. *Collins*, *supra*, at p. 287 (SCR)
12. *R v Yaran*, 2009 ABPC 150 (CanLII), *per* Fradsham J, at para 8
13. *Collins*, *supra*, at p. 287
14. *R v Therens*, 1985 CanLII 29 (SCC), [1985] 1 SCR 613
    *R v Stachan*, 1988 CanLII 25 (SCC), [1988] 2 SCR 980, at para 36/, at p. 1000 ("... Section 24(2) is a special remedial provision. It is set apart from s. 24(1), the general remedial section of the Charter. Section 24(2) sets out the conditions in which the exclusion of evidence may be granted in an application for a remedy under s. 24(1). In *R v Therens* and *R v Collins*, majorities of the Court held that s. 24(2) provides the sole basis for the exclusion of evidence; evidence cannot be excluded under s. 24(1) alone. ...")

## Test for Exclusion

There are essentially two stages to the test. There is the "threshold stage" followed by the "evaluative stage". The first stage considers whether actions are sufficiently proximate to the Charter right breach to be worth evaluating. The second stage consists of the "Grant factor" analysis to determine if an actual reason to exclude evidence.[1]

#### Threshold Test

The threshold stage requires that the evidence was "obtained in a manner" that infringed the Charter. There is no need for a "causal relationship" between the conduct and the breach. It is only necessary that the conduct be part of the "same transaction or course of conduct". The connection can be temporal, contextual, causal or a combination of all three.[2]

#### Revised Administration of Justice Test

The Supreme Court of Canada made a complete revision of the analytical approach in *R v Grant*, 2009 SCC 32. Under Grant, there are "three avenues of inquiry" that a court must consider:[3]

> “ ...when faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:
>
> (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
> (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and
> (3) society's interest in the adjudication of the case on its merits. ”

> The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute...

The factors should be weighed to determine whether, "having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute". [4] No single factor should trump any of the other factors.[5]

The balancing is not a determination of whether the court approves or disapproves of the conduct in the particular case, but is meant to consider the broader effects of judicially condoning the Charter breach by allowing the Crown to admit evidence it should not have.[6]

This analysis should focus on the "long-term, prospective and societal" effect of the violations.[7]

It is less concerned with the particular case as it is concerned with the impact in the future of admitting evidence obtained in such a illegal manner.[8]

It is intended to reflect society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law".[9]

The analysis should be from an objective view and ask "whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute"[10]

There is no rule requiring the automatic exclusion of a statement obtained by Charter violations.[11]

#### Relationship between the Three Factors

The first two factors are meant to work "in tandem" as they both pull towards the exclusion of evidence, while the third factor pulls in the opposite direction towards the interests in admitting the evidence.[12]

1. *R v Robertson*, 2019 BCCA 116 (CanLII), *per* Fitch JA, at para 56
   *R v Plaha*, 2004 CanLII 21043 (ON CA), 188 CCC (3d) 289, *per* Doherty JA, at para 44 ("There are two components to s. 24(2). The first is a threshold requirement. The impugned evidence, in this case, statement #4, must be obtained “in a manner that infringed” a right under the Charter. If the threshold is crossed, one then turns to the evaluative component of s. 24(2) – could the admission of the impugned evidence bring the administration of justice into disrepute?")
2. *Plaha*, *ibid.*, at para 45 ("The jurisprudence establishes a generous approach to the threshold issue. A causal relationship between the breach and the impugned evidence is not necessary. The evidence will be “obtained in a manner” that infringed a Charter right if on a review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct. The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three.")
3. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 71
4. *R v Harrison*, 2009 SCC 34 (CanLII), [2009] 2 SCR 494, *per* McLachlin CJ, at para 36 See also *R v Morelli*, 2010 SCC 8 (CanLII), [2010] 1 SCR 253, *per* Fish J
   *R v Côté*, 2011 SCC 46 (CanLII), [2011] 3 SCR 215, *per* Cromwell J, at paras 45 to 48
5. *Grant*, *supra*, at para 86
6. *R v ARM*, 2011 ABCA 98 (CanLII), 283 CCC (3d) 89, *per* Topolniski JA, at para 64
7. see *R v Mahmood*, 2011 ONCA 693 (CanLII), 282 CCC (3d) 314, *per* Watt JA
   *R v Dhillon*, 2012 BCCA 254 (CanLII), [2012] BCJ No 1158 (CA), *per* D Smith JA, at para 78
   *Grant*, *supra*, at paras 69 and 70
8. *R v Morelli*, 2010 SCC 8 (CanLII), [2010] 1 SCR 253, *per* Fish J, at para 108
9. *R v Askov*, 1990 CanLII 45 (SCC), [1990] 2 SCR 1199 (SCC), *per* Cory J, at pp. 1219-20
10. *Grant*, *supra*, at para 68
11. *R v NY*, 2012 ONCA 745 (CanLII), 294 CCC (3d) 313, *per* Blair JA, at paras 56 to 57
12. *R v McGuffie*, 2016 ONCA 365 (CanLII), 336 CCC (3d) 486, *per* Doherty JA (3:0), at paras 62 to 63

### Appellate Standard of Review

An appellate court should give a discretionary decision of a judge, such as in a 24(2) analysis, high deference.[1] The judge should only interfere where "the judge did not give weight to all relevant considerations". [2]

The decision to exclude evidence under s. 24(2) is a matter of law, however, one with “considerable deference”. [3]

Failure to perform the s. 24(2) Charter analysis is an error or law and is reviewable on a standard of correctness.[4]

Absent an error of principle, a palpable and overriding factual error or an "unreasonable determination", an appellate court should not interfere with the application of s. 24(2) of the Charter.[5]

The appellate court should not substitute its own view of the seriousness of state conduct. The weighing of competing interests affords "strong deference".[6]

#### Fresh Review

Where a reversable error is found and there is sufficient record, the appellate court may conduct a fresh s. 24(2) analysis.[7]

1. *R v Mian*, 2014 SCC 54 (CanLII), [2014] 2 SCR 689, at para 77
2. *R v Bacon*, 2012 BCCA 323 (CanLII), 286 CCC (3d) 132, *per* Saunders J, at para 14
3. see *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachln CJ and Charron J, at paras 43, 86
   *R v Beaulieu*, 2010 SCC 7 (CanLII), [2010] 1 SCR 248, *per* Charron J, at para 5
   *R v Cote*, 2011 SCC 46 (CanLII), [2011] 3 SCR 215, *per* Cromwell J, at para 44
4. *R v Willier*, 2008 ABCA 126 (CanLII), 429 AR 135, *per* Slatter JA aff’d 2010 SCC 37 (CanLII), [2010] 2 SCR 429, *per* McLachlin CJ and Charron J
5. *R v McGuffie*, 2016 ONCA 365 (CanLII), 336 CCC (3d) 486, *per* Doherty JA, at para 64

*Grant*, *supra*, at para 86
*R v Cole*, 2012 SCC 53 (CanLII), [2012] 3 SCR 34, *per* Fish J, at para 82
*Côté*, *supra*, at para 44

6. *R v White*, 2015 ONCA 508 (CanLII), 127 OR (3d) 32, *per* Hushcroft JA, at para 63
*R v Buchanan*, 2020 ONCA 245 (CanLII), *per* Fairburn JA, at para 21
7. *R v Balendra*, 2019 ONCA 68 (CanLII), at para 62
*R v Herta*, 2018 ONCA 927 (CanLII), 143 OR (3d) 721, *per* Fairburn JA

### Causation ("in a manner")

The breach of a Charter will only warrant a remedy under s. 24(2) where the evidence was obtained "in a manner" that violated the Charter right.[1]

The nexus element requires that the evidence be obtained by the breach. Without causation there is no remedy under s. 24(2).[2] However, there is a residual exclusion of evidence under s. 24(1) for violation of trial fairness protected under s. 7 and 11(d) of the Charter.[3]

The proximity of the connection between the breach and the evidence is a question of fact on each case.[4]

A strict causal connection between the breach and the evidence is not required. Rather a "purposive and generous approach" should be taken.[5] The judge should look at the entire chain of events between the accused and the police.[6] The evidence is said to be "tainted" by the breach if the evidence "can be said to be part of the same transaction or course of conduct".[7] This determination can be identified "causally, temporally and/or contextually" or any combination of these as longa s the connection is not "too tenuous or too remote".[8]

A temporal connection is not determinative. Whether the connection is "too remote" should be dealt with on a case-by-case basis.[9]

A strictly "causal" connection is not required to apply s. 24(2).[10] It is however a relevant consideration weighing against exclusion.[11]

#### Examples

Evidence seized through a valid search done pursuant to a warrant can still be subject to exclusion as a warrant cannot be said to "expressly or by necessary implication or by the operating requirements of the legislation overrides the citizen's s. 10(b) rights".[12]

The police cannot use evidence obtained by a prior Charter breach to support a search warrant to seize further evidence.[13]

1. *R v Strachan*, 1988 CanLII 25 (SCC), [1988] 2 SCR 980, *per* Dickson CJ, at para 48 ("…the first inquiry under s. 24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence")
2. *R v Spackman*, 2012 ONCA 905 (CanLII), 295 CCC (3d) 177, *per* Watt JA, at para 101
*R v Petit*, 2003 BCCA 522 (CanLII), 179 CCC (3d) 295, *per* Donald JA
*R v Luu*, 2006 BCCA 73 (CanLII), 207 CCC (3d) 175, *per* Smith JA
3. *Spackman*, *supra*, at para 101
*R v White*, 1999 CanLII 689 (SCC), [1999] 2 SCR 417, *per* Iacobucci J, at para 89
*R v Harrer*, 1995 CanLII 70 (SCC), [1995] 3 SCR 562, *per* La Forest J, at para 42
4. *R v Goldhart*, 1996 CanLII 214 (SCC), [1996] 2 SCR 463, *per* Sopinka J, at para 40
5. *R v Plaha*, 2004 CanLII 21043 (ON CA), 188 CCC (3d) 289, *per* Sopinka J, at #par45 para 45 ("The jurisprudence establishes a generous approach to the threshold issue. A causal relationship between the breach and the impugned evidence is not necessary. The evidence will be "obtained in a manner" that infringed a Charter right if on a review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct. The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three. The connection must be more than tenuous.")
*R v Wittwer*, 2008 SCC 33 (CanLII), [2008] 2 SCR 235, *per* Fish J, at para 21 ("In considering whether a statement is tainted by an earlier Charter breach, the courts have adopted a purposive and generous approach. It is unnecessary to establish a strict causal relationship between the breach and the subsequent statement. The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct...The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three"...A connection that is merely "remote" or "tenuous" will not suffice...")
*R v Pileggi*, 2021 ONCA 4 (CanLII), 153 OR (3d) 561, *per* Trotter JA, at para 101
*R v Butters*, 2014 ONCJ 228 (CanLII), 311 CCC (3d) 516, *per* Paciocco J, at para 63
*R v Pino*, 2016 ONCA 389 (CanLII), 337 CCC (3d) 402, *per* Laskin JA, at paras 50 to 68
6. *Pileggi*, *supra*, at para 101
7. *Wittwer*, *supra*, at para 21 ("The [evidence] will be tainted if the breach and the impugned [evidence] can be said to be part of the same transaction or course of conduct")
*Pino*, *supra*, at para 72 ("requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct")
8. *Butters*, *supra*, at para 63
*R v Mack*, 2014 SCC 58 (CanLII), [2014] 3 SCR 3, *per* Moldaver J
*Goldhart*, *supra*, at para 40
*R v Keror*, 2017 ABCA 273 (CanLII), 354 CCC (3d) 1, *per curiam*
*Pileggi*, *supra*, at para 101
9. *Pileggi*, *supra*, at para 102
*Strachan*, *supra* at p. 1005 to 1006 (SCR)
10. *Pileggi*, *supra*, at para 107 ("...it has long been the law, from Strachan onwards, that a causal connection is not required to pass through the s. 24(2) "gateway".")
11. *Pileggi*, *supra*, at para 108
*R v Lenhardt*, 2019 ONCA 416 (CanLII), 437 CRR (2d) 328, *per curiam*, at para 11
12. *R v Strachan*, 1988 CanLII 25 (SCC), [1988] 2 SCR 980, *per* Wilson J (concurrence), at para 64 (there is no "search warrants which expressly or by necessary implication or by the operating requirements of the legislation overrides the citizen's s. 10(b) rights")
13. *R v Carrier*, 1996 ABCA 145 (CanLII), 116 WAC 284, *per* Cote JA, at para 55 (we do not want the police "to get a warrant on the basis of some earlier Charter breach, and then shore up the voidable warrant with the fruits of the search which it purported to authorize.")
*R v Evans*, 1996 CanLII 248 (SCC), [1996] 1 SCR 8, *per* Sopinka J, at para 19 ("warrants based solely on information gleaned in violation of the Charter are invalid")

## First Factor: Seriousness of Police Misconduct

The first factor considers the effect of the police misconduct on the reputation of the justice system. Effectively, considering whether the courts are "condoning" the deviation from the rule of law by failing to disassociate themselves from the fruits of the misconduct.[1]

This factor involves the exercise of placing the breach on the "continuum of misconduct".[2]

However, an over-readiness to exclude for "fleeting and technical violation[s]" is likely "to be seen as symptom of systemic impotency which would breed public contempt for the criminal justice system"[3]

The inquiry is into "what the police did" and what is "their attitude when they did it".[4]

Factors the court must consider include:[5]

- Was the breach “inadvertent or minor” or a result of willful or reckless or deliberate disregard for the Charter?
- Did the police act in good faith?
- Were there “extenuating circumstances”?

The existence of multiple Charter breaches will have the effect of aggravating the seriousness of the breach. [6]

Examples of aggravating factors to seriousness analysis include:[7]

- severe or deliberate police conduct contravening established Charter standards;
- major departure from Charter standards;
- systemic or institutional abuse;
- willful, flagrant or reckless disregard of Charter rights;
- ignorance, negligence or wilful blindness to Charter standards;
- a pattern of abuse; and
- misleading testimony by the police.

Examples of mitigating factors to seriousness analysis include:[8]

- the Charter violation is inadvertent or minor;
- the breach is merely technical;
- "good faith" error on the part of the police;
- the breach results from an understandable mistake; and
- extenuating circumstances, such as the need to prevent destruction of evidence.

1. *R v Ngai*, 2010 ABCA 10 (CanLII), [2010] AJ No 96 (CA), *per curiam*, ("court's first stage of inquiry requires it to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts effectively condone state deviation from the rule of law by failing to disassociate themselves from the fruit of that unlawful conduct." )
   *R v Dhillon*, 2010 ONCA 582 (CanLII), [2010] OJ No 3749 (CA), *per* Simmons JA, at para 45
2. *R v Blake*, 2010 ONCA 1 (CanLII), [2010] OJ No 48, *per* Doherty JA
   *R v Flett*, 2016 MBPC 66 (CanLII), *per* Corrin J, at para 20
3. see *R v Shinkewski*, 2012 SKCA 63 (CanLII), [2012] SJ No 376, *per* Caldwell JA, at para 33
   *R v Giulioni*, 2011 NLTD 117 (CanLII), [2011] NJ No 322 (S.C.), *per* Goodridge J
   *R v Hart*, 2012 NLCA 61 (CanLII), 97 CR (6th) 16, *per* Barry JA
4. *R v Ramage*, 2010 ONCA 488 (CanLII), 257 CCC (3d) 261, *per* Doherty JA, at para 48
5. *R v Loewen*, 2010 ABCA 255 (CanLII), 260 CCC (3d) 296, *per* Slatter JA, at para 83
6. *R v Calderon*, 2004 CanLII 7569 (ON CA), 188 CCC (3d) 481, *per* Weiler JA, at paras 93 to 94
7. *R v Oswald*, 2019 BCSC 892 (CanLII), *per* Kent J, at para 26
8. *Oswald*, *supra*, at para 27

### Level of Intent

The gravity of the conduct depends on the degree of intention of the officer, ranging from inadvertent or minor violations to willful or reckless disregard for Charter rights.[1]

Flagrant disregard of Charter right are to be treated differently than breaches arising out of conduct that is in accordance with the law.[2]

The Court should consider "what the police did and their attitude when they did it".[3]

A "cavalier" attitude to the use of police powers will also aggravate the breach.[4]

The judge is permitted to proceed on the basis that the police conduct themselves in accordance with the law where there has been no "claim of police misconduct or negligence in [police activity]”.[5]

Whether the conduct was an isolated incident or part of a larger pattern of police disregard of Charter rights will affect the seriousness of the breach.[6] This can usually come out through voir dire evidence of whether the officer was acting on an established practice.

The seriousness can be mitigated by factors such as "good faith" on the part of the officer or extenuating circumstances that may warrant quick action to avoid losing evidence.[7]

The presence of reasonable and probable grounds for the police conduct will lessen the seriousness of the violation.[8]

The officer's knowledge of their limits of their authority is a factor in determining the seriousness of the breach.[9]

Even physical evidence that is reliable can be excluded where the violation was "deliberate and egregious and severely impacted" the accused's rights.[10]

#### Technical Errors

Mere technical errors in the warrant that results in a breach, absent bad faith or negligence, should not be used to undermine or upset presumptively valid warrants.[11]

#### Alternatives

Where the evidence could have been obtained without infringing the Charter can render the breach more serious.[12]

#### Examples

Entry into a residence with an invalid warrant or without any warrant is considered a serious violation of the accused's rights and tends to lean towards exclusion.[13]

Factors considered on a breach of s. 8 include:[14]

1. the good faith of the officers who breached the rights;
2. was the police conduct inadvertent or a deliberate ignoring of the law?
3. were their actions motivated by a genuine and realistic urgency or necessity?
4. could the evidence have been found in any other way?
5. the obtrusiveness or otherwise of the search
6. any expectation of privacy; and
7. the existence of reasonable and probable grounds.

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachln CJ and Charron J, at para 74
2. see *R v Beaulieu*, 2010 SCC 7 (CanLII), [2010] 1 SCR 248, *per* Charron J
   *R v Loewen*, 2011 SCC 21 (CanLII), [2011] 2 SCR 167, *per* McLachlin CJ
3. see *R v Ramage*, 2010 ONCA 488 (CanLII), 257 CCC (3d) 261, *per* Doherty JA, at para 48
4. *R v Brown*, 2012 ONCA 225 (CanLII), 286 CCC (3d) 481, *per curiam*
5. *R v Blake*, 2010 ONCA 1 (CanLII), 251 CCC (3d) 4, *per* Doherty JA
6. *R v Greffe*, 1990 CanLII 143 (SCC), [1990] 1 SCR 755, *per* Lamer J, at para 50
7. *R v Silveira*, 1995 CanLII 89 (SCC), [1995] 2 SCR 297, *per* Cory J
8. *R v Caslake*, 1998 CanLII 838 (SCC), [1998] 1 SCR 51, *per* Lamer CJ
   *R v Belnavis*, 1997 CanLII 320 (SCC), [1997] 3 SCR 341, *per* Cory J
9. *R v Nguyen*, 2009 CanLII 59692 (ON SC), *per* Bryant J, at para 220
10. *Nguyen*, *ibid.*
11. *R v Pammett*, 2014 ONSC 1242 (CanLII), *per* McCarthy J, at para 10
12. *Nguyen*, *ibid.*, at para 222
13. *R v Maton*, 2005 BCSC 330 (CanLII), 65 WCB (2d) 186, *per* Romilly J, at paras 56 to 64
14. *R v Moldovan*, 2009 CanLII 58062 (ON SC), *per* R Clark J, at para 163
    *R v Buhay*, 2003 SCC 30 (CanLII), [2003] 1 SCR 631, *per* Arbour J, at para 52

### Blatant, Flagrant and Extremely Serious Breaches

The most serious type of behaviour is that which is considered "flagrant", "blatant" or "extremely serious".[1]

#### Bad Faith

The absence of good faith does not equate to bad faith.[2]

A peace officer acting in bad faith, but later taking responsibility for the misconduct does not have a mitigating effect.[3]

1. *R v Harrison*, 2009 SCC 34 (CanLII), [2009] 2 SCR 494, *per* McLachlin CJ, at para 23
2. *R v Caron*, 2011 BCCA 56 (CanLII), 269 CCC (3d) 15, *per* Frankel JA, at paras 38 to 42
3. *R v Buhay*, 2003 SCC 30 (CanLII), [2003] 1 SCR 631, *per* Arbour J, at #par60 para 60
   *R v Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 SCR 3, *per* Sopinka J, at p. 29 ("[T]he Crown would happily concede s. 8 violations if they could routinely achieve admission under s. 24(2) with the claim that the police did not obtain a warrant because they did not have reasonable and probable grounds." [underline in original]) *R v Strauss*, 2017 ONCA 628 (CanLII), 353 CCC (3d) 304, *per* Benotto JA, at para 50 ("In considering the seriousness of the s. 8 breach, the trial judge also noted ... he accepted full responsibility; and he had never previously conducted a warrantless entry and search. These comments do not minimize the seriousness of the breach. It is unreasonable to say otherwise.")

### Negligence

When evaluating conduct it is permissible for a judge to make findings that the police were careless or negligent.[1]

Negligent conduct will not necessarily amount to bad faith.[2]

Negligence can be found where there are errors on the face of the warrant such that "with a minimum of care and attention" by the affiant, authorizing justice, or executing officers, it would have been discovered.[3]

Overly expeditious execution of a warrant where there is knowledge on the part of the police that there was no risks of destruction of evidence may play a part in the considerations.[4]

Errors in the dates authorized for the execution of the search have been found to be negligent.[5]

1. *R v Campbell*, 2018 NSCA 42 (CanLII), 362 CCC (3d) 104, *per* Bourgeois JA, at paras 30 to 31, 37
2. *R v Cote*, 2011 SCC 46 (CanLII), [2011] 3 SCR 215, at para 71
3. *Campbell*, *ibid.*, at para 40
4. *Campbell*, *ibid.*, at para 40
5. *Campbell*, *ibid.*
   *R v LSU*, 1999 CanLII 15167 (BC SC), *per* Stromberg-Stein J, at para

39 ("Non-compliance with the time indicated on the search, acting on an undated search warrant, and the preparation of an inadequate Information to Obtain is not merely sloppy and careless but amounts to negligence.")

## Good Faith

Good faith, if established, will favour admission because it will "reduce the need for the court to disassociate itself from police conduct".[1]

Good faith however cannot be equated with wilful blindness, negligence or ignorance.[2] Same goes for recklessness[3] , negligence[4] , casually,[5] , or intentionally.[6]

Good faith cannot be inferred merely from the absence of bad faith. The court must make a finding that the officers had and honestly held belief that was reasonable.[7]

Courts should forgive "understandable errors" since they do not significantly corrode public confidence in the system.[8] There can be no finding of bad faith where the police do exactly what they are supposed to do in the circumstances.[9]

### Subjective and Objective Belief

The officer's subjective belief that Charter rights were not affected by their conduct does not diminish the seriousness of the breach unless the belief was objectively reasonable.[10]

Their belief will not be reasonable where the breach was "committed in ignorance of the scope of their constitutional authority".[11]

### Officer's Training

The officer's quality and focus of training has some but limited importance in considering good faith.[12]

### Crown Advice

Whether the Crown was consulted for advice on the matter will weigh towards the likelihood of good faith.[13] There is however little relevancy in the failure of either police or crown to take notes of their advice conversation.[14]

### Evidence

Evidence including testimony from the officer establishing that they reasonably believed that their actions were authorized by law or reflective of the state of the law at the time.[15]

### Examples

where a demarcation in law is not easy to identify consistently, such as the point where interactions between police and civilian becomes a detention, errors on the part of the police can be understandable.[16]

Police acting on an honest but mistaken belief of the lawfulness of their conduct, such as operating under an invalid warrant or believing that a warrant to search was unnecessary, may have the effect to lessen the gravity of the breach.[17] However, acting without authorization where there were sufficient grounds to obtain one, may have the effect of aggravating the breach.[18]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachln CJ and Charron J, at para 75
2. *R v Tombs*, 2012 BCSC 1826 (CanLII), *per* Brown J, at paras 89 to 90
3. *Grant*, *supra*, at para 74
4. *R v Morelli*, 2010 SCC 8 (CanLII), [2010] 1 SCR 253, *per* Fish J, at para 99
5. *R v Buhay*, 2003 SCC 30 (CanLII), [2003] 1 SCR 631, *per* Arbour J, at para 57
6. *Grant*, *supra*, at para 133
7. *R v Caron*, 2011 BCCA 56 (CanLII), 269 CCC (3d) 15, *per* Frankel JA, at paras 38 (" “Good faith” and its polar opposite, “bad faith” (or “flagrant” disregard), are terms of art in the s. 24(2) lexicon: Kokesch at 30. The absence of bad faith does not equate to good faith, nor does the absence of good faith equate to bad faith. To fall at either end of this spectrum requires a particular mental state.") and 41 to 42
8. *Grant*, *supra*, at para 75
9. *R v Blake*, 2010 ONCA 1 (CanLII), 251 CCC (3d) 4, *per* Doherty JA, at para 25
10. *R v Buhay*, 2003 SCC 30 (CanLII), [2003] 1 SCR 631, *per* Arbour J, at para 59 ("officer’s subjective belief that the appellant’s rights were not affected does not make the violation less serious, unless his belief was reasonable”)
11. *R v Davidson*, 2017 ONCA 257 (CanLII), 352 CCC (3d) 420, *per* Laskin JA, at para 48
12. *R v Clayton*, 2007 SCC 32 (CanLII), [2007] 2 SCR 725, *per* Abella J, at paras 51 to 52
13. *R v Jones*, 2011 ONCA 632 (CanLII), 278 CCC (3d) 157, *per* Blair JA
14. see *Jones*, *ibid.*
15. *R v Spencer*, 2014 SCC 43 (CanLII), [2014] 2 SCR 212, *per* Cromwell J, at para 77
16. *Grant*, *supra*, at para 133
17. *R v Blake*, 2010 ONCA 1 (CanLII), 251 CCC (3d) 4, *per* Doherty JA, at paras 24 to 27
    *R v Mahmood*, 2011 ONCA 693 (CanLII), 282 CCC (3d) 314, *per* Watt JA, at paras 82, 119
    *R v Bacon*, 2012 BCCA 323 (CanLII), 286 CCC (3d) 132, at paras 27 to 31
    *R v Rocha*, 2012 ONCA 707 (CanLII), 292 CCC (3d) 325, at to 32 paras 28 to 32{{{3}}}
    *R v Cole*, 2012 SCC 53 (CanLII), [2012] 3 SCR 34, at para 89 ("Where a police officer could have acted constitutionally but did not, this might indicate that the officer adopted a casual attitude toward — or, still worse, deliberately flouted — the individual’s Charter rights... . But that is not this case: The officer, as mentioned earlier, appears to have sincerely, though erroneously, considered Mr. Cole’s Charter interests. ")
    *R v Cote*, 2011 SCC 46 (CanLII), [2011] 3 SCR 215, at para 71 ("...the facts that the police exhibited good faith and/or had a legitimate reason for not seeking prior judicial authorization of the search will likely lessen the seriousness of the Charter-infringing state conduct...")
18. *Cote*, *ibid.*, at para 71 (" If the police officers could have conducted the search legally but failed to turn their minds to obtaining a warrant or proceeded under the view that they could not have demonstrated to a judicial officer that they had reasonable and probable grounds, the seriousness of the state conduct is heightened. ...[A] casual attitude towards, or a deliberate flouting of, *Charter* rights will generally aggravate the seriousness of the Charter-infringing state conduct.")

### Urgency or Necessity

Searches that are done out of urgency or necessity favour admission of evidence. [1] Circumstances would include risk of evidence being destroyed or lost.[2]

The presence of ignored lesser intrusive options to chosen the method of investigation will have an aggravating effect on the seriousness of the Charter breach.[3]

A disregard of any non-violate alternative options supports exclusion of the evidence.[4]

1. *R v Buhay*, 2003 SCC 30 (CanLII), [2003] 1 SCR 631, *per* Arbour J, at paras 52, 61, 63
2. *Buhay*, *ibid.*
3. *R v Brown*, 2012 ONCA 225 (CanLII), 286 CCC (3d) 481, *per curiam*
4. *R v Collins*, 1987 CanLII 84 (SCC), [1987] 1 SCR 265, *per* Lamer CJ, at para 38

### Police Policies and Practice

It is valid for courts to consider the existence of police policy when the infringing police conduct was in compliance with policies or practices. This will militate towards exclusion.[1]

1. *R v GTD*, 2017 ABCA 274 (CanLII), 355 CCC (3d) 431, *per curiam* (2:1) aff'd at 2018 SCC 7 (CanLII), *per* Brown J

## Second Factor: Impact on Personal Interests

The second factor considers what impact the unlawful conduct had upon the accused. The greater the impact on the accused's personal interests, the more likely admission of the evidence will bring the administration of justice into disrepute.[1]

The impact on personal interests is a two part inquiry. First, the interest engaged must identified, and then the degree to which the violation impacted this interest must be considered.[2]

Failure to begin by identifying the interests impacted may in certain circumstances amount to a reversable error.[3]

#### Ranges of Impact

The impact can range from fleeting and technical to profoundly intrusive.[4]

Being stopped and searched without justification impacts liberty and privacy in more than a trivial manner. [5]

Stopping a vehicle creates a lesser impact on personal interests than a search of a residence.[6]

In the context of a roadside screening demand, it has been said that only the breaching event is to be considered in determining the impact on personal interests. The judge should not consider the events that follow including the subsequent arrest, personal consequences, or employment consequences.[7]

#### Denial of Ownership of Evidence

The fact that the accused denies ownership in the item seized is an "important factor" to consider[8]

1. *R v Côté*, 2011 SCC 46 (CanLII), [2011] 3 SCR 215, *per* Cromwell J, at para 47
2. *R v MacMillan*, 2013 ONCA 109 (CanLII), 296 CCC (3d) 277, *per* Rosenberg JA, at para 77 ("The majority of the Supreme Court in Grant (2009) mandated,... that the court evaluate the extent to which the breach actually undermined the interests protected by the right infringed. This requires the court to identify the interests engaged by the infringed right and examine the degree of impact from the violation.")
3. *MacMillan*, *ibid.*, at paras 77 to 85
4. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachln CJ and Charron J
5. *R v Harrison*, 2009 SCC 34 (CanLII), [2009] 2 SCR 494, *per* McLachlin CJ, at para 31 "being stopped and subjected to a search by the police without justification impacts on the motorist's rightful expectation of liberty and privacy in a way that is much more than trivial.")
6. see *R v Bacon*, 2012 BCCA 323 (CanLII), [2012] BCJ No 1571 (CA), *per* Saunders JA (3:0), at para 34
   *R v Loewen*, 2011 SCC 21 (CanLII), [2011] 2 SCR 167, *per curiam*, at paras 12 and 13
   *Harrison*, *supra*, at para 31
7. *R v Booth*, 2010 ABQB 797 (CanLII), *per* Clackson J
8. *R v Harrison*, 2009 SCC 34 (CanLII), [2009] 2 SCR 494, *per* McLachlin CJ, at paras 63 and 64 endorsing the Court of Appeal decision

### Discoverability

The older test under Collins placed emphasis on the discoverability of the evidence, inquiring whether the evidence would have been otherwise discovered during the investigation. Under the new model, the discoverability is still relevant to the first two branches of the analysis but less crucial to the analysis.[1] However, putting too much weight on discoverability may be an error in law.[2]

The law remains that the impact of a breach is lessened and the admission is more likely where the derivative evidence was otherwise discoverable.[3] The "more likely that the evidence would have been obtained even without [the impugned statement of the accused] the lesser the impact of the breach on the accused's underlying interest against self-incrimination".[4]

1. *R v Côté*, 2011 SCC 46 (CanLII), [2011] 3 SCR 215, *per* Cromwell J, at para 70

2. *R v MacMillan*, 2013 ONCA 109 (CanLII), 296 CCC (3d) 277, *per* Rosenberg JA (3:0) starting, at para 63
3. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 125
4. *Grant*, *ibid.*, at para 122

## Third Factor: Interest in Trying Case on Merits

The third step considers the "truth-seeking function" of the trial process.[1] It asks whether this "truth-seeking function" is better served by either the exclusion or admission of the evidence.[2]

This factor "reflects society's expectation that the criminal allegations will be adjudicated according to their merits."[3] It is presumed that society has an interest in adjudicating matters on their merits. A balance must be made between the effect of its exclusion to the effect of its inclusion.

This factor "becomes important" when either the first *or* the second factor (but not both) push "strongly toward the exclusion of the evidence".[4] However, where both favour exclusion, the third factor will "seldom, if ever, tip the balance in favour of admissibility'.[5] When both favour inclusion, the third factor will "almost certainly confirm the admissibility of the evidence".[6]

The third factor will "seldom tip the balance in favour of admissibility on its own". Rather it will work in support of the second factor analysis supporting admission.[7]

#### Relability of the Evidence

The "reliability" of the evidence is an important inquiry. If the breach brings the reliability into question it will favour exclusion.[8] Admitting unreliable impacts the fairness of the trial and the public's desire to uncover the truth. However, excluding reliable evidence will undermine trial fairness and the truth-seeking function of the justice system.[9]

It is inconsistent with the Charter to "view that reliable evidence is admissible regardless of how it was obtained".[10]

Where the evidence forms the core of the Crown's case, admitting unreliable evidence is more likely to bring the administration of justice into disrepute. By contrast, excluding reliable evidence in such circumstances will impact trial fairness and the truth-seeking function even more.[11]

#### Importance to the Crown's Case

The importance of the evidence on the Crown's case is also important. [12] Where the exclusion would effectively "gut" the case, it will be a factor in favour of admission.[13]

#### Seriousness of Offence

The seriousness of the offence has some importance,[14] but not as much as it did under the old "Stillman test".[15] Nevertheless, seriousness can "cut both ways".[16] The importance of the short-term desire to convict for serious offences is balanced against the need for fair conduct where the penalty is so great.

There will be cases where the seriousness of the offence is considered "neutral".[17]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J
2. *Grant*, *ibid.*, at para 79
3. *R v Manchulenko*, 2013 ONCA 543 (CanLII), 301 CCC (3d) 182, *per* Watt JA, at para 92
4. *R v McGuffie*, 2016 ONCA 365 (CanLII), 336 CCC (3d) 486, *per* Doherty JA, at para 63 ("In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence")
   *R v Spencer*, 2014 SCC 43 (CanLII), [2014] 2 SCR 212, *per* Cromwell J, at para 75
   *R v Jones*, 2011 ONCA 632 (CanLII), 107 OR (3d) 241, *per* Blair JA, at para 75
5. *McGuffie*, *ibid.*, at para 63
6. *McGuffie*, *ibid.*, at para 63
7. *R v Robertson*, 2019 BCCA 116 (CanLII), *per* Fitch JA, at para 65
   *R v Le*, 2019 SCC 34 (CanLII), [2019] 2 SCR 692, *per* Brown and Martin JJ, at para 142
8. *Grant*, *supra*, at para 83
   *R v Atkinson*, 2012 ONCA 380 (CanLII), [2012] OJ No 2520 (CA), *per* Watt JA, at para 93
9. *Grant*, *supra*, at para 81 ("exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.")
10. *Grant*, *supra*, at para 80
11. *Cote*, *supra*, at para 47
12. *Grant*, *supra*, at para 83
13. see *R v MacDonald*, 2012 ONCA 495 (CanLII), [2012] OJ No 3210 (CA), *per* MacPherson JA
14. *R v Reddy*, 2010 BCCA 11 (CanLII), 251 CCC (3d) 151, *per* Frankel JA, at para 94
    *R v Stevens*, 2011 ONCA 504 (CanLII), 274 CCC (3d) 353, *per* Armstrong JA, at para 62
15. *R v Tombs*, 2012 BCSC 1826 (CanLII), *per* N Brown J, at para 92
16. *Grant*, *supra*, at para 84
17. see *R v Martin*, 2010 NBCA 41 (CanLII), [2010] NBJ No 198 (CA), *per* Richard JA, at para 96

## Balancing of Factors

The balancing of these factors must focus upon the "long-term prospective repute of the administration of justice".[1]

Where the first and second factors favour exclusion the third factor “will seldom, if ever, tip the balance in favour of admissibility”.[2]

The repute of the administration of justice will be "significantly undermined" where evidence is included at trial which was obtained "from the most private 'place' in the home on the basis of misleading, inaccurate, and incomplete Informations" that formed the foundation of the warrant.[3]



1. *R v Morelli*, 2010 SCC 8 (CanLII), [2010] 1 SCR 253, *per* Fish J, at para

108
2. *R v McGuffie*, 2016 ONCA 365 (CanLII), 336 CCC (3d) 486, *per* Doherty JA, at para 6
3. *Morelli*, *supra*, at para 109

## Analysis for Certain Types of Evidence

### Statements by Accused

The common law historically treats statements different from other types of evidence.[1] The concern for "proper police conduct in obtaining statements" and "the centrality of the protected interested" present in most cases will favour the exclusion of statements.[2]

The third factor will often be attenuated due to the lack of reliability of a unconstitutionally obtained statement.[3]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 98
2. *Grant*, *ibid.*, at para 98
3. *Grant*, *ibid.*, at para 98

### Bodily Evidence

On the second factor, a breach of s. 8 of the Charter will focus on the "degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused".[1]

The third factor will usually favour admission in cases involving bodily samples as it is usually inherently reliable.[2]

Generally, where the breach was "deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded".[3]

Due to the reliability of bodily substances independent of the breach. The third factor will tend to weigh in favour of admission.[4]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 109
2. *Grant*, *ibid.*, at para 110
3. *Grant*, *ibid.*, at para 111
4. *Grant*, *ibid.*, at para 115

### Non-Bodily Physical Evidence

Exclusion of physical evidence will typically result where the conduct is "deliberate or egregious".[1]

Breaches of s. 8 will concern the impact on the type of privacy interests as well as the interests of human dignity.[2]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 112
2. *Grant*, *ibid.*, at paras 112 to 113

### Derivative

Derivative evidence is physical evidence obtained through the information provided by an unlawfully obtained statement.[1]

The second factor should consider to what extent the breach "impinged upon that interest in a free and informed choice".[2] A significant compromise of this interest will "strongly favour" the exclusion of evidence.[3]

Whether the evidence was otherwise discoverable will be a consideration in favour of admission. The lack of discoverability will favour exclusion.[4]

Applying the "discoverability rule" as determinative will not always work as it relies on hypothetical and theoretical circumstances.[5]

Given the reliability of real or physical evidence, the third factor will usually favour admission.[6]

Deliberate abuse of accused's rights should result in exclusion.[7]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 116
2. *Grant*, *ibid.*, at para 125
3. *Grant*, *ibid.*, at para 125
4. *Grant*, *ibid.*, at para 122
5. *Grant*, *ibid.*, at paras 120 to 121
6. *Grant*, *ibid.*, at para 126
7. *Grant*, *ibid.*, at para 128

## Interests for Specific Offences

No matter how serious the offence and important the societal interest in eliminating the crime, the Charter must always be complied with.[1]

1. *R v Silveira*, 1995 CanLII 89 (SCC), [1995] 2 SCR 297, *per* Cory J, at para 91 ("It cannot be disputed that the drug trade is odious, and poses a grave threat to society. And I therefore agree that all reasonable steps must be taken to eradicate it. But we cannot allow the desirability of these efforts to make the courts deviate from their high duty to ensure

> that those who wield power on behalf of the state must do so within the limits the Charter dictates for the benefit of the individual. No matter how grave the threat, law enforcement must operate in conformity with the enshrined protections of the Charter")

### Motor Vehicle Offences

Cases have addressed society's interest screening of impaired drivers to reduce the carnage on our highways prefers the inclusion of evidence.[1]

The ASD procedure has been described as a "non-invasive" and "does not undermine bodily integrity or dignity".[2]

Breath sample evidence by ASD or intoxilyzers are "generally considered reliable" subject to other evidence in a given case.[3]

1. see *R v Elias; R v Orbanski*, 2005 SCC 37 (CanLII), [2005] 2 SCR 3, *per* Charron J, at paras 3, 24 to 27, 49 55 and 58
2. *R v Vandenberg*, 2010 ABQB 261 (CanLII), 491 AR 167, *per* LJ Smith J
3. *R v Bryce*, 2009 CanLII 45842 (ON SC), [2009] OJ No 3640 (ONSC), *per* Hill J, at paras 64 and 65

### Weapons Offences

In consideration under s.24(2) of the Charter, courts have commented on the public interest with respect to gun cases:[1]

> Offences involving handguns is a “serious and growing societal danger”.[2]

There is a strong emphasis on the need to denounce and deter the use of firearms in public places.[3] There has been judicial notice that as of 2007 there has been a national increase in gun violence and gun-related offences.[4]

It has been said that "the exclusion of firearms would more negatively impact the administration of justice than their admission."[5]

1. See *R v Campbell*, 2009 CanLII 55314 (ON SC), [2009] OJ 4132, *per* Marrocco J
2. *R v Clayton*, 2005 CanLII 16569 (ON CA), 194 CCC (3d) 289, *per* Doherty JA at 41 appealed at 2007 SCC 32 (CanLII), [2007] 2 SCR 725, *per* Abella J
3. *R v Danvers*, 2005 CanLII 30044 (ON CA), 199 CCC (3d) 490, *per* Armstrong JA, at para 77
   *R v Bellamy*, 2008 CanLII 26259 (ON SC), [2008] 175 CRR (2d) 241, *per* Boswell J, at para 76
   *R v Brown*, 2006 CanLII 39311 (ON SC), OJ No 4681, *per* Trafford J, at para 9
4. *R v Clayton*, 2007 SCC 32 (CanLII), [2007] 2 SCR 725, *per* Abella J, at para 110
5. *R v Mpamugo*, 2009 CanLII 9741 (ON SC), [2009] OJ No 953, *per* Baltman J, at para 48
   *R v Harrison*, 2009 SCC 34 (CanLII), [2009] 2 SCR 494, *per* McLachlin CJ, at para 82

### Drugs and Guns Offences

There have been many cases confirm the public interest in prosecuting drug and gun offences.[1]

1. *R v Prosser*, 2014 ONSC 2645 (CanLII), OJ No 2543, *per* Wilson J, at para 99
   *R v Greffe*, 1990 CanLII 143 (SCC), [1990] 1 SCR 755, *per* Lamer J
   *R v Silveira*, 1995 CanLII 89 (SCC), [1995] 2 SCR 297, *per* Cory J
   *R v Nguyen*, [2005] OJ No 1948 (SCJ)(*no CanLII links)
   *R v Brown*, 2009 ONCA 563 (CanLII), 251 OAC 264, *per curiam*, at para 33
   *R v Brown*, 2009 ONCA 563 (CanLII), [2007] OJ No 5659, *per* Nordheimer J, at para 20 appealed to , *per curiam*
   *R v Smickle*, 2013 ONCA 678 (CanLII), 304 CCC (3d) 371, *per* Doherty JA, at paras 28 to 30

## Types of Police Conduct

Police are presumed to know the law. However, where there exist conflicting precedent they are not expected to reflect "judicially" on the distinctions.[1]

The unlawful entry into a persons home "is the ultimate invasion of privacy. It is a denial of one of the fundamental rights of individuals living in a free and democratic society.”[2]

Where telewarrant process was used "without having adequately demonstrated that it was impractical to appear in person" is not considered a "serous breach".[3]

Admission of evidence obtained from unacceptable police conduct or practices in performing warrantless searches leaves justice with a "black eye".[4]

#### Entry into a Dwelling House

A search of a dwelling house "must be approached with the degree of responsibility appropriate to an invasion of a place where the highest degree of privacy is expected".[5]

#### Breach of Solicitor-Client Privilege

An unlawful seizure of solicitor-client privilege documents should include consideration of:[6]

- the number of seized records over which privilege was indeed claimed
- whether notes were taken relating to the seizure of the items
- whether the records were indeed looked at
- whether any privileged information was disclosed to police

- whether the Crown sought to adduce any privilege documents.

#### Failure to File a Report to Justice

A failure to file a report to justice "as soon as practicable" is a s. 8 violation.[7]

A complete subversion of the supervision authority of a detention order will weigh in favour of exclusion.[8]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ and Charron J, at para 133 ("We add that the Court's decision in this case will be to render similar conduct less justifiable going forward. While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is...")
2. *R v Silveira*, 1995 CanLII 89 (SCC), [1995] 2 SCR 297, *per* Cory J, at para 148
3. *R v Lacelle*, 2013 ONCA 390 (CanLII), 284 CRR (2d) 184, *per curiam*, at para 11
4. *R v Morelli*, 2010 SCC 8 (CanLII), [2010] 1 SCR 253, *per* Fish J, at para 110
5. *R v Sutherland*, 2000 CanLII 17034 (ON CA), 150 CCC (3d) 231, *per* Carthy JA, at para 15
6. *R v Schulz*, 2018 ONCA 598 (CanLII), 142 OR (3d) 128, *per* Brown JA, at para 26
7. R v Garcia-Machado, 2015 ONCA 569 at paras 44 to 45
8. e.g. *R v Yogeswaran*, 2021 ONSC 1242 (CanLII)

## Evidence Collected Outside Canada

Th Charter generally does not apply to foreign authorities.[1]

Evidence collected outside of Canada in a manner compliant with local laws but not compliant with Canadian laws may be admissible unless do admit it would render the trial unfair.[2] All relevant factors must be considered.[3]

A major factor includes whether the official conducting the investigation is from Canada or a foreign country. [4]

Trial will be unfair where "so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience"[5]

1. *R v Harrer*, 1995 CanLII 70 (SCC), [1995] 3 SCR 562, *per* La Forest J, at para 35
2. *R v Tan*, 2014 BCCA 9 (CanLII), 299 CRR (2d) 73, *per* Bennett JA
3. *R v Cook*, 1998 CanLII 802 (SCC), [1998] 2 SCR 597, *per* Cory and Iacobucci JJ
4. *R v Hape*, 2007 SCC 26 (CanLII), 220 CCC (3d) 161, *per* LeBel J, at para 109
4. *R v Mathur*, 2007 CanLII 38943 (ON SC), 162 CRR (2d) 23, *per* Marrocco J, at para 33
5. *Harrer*, *supra*, at para 51

## Pre-Grant Analysis

#### Trial Fairness

The factor of "trial fairness" under the previous Collins test had problems, including that is was largely determinative of the issue. Rather, trial fairness is considered an overarching goal of the analysis and not merely a factor.[1]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachln CJ and Charron J, at paras 62 to 65

### Collins/Stillman Analysis

Under the Collins test, the administration of justice is brought into "disrepute" where a combination of three factors weight in favour of exclusion of evidence. These sets of factors consist of:[1]

1. factors affecting the fairness of the trial,
2. factors relevant to the seriousness of the violation; and
3. factors relevant to the effect of excluding the evidence.

The Stillman test considers the first set of factors. It examines the nature of the evidence and alternatives to its discovery.[2] The Stillman test directs the following analysis:

1. Classify the evidence as conscriptive or non-conscriptive based on the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the Court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.
2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.
3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the Charter breach and the effect of exclusion on the repute of the administration of justice will have to be considered.

1. *R v Collins*, 1987 CanLII 84 (SCC), [1987] 1 SCR 265, *per* Lamer CJ
2. *R v Stillman*, 1997 CanLII 384 (SCC), [1997] 1 SCR 607, *per* Cory J

### Conscriptive Evidence

Evidence that is conscriptive is a factor against the admission of evidence obtained by a Charter violation.

Conscriptive evidence affects the trial fairness factor. It arises from any of the following:[1]

1. statements
2. use of the accused's body
3. taking of bodily sample
4. evidence derived from the above (derivative evidence)

Evidence that is conscriptive and not otherwise discoverable will tend to be excluded.

A voluntary statement cannot be conscriptive.[2]

#### Burden and Standard of Proof

Conscriptiveness must be proven by the Accused on a balance of probabilities.

#### Discoverability

Discoverable evidence is evidence that 1) can be proven by other non-conscriptive means or 2) would inevitably be discovered.[3]

Discoverability must be proven by the Crown on a balance of probabilities.

The automatic exclusion of non-discoverable conscriptive evidence was rejected under the Grant approach.[4]

1. Watt, Manual of Criminal Evidence at 41.03
   *R v Stillman*, 1997 CanLII 384 (SCC), [1997] 1 SCR 607, *per* Cory J - lists the first three factors
2. Watt at 41.03
3. Stillman
4. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachln CJ and Charron J

## Other Uses of Excluded Evidence

Evidence that has been subject to an exclusion under s. 24(2) of the Charter in a criminal trial will normally be inadmissible for other purposes, including a dangerous offender applications.[1]

Where the excluded evidence is a statement, the excluded statement will not normally be permitted to be used to impeach the accused during cross-examination.[2]There may however be in "very limited circumstances" cases where this should be permitted.[3]

1. *R v Ricciardi*, 2018 ONSC 445 (CanLII), *per* Di Luca J
2. *R v Calder*, 1996 CanLII 232 (SCC), [1996] 1 SCR 660, *per* Sopkina J, at para 34 ("The effect of destroying the credibility of an accused who takes the stand in his or her defence using evidence obtained from the mouth of the accused in breach of his or her Charter rights will usually have the same effect as use of the same evidence when adduced by the Crown in its case in chief for the purpose of incrimination.")
3. *Calder*, *ibid.*, at para 35

## Relevant Charter Rights

- Rights Against Search and Seizure
- Right to Counsel
- Right Against Arbitrary Detention
- Right to be Informed of Charges

## Other Remedies for Charter Breaches

- See Costs
- Stay of Proceedings

## See Also

#### External Links

- Section 24(2) paper

# Compelling the Accused to Attend Court

< Procedure and Practice < Compelling the Accused to Attend Court

## Introduction

A person can be compelled to attend court to face criminal charges in several ways. It starts with the police. They investigate a crime and at some point they suspect an individual is responsible.

The police start by doing one of three things:

1. serve an appearance notice on the accused;
2. arrest the accused; or
3. lay a charge and issue a warrant or summons

These are not mutually exclusive actions but rather first steps.

Where the person is given an appearance notice, they are simply served with a document directing them to attend court.

Where the person is arrested first, the police will decide whether to lay a charge. If a charge will be layed the police can do one of the following:

1. hold him for court
2. release him using a summons, Appearance Notice, Promise to Appear (with or without an undertaking), or Recognizance (with or without an undertaking)

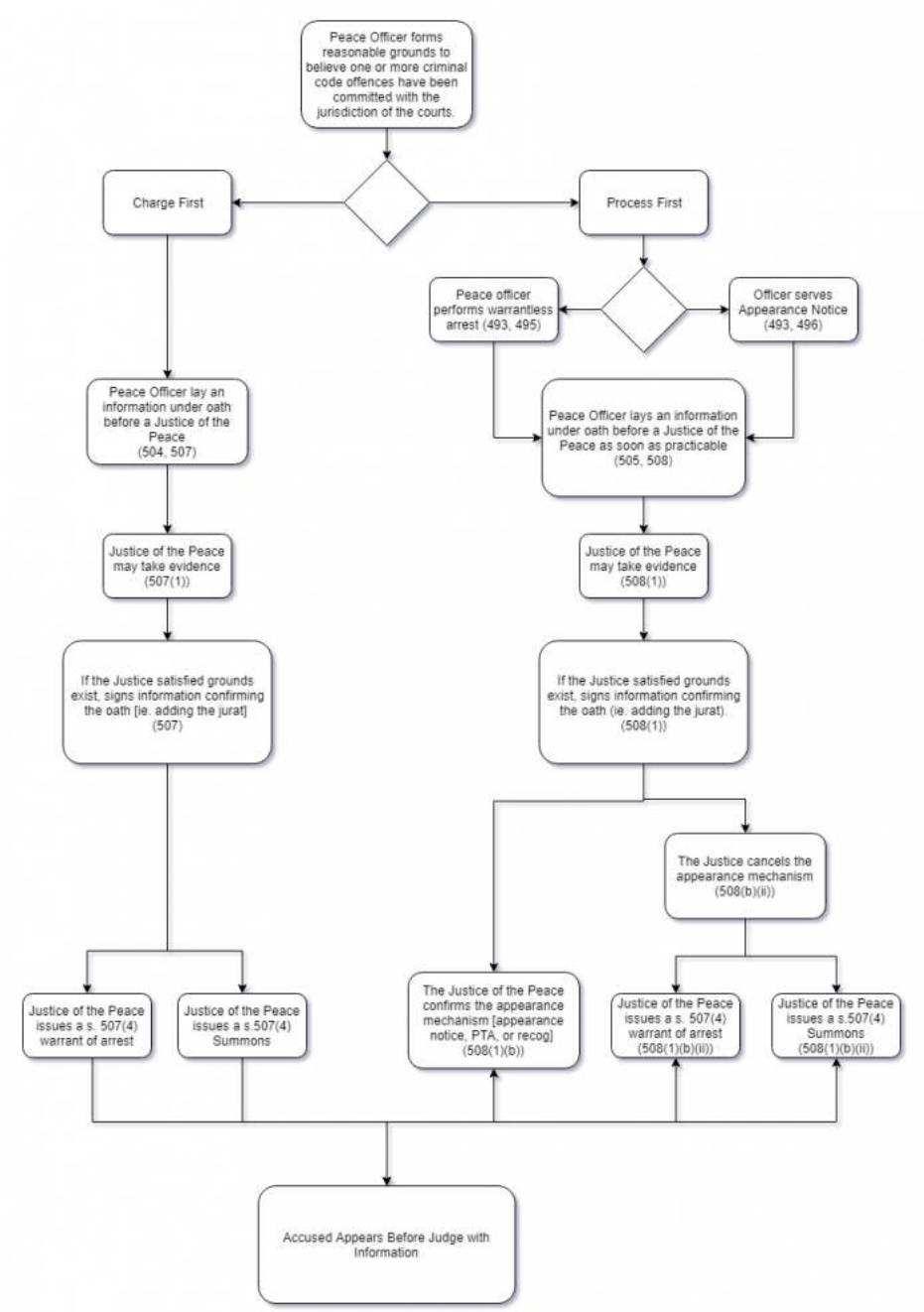
If they are held for court, the issue of release will be left to the judge to determine.

Where the charge is layed first, the warrant or summons gives authority to the police to locate the individual for the purpose of arresting them to serving them with notice to attend court.

## Topics

- Compelling Attendance by Accused Without Arrest
- Warrantless Arrests and Warrant Arrests
- Laying of an Information, Issuing Process and Informations and Indictments: At some point after the initial arrest and before the first appearance for arraignment, the peace officer is expected to prepare an Information and swear the information before a justice of the peace. The officer will give sworn evidence that they had reasonable ground to believe that the offence had been committed by the accused. This can be done at any time prior to the first appearance for arraignment so long as it is within the time limit for the offence (6 months if summary offence).
- Release by Police
- Judicial Interim Release: If the peace officer does not release the accused, then under s. 503 they must present the accused before a justice within 24 hours to consider whether to release the accused under s. 515.
- Procuring the Attendance of a Prisoner

## Flow Chart




## See Also

- Compelling Attendance of Witnesses

# Compelling Attendance by Accused Without Arrest

< Procedure and Practice < Compelling the Accused to Attend Court

## General Principles

An accused can be compelled to attend court without arrest by means of either an appearance notice or a summons.

## Appearance Notice

Section 497 concerns the issuing of an appearance notice without arrest:

> **Issue of appearance notice by peace officer**

497 If, by virtue of subsection 495(2) [*public interest exception to arrest power*], a peace officer does not arrest a person, they may issue an appearance notice to the person if the offence is

(a) an indictable offence mentioned in section 553 [*absolute jurisdiction offences*];
(b) an offence for which the person may be prosecuted by indictment or for which they are punishable on summary conviction; or
(c) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 497; 1999, c. 25, s. 3(Preamble); 2019, c. 25, s. 212.
[*annotation(s) added*]

– CCC

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Where an officer provides an appearance notice, the notice must be confirmed under s. 505 and 508.

An "appearance notice" is defined under s. 493 as "a notice in Form 9 issued by a peace officer".

If an accused refuses to sign an appearance notice, that is not a reason to detain. The signature "merely permits the appearance notice to be confirmed by a justice of the peace". Without it the officer would need to adduce proof of service.[1]

A failure of a judge to confirm an appearance notice does not remove the judge's jurisdiction over the matter. The defect can be cured by the accused's attendance.[2]

Appearance notices can be issued after arrest under s. 497 or 498.

1. *R v Farncombe*, 1984 CanLII 2626 (SK QB), 1984 CarswellSask 368, 12 WCB 222, 34 Sask R 161, *per* Matheson J, at para 13
2. *Re Ridgely*, 1978 CanLII 2471 (NL SC), 42 CCC (2d) 291, *per* Mifflin CJ - Mandamus was used to compel the judge to require attendance

## Appearance Notice for Breach of Conditions

**Appearance notice for judicial referral hearing**

496 If a peace officer has reasonable grounds to believe that a person has failed to comply with a summons, appearance notice, undertaking or release order or to attend court as required and that the failure did not cause a victim physical or emotional harm, property damage or economic loss, the peace officer may, without laying a charge, issue an appearance notice to the person to appear at a judicial referral hearing under section 523.1 [*judicial referral hearing*].

R.S., c. C-34, s. 451; R.S., c. 2(2nd Supp.), s. 5; 2019, c. 25, s. 212.
[*annotation(s) added*]

– CCC

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## Contents of Appearance Notice

**Contents of appearance notice**

500 (1) An appearance notice shall

(a) set out the name, date of birth and contact information of the accused;
(b) set out the substance of the offence that the accused is alleged to have committed;
(c) require the accused to attend court at a time and place to be stated in the notice and to attend afterwards as required by the court; and
(d) indicate if the accused is required to appear at a judicial referral hearing under section 523.1 [*judicial referral hearing*] for a failure under section 496 .

**Summary of consequences — failure to appear**

(2) An appearance notice shall set out a summary of subsections 145(3) [*failure to comply with appearance notice or summons*] and (6) [*provisions re failure to comply – no excuse where offence wrongly described*], section 512.2 [*Arrest warrant – failure to appear under appearance notice or undertaking*] and subsection 524(4) [*breach allegations – remand after cancellation*] and the possible consequences of a failure to appear at a judicial referral hearing under section 523.1 [*judicial referral hearing*].

**Attendance for purposes of *Identification of Criminals Act***

(3) An appearance notice may require the accused to appear at the time and place stated in it for the purposes of the *Identification of Criminals Act*, if the accused is alleged to have committed an indictable offence and, in the case of an offence designated as a contravention under the *Contraventions Act*, the Attorney General, within the meaning of that Act, has not made an election under section 50 of that Act.

**Signature of accused**

(4) An accused shall be requested to sign in duplicate their appearance notice and, whether or not they comply with that request, one of the duplicates shall be given to the accused. If the accused fails or refuses to sign, the lack of their signature does not invalidate the appearance notice.

2019, c. 25, s. 215.
[*annotation(s) added*]

– CCC

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# Issuing a Summons Without Arrest

A summons can be issued under s. 493, 508 or 512.

**Summons vs Arrest and Release**

A summons has no connection to the powers of arrest or judicial release. The subject is simply compelled to attend court and nothing more.[1]

## Content of Summons

**Summons**

509 (1) A summons issued under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] shall

(a) be directed to the accused;
(b) set out briefly the offence in respect of which the accused is charged; and
(c) require the accused to attend court at a time and place to be stated therein and to attend thereafter as required by the court in order to be dealt with according to law.

**Service on individual**

(2) A summons shall be served by a peace officer who shall deliver it personally to the person to whom it is directed or, if that person cannot conveniently be found, shall leave it for him at his latest or usual place of abode with an inmate thereof who appears to be at least sixteen years of age.
(3) [Repealed, 2008, c. 18, s. 17]

**Summary of certain provisions**

(4) The summons must set out a summary of subsection 145(3) [*failure to comply with appearance notice or summons*], section 512.1 [*Arrest warrant – failure to appear under summons*] and subsection 524(4) [*breach allegations – remand after cancellation*].

**Attendance for purposes of *Identification of Criminals Act***

(5) A summons may require the accused to appear at a time and place stated in it for the purposes of the *Identification of Criminals Act*, where the accused is alleged to have committed an indictable offence and, in the case of an offence designated as a contravention under the *Contraventions Act*, the Attorney General, within the meaning of that Act, has not made an election under section 50 of that Act.
R.S., 1985, c. C-46, s. 509; R.S., 1985, c. 27 (1st Supp.), s. 80; 1992, c. 47, s. 71; 1996, c. 7, s. 38; 2008, c. 18, s. 17; 2019, c. 25, s. 221.
[*annotation(s) added*]

– CCC

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**Fingerprinting**

A summons for the purpose of attending for fingerprinting is only permitted when there is a concurrent order to attend court relating to charges.[2]

**Procedure**

A person who is to be summons should be given a notice under Form 6 of the Code.[3]

1. *R v Goikhberg*, 2014 QCCS 3891 (CanLII), QJ 8164, *per* Cournoyer J, at paras 50 to 57, 85

2. *R v Michelsen*, 1983 CanLII 3564 (MB QB), 4 CCC (3d) 371, 33 CR (3d) 285, *per* Scollin J

3. *Goikhberg*, *supra*, at para 54

## See Also

- Compelling Attendance by Accused Without Arrest (Until December 18, 2019)
- Release by Police on Undertaking

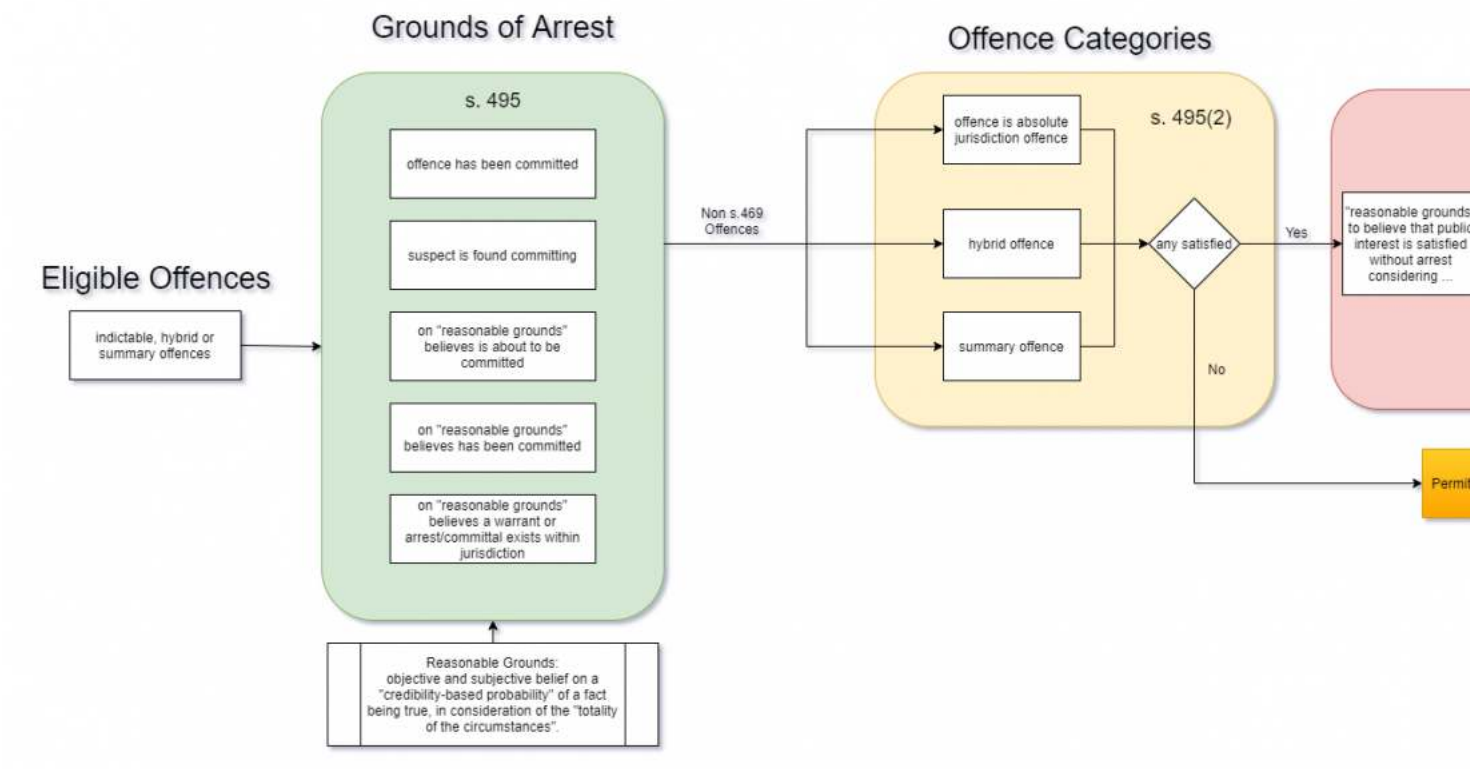
# Warrantless Arrests

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79568)

< Procedure and Practice < Arrest and Detention

## Introduction

Peace officers are granted authority to perform warrantless arrests where it is authorized by law. The primary source of authority is found in section 495 of the *Criminal Code*.




The validity of any arrest must be determined by reference to what was known to the police officer at the time. A subsequent failure to convict for the offence for which the accused was arrested has no bearing on the analysis.[1]

However, an officer cannot be excused for arresting a person for a law that was previously repealed.[2]

1. *R v Biron*, 1975 CanLII 13 (SCC), [1976] 2 SCR 56, *per* Martland J (5:3)

2. *R v Houle*, 1985 ABCA 275 (CanLII), 24 CCC (3d) 57, *per* Stevenson JA (3:0)

## Power to Arrest

Where there is no warrant for a person's arrest, a peace officer is governed by section 495:

> **Arrest without warrant by peace officer**
>
> 495 (1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable 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 in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII [*Pt. XXVIII – Miscellaneous (s. 841 to 849)*] in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[*omitted (2)*]

**Consequences of arrest without warrant**

(3) Notwithstanding subsection (2) [*public interest exception to arrest power*], a peace officer acting under subsection (1) [*warrantless arrest power*] is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; and
(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2) [*public interest exception to arrest power*].

R.S., 1985, c. C-46, s. 495; R.S., 1985, c. 27 (1st Supp.), s. 75.
[*annotation(s) added*]

– CCC

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A police officer can arrest where:

1. there is reasonable grounds a person has committed an indictable offence;
2. there is reasonable grounds a person is about to commit an indictable offence;
3. a person is committing an indictable offence; or
4. a person has a warrant out for his/her arrest.

There is limited power to arrest where the accused is found committing a summary offence *and* it is necessary to establish the accused's identity, among other things.[1]

Section 495 (1)(b) does not require the officer to "rule out potential innocent explanations" to his observations.[2] The formation of reasonable grounds does not require a prima facie case.[3]

1. *Moore v The Queen*, 1978 CanLII 160 (SCC), [1979] 1 SCR 195, *per* Spence J
2. *R v MacCannell*, 2014 BCCA 254 (CanLII), 314 CCC (3d) 514, *per* Garson JA, at para 46
3. *MacCannell*, *ibid.*

## Arrest for Breach of Peace

There is also a common law power for peace officers to arrest without a warrant where the officer has an honest and reasonable belief that there has been a breach of the peace or where there is one that is imminent.[1] This power is limited and cannot permit a "roving commission" to arrest those who the police wish.[2] They must have a "reasonable basis" to invoke this power. This includes the requirement that the conditions pre-exist the officer's attendance rather than being the result of police action.[3]

1. *Hayes v Thompson*, 1985 CanLII 151 (BCCA), 18 CCC (3d) 254, *per* Hutcheon JA
*Brown v Durham (Regional Municipality) Police Force*, 1998 CanLII 7198 (ON CA), [1998] O.J. No. 5274, *per* Doherty JA
*R v Collins*, 2012 CanLII 26587 (NL PC), *per* Orr J
*R v Khatchadorian*, 1998 CanLII 6115 (BC CA), 127 CCC (3d) 565, *per* Hall JA, at para 8 ("It seems to me that there exists clear authority in previous judgments of this court to sustain the proposition that a police officer is entitled to make a lawful arrest of someone who is engaged in a breach of the peace or who it is anticipated may shortly engage in such activity.") *R v Lefebvre*, 1984 CanLII 473 (BCCA), 15 CCC (3d) 503, *per* Craig JA
2. *Khachadorian*, *supra*
3. *Khachadorian*, *supra*

## Arrest for Breach of Conditions

**Arrest without warrant – application of section 524**

495.1 Despite any other provision in this Act, if a peace officer has reasonable grounds to believe that an accused has contravened or is about to contravene a summons, appearance notice, undertaking or release order that was issued or given to the accused or entered into by the accused, or has committed an indictable offence while being subject to a summons, appearance notice, undertaking or release order, the peace officer may arrest the accused without a warrant for the purpose of taking them before a judge or justice to be dealt with under section 524 [*procedure relating to breach of conditions*].

2019, c. 25, s. 211.
[*annotation(s) added*]

– CCC

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This provision came into force on December 18, 2019.

## Duty Not to Arrest on Public Interest Grounds

> 495.
> [*omitted (1)*]
>
> **Limitation**
>
> (2) A peace officer shall not arrest a person without warrant for
>
> (a) an indictable offence mentioned in section 553 [*absolute jurisdiction offences*],
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction [*i.e. hybrid offences*], or
> (c) an offence punishable on summary conviction [*see list of summary offences*],
>
> in any case where
>
> (d) he believes on reasonable grounds 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 grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.
>
> [*omitted (3)*]
> R.S., 1985, c. C-46, s. 495; R.S., 1985, c. 27 (1st Supp.), s. 75.
> [*annotation(s) added*]
>
> – CCC

The failure to properly consider factors in favour of release may be grounds to find arbitrary detention.[1]

1. see *R v Baker* (1988), 88 NSR (2d) 250 (NSCA)(*no CanLII links) *R v Cayer* (1988), OJ No. 1120 (ONCA)(*no CanLII links)

### Appearance Notice on Public Interest Grounds

> **Issue of appearance notice by peace officer**
>
> 497 If, by virtue of subsection 495(2) [*public interest exception to arrest power*], a peace officer does not arrest a person, they may issue an appearance notice to the person if the offence is
>
> (a) an indictable offence mentioned in section 553 [*absolute jurisdiction offences*];
> (b) an offence for which the person may be prosecuted by indictment or for which they are punishable on summary conviction; or
> (c) an offence punishable on summary conviction.
>
> R.S., 1985, c. C-46, s. 497; 1999, c. 25, s. 3(Preamble); 2019, c. 25, s. 212.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

## Right Against Unlawful Arrest

Section 9 of the Charter prohibits arbitrary detention. Under the header "Detention or imprisonment" the Charter states:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> – CCRF

#### Purpose

The "purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference"[1] Thus "a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9"[2]

#### Burden

The burden is upon the applicant to prove that the accused was "detained" within the meaning of s. 9 which must be proven on a balance of probabilities.[3]

The burden then moves onto the Crown to establish that a warrantless arrest was legal and not in violation of s. 9 of the Charter.[4]

#### Standing

An accused arrested on grounds that included evidence obtained through the breach of a third party's Charter rights does not have standing to challenge the third party's rights.[5] The only remedy in such a situation would be in an abuse of process application.[6]

1. *R v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, *per* McLachlin CJ, at para 20
2. *Grant*, *ibid.*, at para 55
3. *R v Bush*, 2010 ONCA 554 (CanLII), 259 CCC (3d) 127, *per* Durno J, at para 74
   *R v B(L)*, 2007 ONCA 596 (CanLII), 227 CCC (3d) 70, *per* Moldaver JA, at para 60
4. *R v Murphy*, 2018 NSSC 191 (CanLII), *per* Rosinski J, at para 4
5. *R v Todd*, 2015 BCSC 680 (CanLII), 121 WCB (2d) 113, *per* Rogers J *R v Tran*, 2016 BCPC 159 (CanLII), *per* Lamperson J, at paras 46 to 49 cf. *R v Brown*, 2014 BCSC 1665 (CanLII), *per* Funt J
6. *Tran*, *ibid.*, at para 46

## Reasonable and Probable Grounds

An arresting officer must have reasonable and probable grounds to make the arrest. Those grounds must be subjectively held by the officer and must be reasonable.[1] Thus, the analysis considers both an objective and subjective component.[2]

An arresting officer is not required the same scrutiny as a justice of a peace would need to be in considering a search warrant.[3]

#### Objective Requirement

The objective component asks whether the "existence of objectively reasonable grounds for arrest requires that a Court consider whether a reasonable person would find reasonable and probable ground for arrest". This reasonable person must be "in the shoes" of the officer, taking into account "training and experience".[4]

The analysis is "approached as a whole" looking at the "cumulative effect" of all the evidence known at the time.[5]

#### Timing When Grounds are Formed

Police cannot arrest first and then determine after the fact whether the accused had a connection with their investigation.[6]

The reasonableness of an officers actions is based on what was known to them prior to acting, regardless of its accuracy and completeness. The court may take into account the nature of the power being exercised in its context. The dynamics of an arrest will vary in different circumstances and will sometimes need to be decided upon quickly.[7]

#### Sources

The officer may base his belief upon assumptions or secondary sources. However, the belief cannot be only a hunch. The circumstances must be sufficient to convince a reasonably fair-minded person put in the same position as the officer that the grounds for his or her belief are reasonable. The facts must not be considered piecemeal but in a holistic manner.[8]

#### Foundation of Belief

A conclusory statement from one officer to another, such as “a drug transaction has taken place ”, will not support an objective finding of reasonable and probable grounds for an arrest.[9]

#### Sharing of Reasonable Belief Between Officers

The arresting officer can safely assume grounds exist where he is directed by another officer to arrest the accused.[10] It is the officer who has formed the grounds who decides on whether to arrest a person. They do not need to be the one performing the arrest and the arresting officer may rely on the assessment of that officer.[11]

#### Multiplicity of Beliefs

A police office can have more than one believe and objective in doing a search incident to arrest as long as it is objectively justifiable.[12]

#### Sufficiency of Investigation

An arrest may be invalid where the investigator failed to gather sufficient information to form grounds by abbreviating their investigation.[13]

The police observation of two men exchanging an unknown object, without anything more, does not meet the standard of reasonable suspicion to detain or reasonable and probable grounds to arrest.[14]

A mistaken belief that there is a warrant out for arrest does not obligate the police to look into every claim by detainee that there is no warrant, however, the police may not disregard the claim without reason to believe it may be an unreliable claim.[15]

#### Timing at Which Grounds are Formed

Objective reasonableness is determined on the "factual matrix that existed at the time the arrest was made". Other information not known to the arresting officer is not relevant.[16]

1. *R v Storrey*, 1990 CanLII 125 (SCC), [1990] 1 SCR 241, *per* Cory J, at pp. 250-1
2. *Storrey*, *ibid.*
   *R v Grotheim*, 2001 SKCA 116 (CanLII), 161 CCC (3d) 49, *per* Cameron JA
   *R v McClelland*, 1995 ABCA 199 (CanLII), 165 AR 332 (CA), *per* McFadyen JA (2:1), at para 21
   *R v Juan*, 2007 BCCA 351 (CanLII), 222 CCC (3d) 289, *per* Thackray JA, at para 27
   *R v Phung*, 2013 ABCA 63 (CanLII), 542 AR 392, *per curiam*
3. see *R v Polashek*, 1999 CanLII 3714 (ON CA), 45 OR (3d) 434, *per* Rosenberg JA *Golub*, *supra*, at p. 750
4. *Phung*, *supra*, at para 10
5. *R v Nolet*, 2010 SCC 24 (CanLII), [2010] 1 SCR 851, *per* Binnie J, at para 48
6. see *R v Whitaker*, 2008 BCCA 174 (CanLII), 254 BCAC 234, *per* Frankel JA
   *R v Chaif-Gust*, 2011 BCCA 528 (CanLII), 280 CCC (3d) 548, *per* Finch CJ
7. *R v Golub*, 1997 CanLII 6316 (ON CA), 34 OR (3d) 743, 117 CCC (3d) 193, *per* Doherty JA, at p. 750
8. *R v Chin*, 2003 ABPC 118 (CanLII), 345 AR 157, *per* Allen J, at para 60
9. *R v Lal*, 1998 CanLII 4393 (BCCA), 130 CCC (3d) 413, *per* Ryan JA
10. *R v Chervinski*, 2013 ABQB 29 (CanLII), *per* Hall J, at paras 21, 22
11. *R v Shokar*, 2006 BCSC 770 (CanLII), BCJ No 1163, *per* Joyce J, at para 21
    *R v Hall*, 2006 SKCA 19 (CanLII), 206 CCC (3d) 416, *per* Gerwing JA
12. *R v Chubak*, 2009 ABCA 8 (CanLII), 243 CCC (3d) 202, *per* Ritter JA, at para 18
    *R v Galye*, 2015 BCSC 1950 (CanLII), *per* Kent J, at para 38(an "arresting officer's subjective belief that he or she has the requisite reasonable grounds is insufficient by itself for an arrest under s. 495(1)(a) of the Code to be lawful. Those grounds must also be justifiable from an objective point of view")
13. e.g. *R v Munoz*, 2006 CanLII 3269 (ONSC), 86 OR (3d) 134, 205 CCC (3d) 70, *per* Ducharme J
14. *R v NO*, 2009 ABCA 75 (CanLII), 186 CRR (2d) 60, *per curiam*
    *R v Rahmani-Shirazi*, 2008 ABQB 145 (CanLII), 451 AR 145, *per* Sullivan J
15. *R v Gerson-Foster*, 2019 ONCA 405 (CanLII), *per* Paciocco JA
16. *Galye*, *supra*, at para 38 ("Determining whether the arresting officer's grounds were objectively reasonable involves an assessment of the factual matrix that existed at the time the arrest was made. Whether other information, had it been available, might have strengthened or weakened those grounds is not a relevant consideration")

### "About to Commit"

Under s. 495(1)(a) a peace officer may make a warrantless arrest of a person who is "about to commit" a hybrid or indictable offence.

An inebriated person about to operate a motor vehicle will be "about to commit" an offence of impaired driving.[1]

1. see *R v Beaudette*, 1957 CanLII 502 (ON CA), 118 CCC 295, *per* Schroeder JA

### "Finds Committing"

Under s. 495(1)(b) empowers a peace officer to make a warrantless arrest where a person is "apparently" committing an offence. This must be an honestly held belief and must be reasonable. The officer does not have to be so certain as equate with a conviction.[1]

The requirements of "finds committing" consist of:[2]

1. the officer's knowledge must be contemporaneous with the event;
2. the officer must actually observe or detect the commission of the offence; and
3. there must be an "objective basis for the officer's conclusion that an offence is "being committed". It "must be apparent to a reasonable person placed in the circumstances of an arresting officer".

It has been found that the strong smell of raw marijuana can be sufficient to conclude that the accused was in possession or marijuana and is arrestable under s.495(1)(b).[3] A faint and intermittent smell is not sufficient for arrest.

The person arresting does not mean that he "must be present when the offence is committed". He can "rely on reasonable inferences drawn from what he or she has seen transpire".[4]

1. *The Queen v Biron*, 1975 CanLII 13 (SCC), [1976] 2 SCR 56, *per* Martland J
   *R v Roberge*, 1983 CanLII 120 (SCC), 4 CCC (3d) 304, *per* Lamer J
2. *R v STP*, 2009 NSCA 86 (CanLII), 893 APR 1, *per* MacDonald CJ
3. *R v Harding*, 2010 ABCA 180 (CanLII), 482 AR 262, *per curiam*, at para 29
4. *R v McCowan*, 2011 ABPC 79 (CanLII), 509 AR 202, *per* Fradsham J

### Confidential Sources and Informers

- See Confidential Informers

### Procedure

When an accused challenges the grounds of a warrantless arrest, trial fairness requires that the onus is on the Crown to establish the reasonable and probable grounds on direct examination and the defence must be permitted to cross-examine the officer.[1]

1. *R v Besharah*, 2010 SKCA 2 (CanLII), 251 CCC (3d) 516, *per* Smith JA, at para 35

## Types of Observations Forming Grounds of Arrest

An observed "hand to hand" exchange without any suggestive circumstances is no reasonable basis to conclude an illegal activity.[1]

However, certain activities may be interpreted using expertise and experience may be found to be reasonably believed to be connected to illegal activity.[2]

**Marijuana Smell (Pre-October 2018)**

The use of the smell of fresh marijuana as grounds to arrest requires an opinion with "substantial underpinnings and training and/or experience" and still be considered with caution.[3]

In many circumstances, there should be some corroboration by another individual.[4]

Observation of a "very strong smell" alone may in some circumstances be sufficient to arrest.[5]

1. *R v Russell*, 2017 ABQB 298 (CanLII), *per* Goss J, at para 35
   *R v NO*, 2009 ABCA 75 (CanLII), 186 CRR (2d) 60, *per curiam*, at paras 41 and 42
2. *R v Rajaratnam*, 2006 ABCA 333 (CanLII), 214 CCC (3d) 547, *per curiam*, at para 25
3. *R v Quesnel*, 2018 NSSC 221 (CanLII), *per* Scaravelli J, at para 48
4. *Quesnel*, *ibid.*, at para 48
5. *R v Harding*, 2010 ABCA 180 (CanLII), 256 CCC (3d) 284, *per curiam*

## Citizen's Arrest

## See Also

- Release by Police on Undertaking
- Compelling the Accused to Attend Court
- Warrant Arrests
- Warrantless Searches
- Warrantless Searches (Cases)
- Warrantless Arrests (Until December 18, 2019)

# Warrant Arrests

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79568)



## General Principles

A warrant is one among several means of securing a person's attendance at court, usually it is the accused. There are several sections of the Code that address arrest warrant powers depending on the circumstances.

> **Release from custody — arrest with warrant**
>
> 499 If a person who has been arrested with a warrant by a peace officer is taken into custody for an offence other than one listed in section 469 [*exclusive jurisdiction offences*] and the warrant has been endorsed by a justice under subsection 507(6) [*endorsement of warrant by justice*], a peace officer may release the person, if
>
> (a) the peace officer issues an appearance notice to the person; or
> (b) the person gives an undertaking to the peace officer.
>
> R.S., 1985, c. C-46, s. 499; R.S., 1985, c. 27 (1st Supp.), s. 186; 1994, c. 44, s. 40; 1997, c. 18, s. 53; 1999, c. 25, s. 5(Preamble); 2019, c. 25, s. 214.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

**Youth Court Justice**

Any warrant issued by a youth court justice may be executed anywhere in Canada.[1]

1. see s. 145 YCJA: "145 A warrant issued by a youth justice court may be executed anywhere in Canada."

## Issuing Warrant for an Accused at First Instance and Issuing Process

## Issuing Warrant for an Accused After They Failed to Attend Court

- Accused Arrest Warrants for Failing to Attend Court

## Issuing Warrant for Breaches of Orders

- Arrest Warrants for Accused Persons

## Issuing Warrant for Witness

- Arrest Warrants for Witnesses

## Form of Arrest Warrants

**Contents of warrant to arrest**

511 (1) A warrant issued under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] shall

(a) name or describe the accused;
(b) set out briefly the offence in respect of which the accused is charged; and
(c) order that the accused be forthwith arrested and brought before the judge or justice who issued the warrant or before some other judge or justice having jurisdiction in the same territorial division, to be dealt with according to law.

[*omitted (2), (3) and (4)*]
R.S., 1985, c. C-46, s. 511; R.S., 1985, c. 27 (1st Supp.), s. 81; 1997, c. 18, s. 57.
[*annotation(s) added*]

– CCC

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511
[*omitted (1)*]

**No return day**

(2) A warrant issued under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] remains in force until it is executed and need not be made returnable at any particular time.
[*omitted (3) and (4)*]
R.S., 1985, c. C-46, s. 511; R.S., 1985, c. 27 (1st Supp.), s. 81; 1997, c. 18, s. 57.
[*annotation(s) added*]

– CCC

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**Formalities of warrant**

513 A warrant in accordance with this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] shall be directed to the peace officers within the territorial jurisdiction of the justice, judge or court by whom or by which it is issued.
R.S., c. 2(2nd Supp.), s. 5.
[*annotation(s) added*]

– CCC

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## Execution of Warrant

511
[*omitted (1) and (2)*]

**Discretion to postpone execution**

(3) Notwithstanding paragraph (1)(c) [*contents of arrest warrant – arrest and delivery before judge or justice*], a judge or justice who issues a warrant may specify in the warrant the period before which the warrant shall not be executed, to allow the accused to appear voluntarily before a judge or justice having jurisdiction in the territorial division in which the warrant was issued.

**Deemed execution of warrant**

(4) Where the accused appears voluntarily for the offence in respect of which the accused is charged, the warrant is deemed to be executed.
R.S., 1985, c. C-46, s. 511; R.S., 1985, c. 27 (1st Supp.), s. 81; 1997, c. 18, s. 57.
[*annotation(s) added*]

– CCC

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**Execution of warrant**

514 (1) A warrant in accordance with this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] may be executed by arresting the accused

(a) wherever he is found within the territorial jurisdiction of the justice, judge or court by whom or by which the warrant was issued; or
(b) wherever he is found in Canada, in the case of fresh pursuit.

**By whom warrant may be executed**

(2) A warrant in accordance with this Part may be executed by a person who is one of the peace officers to whom it is directed, whether or not the place in which the warrant is to be executed is within the territory for which the person is a peace officer.

R.S., c. 2(2nd Supp.), s. 5.
[*annotation(s) added*]

– CCC

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## Release After Warrant Arrest

Where an accused is arrested under a warrant the officer will not normally have discretion to release the accused before delivering the accused before a justice or judge. An exception exists under s. 503(3) where the warrant is "endorsed" for release.

## Special Issues

### Outside Native Jurisdiction

- Out of Province Arrest Warrants

### Delayed Arrests

The practice of waiting to execute an arrest warrant until the accused has finished serving a previous sentence is considered inappropriate.[1]

Where the accused is easily locatable within the province, with no change of name, listed address, and no efforts to conceal his location, will lean to the side of unacceptable delay.[2]

A lack of effort on the part of the police will support unreasonable delay.[3]

1. *R v Parisien*, 1971 CanLII 1171 (BCCA), (1971) 3 CCC (2d) 433, *per* Branca JA, at p. 437
*R v Cardinal*, 1985 ABCA 157 (CanLII), 21 CCC (3d) 254, *per* Kerans JA
2. e.g. *Gahan v A.G. Alberta*, 1988 CanLII 3471 (AB QB), , [1988] AJ No 415 (QB), *per* O'Leary J
*R v Carey*, [1983] BCJ No. 307 (County Ct.)(*no CanLII links)
3. e.g. *R v Yellowhorse*, [1990] AJ No 964 (Prov.Ct.)(*no CanLII links)

#### Arresting the Wrong Person

> **Arrest of wrong person**
>
> 28 (1) Where a person who is authorized to execute a warrant to arrest believes, in good faith and on reasonable grounds, that the person whom he arrests is the person named in the warrant, he is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.
>
> **Person assisting**
>
> (2) Where a person is authorized to execute a warrant to arrest,
>
> (a) every one who, being called on to assist him, believes that the person in whose arrest he is called on to assist is the person named in the warrant, and
> (b) every keeper of a prison who is required to receive and detain a person who he believes has been arrested under the warrant,
>
> is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant. R.S., c. C-34, s. 28.
>
> – CCC

## See Also

- Search and Seizure
- Competence and Compellability#Missing Witnesses
- Warrantless Arrests
- Warrant Arrests (Until December 18, 2019)

# Laying of an Information

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79568)

< Procedure and Practice < Informations and Indictments
< Procedure and Practice < Compelling the Accused to Attend Court

## General Principles

Either before or after arrest a peace officer can create a charge by laying of an information. It typically involves the officer, who has formed reasonable grounds to believe that a criminal offence has occurred, draft an information that will be presented to a justice of the peace along with a sworn summary of the evidence. Under s. 507 or 508 the justice of the peace will determine whether there is sufficient grounds to go forward with laying the sworn information and have the accused attend court. If there is sufficient grounds the justice will either issue a summons or a warrant, or simply confirm the appearance notice already served on the accused. This step is known as "issuing process". Once completed the accused will be required to attend court on the first appearance date. If not satisfied, the justice may cancel the appearance notice, promise to appear or recognizance.

An information must be sworn by an officer who has formed reasonable and probable grounds to believe that the offence described had been committed by the accused.[1] A failure to have the requisite grounds does not render the informations void *ab initio*.[2]

Charges can be laid before any justice within the province.[3]

#### Consequences of Laying an Information

The swearing of information commences "criminal proceedings" against the accused.[4] The commencement of proceedings does not require the issuance of process.[5]

A person is not an "accused" until such time as the charges have been laid.[6]

#### Form of Information

According to s. 506, the format for an information is taken from Form 2 of the Code:

> **Form**

506 An information laid under section 504 [*receiving an information*] or 505 [*time within which information to be laid in certain cases*] may be in Form 2 [*forms*].
R.S., c. 2(2nd Supp.), s. 5.
[*annotation(s) added*]

– CCC

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1. *R v Awad*, 2014 NSSC 44 (CanLII), *per* Edwards J
2. *R v Whitmore*, 1987 CanLII 6783 (ONSC), 41 CCC (3d) 555, *per* Ewaschuk J aff'd 51 CCC (3d) 294
   *Awad*, *supra*, at para 14
3. *R v Ellis*, 2009 ONCA 483 (CanLII), 244 CCC (3d) 438, *per* Gillese JA
4. *R v Awad*, 2015 NSCA 10 (CanLII), 1126 APR 116, *per* Beveridge JA, at para 49
   *R v Pardo*, 1990 CanLII 10957, , 62 CCC (3d) 371, *per* Gendreau JA
   *R v McHale*, 2010 ONCA 361 (CanLII), 256 CCC (3d) 26, *per* Watt JA, at para 85 ("Laying or receipt of an information commences criminal proceedings"
5. *Davidson v British Columbia (Attorney General)*, 2006 BCCA 447 (CanLII), 214 CCC (3d) 373, *per* Levine JA (3:0)
6. *Pardo*, *supra* ("a person is an accused as of the laying of the information, which constitutes the beginning of the proceedings")
   *R v Campbell v Ontario (Attorney General)*, 1987 CanLII 4333 (ON CA), 60 OR (2d) 617, *per curiam*

# Indictable Offences

The two main routes for peace officers to lay an information for an indictable offence (including hybrid offences) start at s. 504 and 505. The main difference between the two options is based on whether the accused was subject to notice of charges. Under s. 504, an information is laid without the accused having any contact with police. Under s. 505 the accused is either arrested or given an appearance notice before an information is laid.

### Laying an Information Under s. 504

Under s. 504, where an accused person is charged with an offence, the Information detailing the charge will be sworn by a peace officer. An officer may only swear an information on the basis of personal information or upon reasonable and probable grounds.[1]

**In what cases justice may receive information**

504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or
(ii) resides or is believed to reside,

within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;
(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or
(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

R.S., c. C-34, s. 455; R.S., c. 2(2nd Supp.), s. 5.

– CCC

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Section 504 provides a preliminary "screen" of the case to only proceed where there is a *prima facie* case.[2]

The justice's function at this stage is "entirely ministerial or administrative."[3]

The process set out in s. 504 is mandatory without any discretion, even in the case of private prosecutions.[4] No additional steps, such as requiring leave before laying an information are permitted.[5]

If the justice affirms the information by signing it, then the information has been laid and the matter begins the prosecution. The judge then must go to the next stage under s. 507 (public prosecutions) or 507.1 (private prosecutions).[6]

Once an information is sworn and laid, there is no obligation on the part of police to seek a summons or arrest "immediately following" the laying of the information.[7]

1. *R v Kamperman*, 1981 CanLII 3159 (NS SC), 48 NSR (2d) 317, 92 APR 317 (S.C.T.D), *per* Glube J
2. *R v Whitmore*, 1989 CanLII 7229 (ON CA), 35 OAC 373, 51 CCC (3d) 294, *per* Grange JA ("In any event, the duty of the justice of the peace is, first, to determine if the information is valid on its face and secondly, to determine whether it discloses or there is disclosed by the evidence a prima facie case of the offences alleged.")
3. *R v Lupyrypa*, 2008 ABQB 427 (CanLII), 451 AR 245, *per* Burrows J, at paras 48 to 49
4. *R v Thorburn*, 2010 ABQB 390 (CanLII), 500 AR 1, *per* Marceau J, at paras 56, 59
5. *Thorburn*, *ibid.*
6. *Thorburn*, *supra*, at para 59
7. *R v Worme*, 2014 SKQB 383 (CanLII), *per* Zuk J, at para 33

### Laying an Information Under s. 505

Section 505 addresses the timing in which the information should be laid before a justice. It states:

> **Time within which information to be laid in certain cases**
>
> 505 If an appearance notice has been issued to an accused under section 497 [*appearance notice by peace officer*], or if an accused has been released from custody under section 498 or 503 [*taking person before justice after arrest*], an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by them shall be laid before a justice as soon as practicable after the issuance or release, and in any event before the time stated in the appearance notice or undertaking for their attendance in court.
>
> R.S., 1985, c. C-46, s. 505; 2019, c. 25, s. 218.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

Where the peace officer fails to comply with 505 by laying an information after the first court appearance does not result in a lack of jurisdiction over the offence or invalidate the information. [1]

1. *R v Markovic*, 2005 CanLII 36251, OJ No 4286 (ON CA), *per* Cronk JA

### Issuing Process

### Laying An Information by Phone

Under s. 508.1, an information can be laid before a justice of the peace by way of telecommunications including telephone. In this case the information provided by phone is deeded to be under oath (s. 508.1(2)).

> **Information laid otherwise than in person**
>
> 508.1 (1) For the purposes of sections 504 to 508 [*provisions relating to laying informations*], a peace officer may lay an information by any means of telecommunication that produces a writing.
>
> **Alternative to oath**
>
> (2) A peace officer who uses a means of telecommunication referred to in subsection (1) [*meaning of telewarrant*] shall, instead of swearing an oath, make a statement in writing stating that all matters contained in the information are true to the officer's knowledge and belief, and such a statement is deemed to be a statement made under oath.
> 1997, c. 18, s. 56.
> [*annotation(s) added*]
>
> – CCC

### Laying an Information in Private Prosecution (s. 507.1)

## Summary Offences

The process of laying charges for summary offences is similar to that of indictable offences. The procedure is set out in s. 788 to 795.

**Commencement of proceedings**

788 (1) Proceedings under this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] shall be commenced by laying an information in Form 2 [*forms*].

**One justice may act before the trial**

(2) Notwithstanding any other law that requires an information to be laid before or to be tried by two or more justices, one justice may

(a) receive the information;
(b) issue a summons or warrant with respect to the information; and
(c) do all other things preliminary to the trial.

R.S., c. C-34, s. 723.
[*annotation(s) added*]

– CCC

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**Formalities of information**

789 (1) In proceedings to which this Part [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] applies, an information

(a) shall be in writing and under oath; and
(b) may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.

**No reference to previous convictions**

(2) No information in respect of an offence for which, by reason of previous convictions, a greater punishment may be imposed shall contain any reference to previous convictions.
R.S., c. C-34, s. 724.
[*annotation(s) added*]

– CCC

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Under s. 795, the provisions of Parts XVI and XVIII, XVIII.1, XX and XX.1 apply equally to summary offences.

All summary offences can only be sworn less than 6 months after the date of the allegations. (s. 786(2))

## Replacement Informations

523
[*omitted (1)*]

**When new information is received**

(1.1) If an accused is charged with an offence and a new information, charging the same offence or an included offence, is received while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, section 507 [*process on justice receiving an information*] or 508 [*justice to hear informant and witnesses*], as the case may be, does not apply in respect of the new information and the order for detention, release order, appearance notice, summons or undertaking applies in respect of the new information. [*omitted (1.2), (2) and (3)*]
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
[*annotation(s) added*]

– CCC

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Under s. 524(1.1) a court has "jurisdiction to receive and proceed on a relaid information nothwithstanding that the process has not been issued no that information".[1]

**New Charges**

Section 523(1.1) does not apply for new charges before the court that does not have process.[2]

Where the accused and a new information without process are both before the court, the court has jurisdiction to deal with the information.[3]

1. *R v Brar*, 2007 ONCJ 359 (CanLII), *per* Cowan J, at para 8
   *Re McCarthy and The Queen*, 1998 CanLII 5749 (BC SC), 131 CCC (3d) 102, *per* Melnick J
2. *R v Dougan*, 2012 YKSC 88 (CanLII), *per* McIntyre J, at para 19
3. *Dougan*, *supra*, at para 19
   *McCarthy*, *supra*

### Direct Indictment Laid

> 523
> [*omitted (1) and (1.1)*]
>
> **When direct indictment preferred**
>
> (1.2) If an accused is charged with an offence, and an indictment is preferred under section 577 charging the same offence or an included offence while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, the order for detention, release order, appearance notice, summons or undertaking applies in respect of the indictment. [*omitted (2) and (3)*]
> R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
> [*annotation(s) added*]
>
> – CCC

## Replacement Release Order

Section 523(2) and (3) relate to the vacating of a previous detention/bail order.

> 523
> [*omitted (1), (1.1) and (1.2)*]
>
> **Order vacating previous order for release or detention**
>
> (2) Despite subsections (1) [*duration that release conditions apply on replacement information*] to (1.2) [*previous release mechanism transfers to direct indictment*],
>
> (a) the court, judge or justice before which or whom an accused is being tried, at any time,
> (b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469 [*exclusive jurisdiction offences*], or
> (c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1) [*consequences on new information is received*], without such consent, at any time
>
> (i) where the accused is charged with an offence other than an offence listed in section 469 [*exclusive jurisdiction offences*], the justice by whom an order was made under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] or any other justice,
> (ii) where the accused is charged with an offence listed in section 469 [*exclusive jurisdiction offences*], a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or
> (iii) the court, judge or justice before which or whom an accused is to be tried,
>
> may, on cause being shown, vacate any order previously made under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] for the interim release or detention of the accused and make any other order provided for in this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.
>
> **Provisions applicable to proceedings under subsection (2)**
>
> (3) The provisions of sections 517 [*Order directing matters not to be published for specified period*], 518 [*Inquiries to be made by justice and evidence*] and 519 [*release of accused after show cause hearing*] apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2) [*power to vacate previous orders*], except that subsection 518(2) [*release on guilty plea pending sentence*] does not apply in respect of an accused who is charged with an offence listed in section 469 [*exclusive jurisdiction offences*].
> R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
> [*annotation(s) added*]

– CCC

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The judge must be satisfied that that "cause" has been shown before they may vacate the old order and make any new one.[1]

The ability to seek an order under 523(2) will depend on the stage of proceedings. An application can be made when:

1. during trial (523(2)(a))
2. upon "completion of the preliminary inquiry", except when it is a 469 offence (523(2)(b))
3. with consent of Crown and defence (523(2)(c)); *or*
4. if no consent, then "any time" so long as it is an order under (1.1) [ie. Replacement information] and the application is before any judge or justice (for a non 469 offence) *or*, if it *is* a 469 offence, it must be before a superior court of criminal jurisdiction;

A judge should only interfere where there has been a "material change in circumstances".[2]

Merely being committed to trial after a preliminary inquiry does not amount to "cause".[3]

Exclusive jurisdictions Offences under s. 469 do *not* apply to these orders under 523(2) and (3).[4]

1. See s. 523(2) "on cause being shown"
2. *R v McDonell*, 2012 ONSC 2567 (CanLII), *per* Hourigan J, at para 17
3. *McDonell*, *ibid.*, at para 19
4. See 523(3)

## Transferring the Accused's Matter to the Proper Jurisdiction

**Remand Where Offence Committed in Another Jurisdiction**
**Order that accused appear or be taken before justice where offence alleged to have been committed**

543 (1) If an accused is charged with an offence alleged to have been committed out of the limits of the jurisdiction in which they have been charged, the justice before whom they appear or are brought may, at any stage of the inquiry after hearing both parties, order the accused to appear or, if the accused is in custody, issue a warrant in Form 15 [*forms*] to convey the accused before a justice who, having jurisdiction in the place where the offence is alleged to have been committed, shall continue and complete the inquiry.

**Transmission of transcript and documents and effect of order or warrant**

(2) Where a justice makes an order or issues a warrant pursuant to subsection (1) [*order that accused appear or be taken before justice where offence alleged to have been committed*], he shall cause the transcript of any evidence given before him in the inquiry and all documents that were then before him and that are relevant to the inquiry to be transmitted to a justice having jurisdiction in the place where the offence is alleged to have been committed and

> (a) any evidence the transcript of which is so transmitted shall be deemed to have been taken by the justice to whom it is transmitted; and
> (b) any appearance notice, undertaking or release order issued to or given or entered into by the accused shall be deemed to have been issued, given or entered into in the jurisdiction where the offence is alleged to have been committed and to require the accused to appear before the justice to whom the transcript and documents are transmitted at the time provided in the order made in respect of the accused under paragraph (1)(a) [*x*].

R.S., 1985, c. C-46, s. 543; 2019, c. 25, s. 245.
[*annotation(s) added*]

– CCC

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## Confirming Attendance

Once the accused attends for the first time in court, the authority of the justice of the peace or peace officer is complete and only the judge may compel future attendance. The purpose of a promise to appear, summons, or any other tool to ensure attendance is to secure attendance for the first time. After the initial appearance the promise to appear is irrelevant.[1]

Whenever a judge had an information before him, he must comply with section 508. Section 508(b)(i) would appear to require that judges confirm that the notice, promise to appear or recognizance remains in effect and then endorse the information.[2]

However, case law has been divergent on the issue of whether the failure to confirm the order to return to court creates a nullity, invalidating the information. While there are a number of cases supporting the nullity effect on the lack of confirmation,[3] there is a growing line of cases that see it as having no effect on the validity of the charge.[4]

1. *R v Oliveira*, 2009 ONCA 219 (CanLII), 243 CCC (3d) 217, *per* Doherty JA at 30
2. *R v Key*, 2011 ONCJ 780 (CanLII), *per* Robertson J - detailed review of cases

3. eg. *R v Koshino*, [1991] OJ No 173 (Gen. Div.)(*no CanLII links)
   *R v Sandoval*, [2000] OJ No 5591 (SCJ)(*no CanLII links)
   *R v Smith*, 2008 CanLII 3410 (ONSC), [2008] OJ No 381 (SCJ), *per* Belobaba J
   *R v Pilieci*, 2010 ONSC 3606 (CanLII), 257 CCC (3d) 541, *per* Lauwers J
4. *R v Rennie*, [2004] OJ No 4990 (SCJ)(*no CanLII links)
   *R v Pavlick*, [2008] OJ No 2114 (SCJ)(*no CanLII links)
   *R v Sullivan*, [2009] OJ No 5075 (SCJ)(*no CanLII links)
   *R v Duran*, 2011 ONSC 7346 (CanLII), 285 CCC (3d) 46, *per* Trotter J
   *R v Morton*, 1992 CanLII 7818 (ONSC), 70 CCC (3d) 625, *per* Then J, affirmed, 83 CCC (3d) 95, 1993 CanLII 8575 (ON CA), *per curiam*
   *R v Matykubov*, 2010 ONCJ 233 (CanLII), *per* Armstrong J
   See also *R v Wetmore*, 1976 CanLII 1358 (NSCA), (1976), 18 NSR (2d) 292 (NSCA), *per* MacKeigan CJ

#### Confirming Attendance After Conviction and Before Sentencing

> 732.2
> [*omitted (1), (2), (3), (4) and (5)*]
>
> **Compelling appearance of person bound**
>
> (6) The provisions of Parts XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] and XVIII [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require, to proceedings under subsections (3) [*probation order – changes to order*] and (5) [*vary or cancel probation order on breach conviction*].
>
> 1995, c. 22, s. 6; 2004, c. 12, s. 12(E).
> [*annotation(s) added*]
>
> – CCC

## See Also

- Release by Police
- Private Prosecutions
- Informations and Indictments

# Issuing Process

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79568)



## General Principles

Issuing process refers to the initial phase of the prosecution where the charges are laid before a judicial officer and the accused is notified of the existence of the charges.

The Criminal Code gives a peace officer two options on how to commence the prosecution. They have the option under s. 507 of first laying the charges and then notifying the accused through a summons or arrest (*Charge First*). Alternatively, the officer can arrest or summons the accused to a court date under s. 508 and then lay the charges after the notice is given (*Notify First*).

Once Justice of the Peace has reviewed and taken oath of the allegations in the information, the information must be endorsed either confirming the release documents, if the accused is present, or issue a summons or arrest warrant if the accused is not present.

#### Judicial Authorization Hearing is Ex Parte and In Camera

The stage where the justice decides whether to "issue process" in order to compel the accused to attend Court is held *ex parte* (without notice to the accused) and *in camera* (closed proceedings).[1]

#### When a Criminal Prosecution Starts

It is only once process is issued that a "criminal prosecution" commences.[2] By contrast a "criminal proceedings" is commenced on the "laying or receipt of an information in writing and under oath".[3]

#### Failure to Endorse the Process

A failure to confirm the release document ("the process") results in the information has been found to produce a nullity.[4] However, the growing attitude has been that the failure to endorse the process does not eliminate jurisdiction over the matter, and rather can only be used to support a charge of failure to attend.[5]

#### Burden to Prove Compliance

There is an onus on the accused to establish that the justice of the peace did not comply with the requirements of s.504-508.[6] If the requirements are not met, the courts may lose jurisdiction over the accused and the charge may become a nullity.

**Forms**

A summons issued under s. 493, 508 or 512 should use Form 6.[7]

**Constitutionality**

The *ex parte* nature of the hearing under s. 507 violates s. 2(b) of the Charter protecting rights of expression. However, they are justified under s. 1 of the Charter and are lawful.[8]

**Issuing Process an Unconstitutional Offence**

Where an offence has been found by a court to be contrary to the Charter and of no force or effect, it is still within the discretion of the issuing justice or judge to issue process for that offence.[9]

1. *R v McHale*, 2010 ONCA 361 (CanLII), 256 CCC (3d) 26, *per* Watt JA, at para 48
2. *McHale*, *ibid.*, at para 71
3. *McHale*, *ibid.*, at para 70
   cf. *R v Awad*, 2015 NSCA 10 (CanLII), 1126 APR 116, *per* Beveridge JA, at para 49 ("The swearing of an information is the act that commences the prosecution of an accused")
4. *R v Gougeon*, 1980 CanLII 2842 (ON CA), [1980] OJ No 1332 (ONCA)
   *R v Matykubov*, 2010 ONCJ 233 (CanLII), *per* Armstrong J
5. *R v Haight*, 2011 ONCJ 156 (CanLII), *per* Krelove J
   *R v Duran*, 2011 ONSC 7346 (CanLII), 285 CCC (3d) 46, *per* Trotter J
6. Romanchuk at 6
7. see List of Criminal Code Forms
8. *R v Southam Inc v Coulter (CA)*, 1990 CanLII 6963 (ON CA), 60 CCC (3d) 267, *per* Krever JA
9. *Canadian Broadcasting Corporation et al v Morrison*, 2017 MBCA 36 (CanLII), MJ No 95, *per* Mainella JA

## Issuing Process Under s. 507 (Charge First)

Upon an information or an indictment being laid under s. 504, the informant (usually a peace officer) can apply to a justice of the peace to compel the accused to attend court either by way of a summons or arrest warrant.

**Justice to hear informant and witnesses — public prosecutions**

507 (1) Subject to subsection 523(1.1) [*consequences on new information is received*], a justice who receives an information laid under section 504 by a peace officer, a public officer, the Attorney General or the Attorney General's agent, other than an information laid before the justice under section 505 [*time within which information to be laid in certain cases*], shall, except if an accused has already been arrested with or without a warrant,

(a) hear and consider, ex parte,

(i) the allegations of the informant, and
(ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

(b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

**Process compulsory**

(2) No justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.
[*omitted (3), (4) and (5)*]

**Endorsement of warrant by justice**

(6) A justice who issues a warrant under this section or section 508 [*justice to hear informant and witnesses*], 512 [*certain actions not to preclude issue of warrant*], 512.1 [*Arrest warrant – failure to appear under summons*] or 512.2 [*Arrest warrant – failure to appear under appearance notice or undertaking*] may, unless the offence is one listed in section 469, authorize the release of the accused under section 499 by making an endorsement on the warrant in Form 29.

[*omitted (7)*]

**Issue of summons or warrant**

(8) Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a justice may issue either a summons or a warrant for the arrest of the accused in order to compel the accused to attend at the new or continued or renewed trial or hearing.
R.S., 1985, c. C-46, s. 507; R.S., 1985, c. 27 (1st Supp.), s. 78; 1994, c. 44, s. 43; 2002, c. 13, s. 21; 2019, c. 25, s. 219.
[*Underline added*]

– CCC

The justice of the peace should issue a summons unless it is in the public interest to issue a warrant.(s. 507(4))

Implied within the phrase of s. 507, includes an exception where "detained at the time the information is laid".[1]

**Definitions**

"Justice" is defined in s. 2 as comprising either a justice of the peace or a provincial court judge.[2]

**Procedure**

507
[*omitted (1) and (2)*]

**Procedure when witnesses attend**

(3) A justice who hears the evidence of a witness pursuant to subsection (1) [*justice to hear informant and witnesses — public prosecutions*] shall

(a) take the evidence on oath; and
(b) cause the evidence to be taken in accordance with section 540 [*taking evidence by preliminary inquiry judge*] in so far as that section is capable of being applied.

[*omitted (4), (5), (6), (7) and (8)*]
R.S., 1985, c. C-46, s. 507; R.S., 1985, c. 27 (1st Supp.), s. 78; 1994, c. 44, s. 43; 2002, c. 13, s. 21; 2019, c. 25, s. 219.
[*annotation(s) added*]

– CCC

Section 507 provides for a justice of the peace to receive an unsworn information outside of those received under s. 505. If the justice receives an information where the accused has not been arrested, the justice must hear and consider evidence setting out the allegations. If satisfied there is reasonable grounds to believe an offence has been committed, the justice may issue a summons or a warrant of arrest to compel the accused to attend before the justice of the peace or a provincial court. Note that the provision does not contemplate the issuance of an appearance notice or promise to appear.

Section 507 gives the justice of the peace the power to issue a summons or warrant where he has received (1) an application from the police or Crown for the summons or warrant and (2) the justice has received allegations or evidence making out the basis for the warrant or summons.[3]

**Cancelling an Order**

A provincial court judge and justice of the peace who issue process by way of an arrest warrant under s. 507 has the jurisdiction to cancel that order at their discretion.[4]

**Other Similar Powers**

Section 578 provides a similar authority to authorize the issuance of a summons or warrant where there has been a direct indictment.

1. *R v Ladzinski*, 2012 ONCJ 205 (CanLII), 101 WCB (2d) 129, *per* Harris J, at para 9
   *R v Drozd*, 2011 ONCJ 51 (CanLII), [2011] OJ No 616 (OCJ), *per* Schwarzl J
2. see Definition of Judicial Officers and Offices
3. *R v Worme*, 2014 SKQB 383 (CanLII), *per* Zuk J, at para 28
4. *R v Muirhead*, 1974 CanLII 274 (AB QB), 1 WWR 680, *per* Milvain CJ

## Section 507(4) Public Interest Warrant or Summons

507
[*omitted (1), (2) and (3)*]

**Summons to be issued except in certain cases**

(4) Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.
[*omitted (5)*]

**Endorsement of warrant by justice**

(6) A justice who issues a warrant under this section or section 508 [*justice to hear informant and witnesses*], 512 [*certain actions not to preclude issue of warrant*], 512.1 [*Arrest warrant – failure to appear under summons*] or 512.2 [*Arrest warrant – failure to appear under appearance notice or undertaking*] may, unless the offence is one listed in section 469 [*exclusive jurisdiction offences*], authorize the release of the accused under section 499 [*release by peace officer (warrant arrest)*] by making an endorsement on the warrant in Form 29 [*forms*].

**Undertaking or appearance notice deemed confirmed**

(7) If, under subsection (6) [*endorsement of warrant by justice*], a justice authorizes the release of an accused under section 499 [*release by peace officer (warrant arrest)*], an appearance notice or undertaking referred to in that section shall be deemed, for the purposes of subsection 145(3) [*failure to comply with appearance notice or summons*] or (4) [*failure to comply with undertaking*], as the case may be, to have been confirmed by a justice under section 508 [*justice to hear informant and witnesses*].
[*omitted (8)*]
R.S., 1985, c. C-46, s. 507; R.S., 1985, c. 27 (1st Supp.), s. 78; 1994, c. 44, s. 43; 2002, c. 13, s. 21; 2019, c. 25, s. 219.
[*annotation(s) added*]

– CCC

**Validity of Appearance Notice**

Where a non-essential component of an appearance notice has been changed from what was presented to the justice it may invalidate the information.[1]

**Validity of the Warrant**

If a warrant is issued then the peace officer may arrest the accused under s. 511. (see Warrant Arrests)

1. *R v Lalonde*, 2009 ONCJ 369 (CanLII), *per* Libman J, at para 18 - officer sworn to serving copy of appearance notice which was changed before service

## Issuing Process Under s. 508 (Notify First)

Section 508 sets out the requirement to confirm the form of the release as well as the need to consider the allegations from the informant and, where necessary, hear evidence, where an information has been laid under s. 505.

**Justice to hear informant and witnesses**

508 (1) A justice who receives an information laid before him under section 505 [*time within which information to be laid in certain cases*] shall

(a) hear and consider, ex parte,

(i) the allegations of the informant, and
(ii) the evidence of witnesses, where he considers it desirable or necessary to do so;

(b) if the justice considers that a case for so doing is made out, whether the information relates to the offence alleged in the appearance notice or undertaking or to an included or other offence,

(i) confirm the appearance notice or undertaking and endorse the information accordingly, or
(ii) cancel the appearance notice or undertaking and issue, in accordance with section 507 [*process on justice receiving an information*], either a summons or a warrant for the arrest of the accused to compel the accused to attend before the justice or some other justice for the same territorial division to answer to a charge of an offence and endorse on the summons or warrant that the appearance notice or undertaking has been cancelled; and

(c) if the justice considers that a case is not made out for the purposes of paragraph (b), cancel the appearance notice or undertaking and cause the accused to be immediately notified of the cancellation.

**Procedure when witnesses attend**

(2) A justice who hears the evidence of a witness pursuant to subsection (1) [*justice obligation on receiving an information*] shall

(a) take the evidence on oath; and
(b) cause the evidence to be taken in accordance with section 540 [*taking evidence by preliminary inquiry judge*] in so far as that section is capable of being applied.

R.S., 1985, c. C-46, s. 508; R.S., 1985, c. 27 (1st Supp.), s. 79; 2019, c. 25, s. 220.
[*annotation(s) added*]

– CCC

Section 508(1) provides a "safeguard against people having to appear in court to answer charges where a judicial officer has not considered the case for issuing process.[1]

Where the accused is released, a justice of the peace will review the charge before ordering the accused to attend court.(s. 508) If satisfied that there is reason to compel an accused to attend court, the justice will confirm the appearance notice or cancel it and issue a summons or warrant of arrest.[2]

1. *R v Matykubov*, 2010 ONCJ 233 (CanLII), *per* Armstrong J
2. *R v Romanchuk*, 2011 SKCA 127 (CanLII), 375 Sask R 296, *per* Caldwell JA, at para 4

# Release by Police

< Procedure and Practice < Compelling the Accused to Attend Court
< Procedure and Practice < Judicial Interim Release

## General Principles

Release of a detainee is governed by Part XVI of the Code entitled "Compelling Appearance of Accused Before a Justice and Interim Release". The purpose of this Part includes minimizing, to "the extent consistent with the public interest, the pre-trial incarceration of persons charged with criminal offences."[1]

A peace officer who arrests an accused person may release the accused under s. 498 or 499.

In certain circumstances, an officer may simply issue an appearance notice under s. 497 or send the matter for a judicial referral hearing under s. 496.

1. *R v Oliveira*, 2009 ONCA 219 (CanLII), 243 CCC (3d) 217, *per* Doherty JA

### Principles of Restraint

> **Principle of restraint**
>
> 493.1 In making a decision under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) [*exception to presumption of release*] or 515(10) [*justification for detention in custody*], as the case may be.
>
> 2019, c. 25, s. 210.
> [*annotation(s) added*]
>
> – CCC

**Purpose**

The purpose of section 493.1 was to codify the common law.[1]

> **Aboriginal accused or vulnerable populations**
>
> 493.2 In making a decision under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], a peace officer, justice or judge shall give particular attention to the circumstances of
>
> (a) Aboriginal accused; and
> (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*].
>
> 2019, c. 25, s. 210.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

## Powers of a Peace Officer

After the officer decides to exercise their authority to arrest without warrant, the peace officer may, depending on the charges, be able to

1. release them with intention to serve them with a summons at a later time;
2. issue an appearance notice;
3. release on an undertaking or
4. detain and bring them to a judge or justice.

**Powers on Arrest Without Warrant**

> **Release from custody — arrest without warrant**
>
> 498 (1) Subject to subsection (1.1) [*exception to presumption of release*], if a person has been arrested without warrant for an offence, other than one listed in section 469 [*exclusive jurisdiction offences*], and has not been taken before a justice or released from custody under any other provision of this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], a peace officer shall, as soon as practicable, release the person, if
>
> (a) the peace officer intends to compel the person's appearance by way of summons;
> (b) the peace officer issues an appearance notice to the person; or
> (c) the person gives an undertaking to the peace officer.
>
> [*omitted (1.01) and (1.1)*]
>
> **When subsections (1) and (1.01) do not apply**
>
> (2) Subsections (1) [*release from custody – arrest without warrant*] and (1.01) [*release on arrest without warrant by citizen or on Customs Act*] do not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in subsection 503(3) [*remand in custody for return to jurisdiction where offence alleged to have been committed*].
> [*omitted (3)*]
> R.S., 1985, c. C-46, s. 498; R.S., 1985, c. 27 (1st Supp.), s. 186; 1997, c. 18, s. 52; 1998, c. 7, s. 2; 1999, c. 25, ss. 4, 30(Preamble); 2019, c. 25, s. 213.
> [*annotation(s) added*]
>
> – CCC

A promise to appear and an undertaking to police are two forms of "police bail" provided by Part XVI of the Code.[2]

Where the officer does not release the accused then they will be brought before a judge to determine if interim release will be granted.

**Citizen's Arrest or Customs Act Arrest**

> 498
> [*omitted (1)*]
>
> **Person delivered or detained**
>
> (1.01) Subsection (1) [*release from custody – arrest without warrant*] also applies in respect of a person who has been arrested without warrant and delivered to a peace officer under subsection 494(3) [*deliver to police after citizen's arrest*] or placed in the custody of a peace officer under subsection 163.5(3) of the *Customs Act* and who is detained in custody for an offence other than one listed in section 469 [*exclusive jurisdiction offences*] and who has not been taken before a justice or released from custody under any other provision of this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*].
>
> **When subsections (1) and (1.01) do not apply**
>
> (2) Subsections (1) [*release from custody – arrest without warrant*] and (1.01) [*release on arrest without warrant by citizen or on Customs Act*] do not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in subsection 503(3) [*remand in custody for return to jurisdiction where offence alleged to have been committed*].
> [*omitted (3)*]
> R.S., 1985, c. C-46, s. 498; R.S., 1985, c. 27 (1st Supp.), s. 186; 1997, c. 18, s. 52; 1998, c. 7, s. 2; 1999, c. 25, ss. 4, 30(Preamble); 2019, c. 25, s. 213.
> [*annotation(s) added*]
>
> – CCC

1. *R v Al-Adhami*, 2020 ONSC 6421 (CanLII), *per* Harris J, at para 53 (The purpose "was simply to codify the common law. In the circumstances of the true allegations")
2. *R v Oliveira*, 2009 ONCA 219 (CanLII), 243 CCC (3d) 217, *per* Doherty JA (3:0), at para 29

## Exception on Out of Territory Offences

The officer should not release if he believes that the person may fail to attend court or where the offence described in s. 503(3) concerning offences outside of the jurisdiction.

503
[*omitted (1), (1.1), (2), (2.1), (2.2) and (2.3)*]

**Remand in custody for return to jurisdiction where offence alleged to have been committed**

(3) Where a person has been arrested without warrant for an indictable offence alleged to have been committed in Canada outside the territorial division where the arrest took place, the person shall, within the time prescribed in paragraph (1)(a) or (b) [*bring detainee to justice within or outside of 24 hours*], be taken before a justice within whose jurisdiction the person was arrested unless, where the offence was alleged to have been committed within the province in which the person was arrested, the person was taken before a justice within whose jurisdiction the offence was alleged to have been committed, and the justice within whose jurisdiction the person was arrested

(a) if the justice is not satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the offence, shall release that person; or
(b) if the justice is satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the offence, may

(i) remand the person to the custody of a peace officer to await execution of a warrant for his or her arrest in accordance with section 528 [*endorsing warrant*], but if no warrant is so executed within a period of six days after the time he or she is remanded to such custody, the person in whose custody he or she then is shall release him or her, or
(ii) where the offence was alleged to have been committed within the province in which the person was arrested, order the person to be taken before a justice having jurisdiction with respect to the offence.

[*omitted (3.1), (4) and (5)*]
R.S., 1985, c. C-46, s. 503; R.S., 1985, c. 27 (1st Supp.), s. 77; 1994, c. 44, s. 42; 1997, c. 18, s. 55; 1998, c. 7, s. 3; 1999, c. 25, s. 7(Preamble); 2019, c. 25, s. 217.
[*annotation(s) added*]

– CCC

## Public Interest Factors for Detention

The peace officer or officer in charge may detain for reasons set out in s. 498(1.1) which mirror each other:

498
[*omitted (1) and (1.01)*]

**Exception**

(1.1) The peace officer shall not release the person if the peace officer believes, on reasonable grounds,

(a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], 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,
(iii) prevent the continuation or repetition of the offence or the commission of another offence, or
(iv) ensure the safety and security of any victim of or witness to the offence; or

(b) that, if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

[*omitted (1.1), (2) and (3)*]
R.S., 1985, c. C-46, s. 498; R.S., 1985, c. 27 (1st Supp.), s. 186; 1997, c. 18, s. 52; 1998, c. 7, s. 2; 1999, c. 25, ss. 4, 30(Preamble); 2019, c. 25, s. 213.

– CCC

Section 498 directs an officer to release an accused as soon as practicable, unless one of the reasons listed in (1.1). One of the "reasonable public interest" grounds include the need to detain a person until they are sober and safe to be released.[1]

The factors set out in 487(1.1) and 498(1.1) is not a closed list.[2] Other circumstances include an offender charged for impaired driving who can be held "until that individual is sober or can be picked up by a sober person".[3] There is no strict obligation to make an inquiry into whether a pick up is available but a failure to make any inquiry could affect the reasonableness of the decision to hold the accused. [4]

1. *R v Viszlai*, 2012 BCCA 442 (CanLII), 293 CCC (3d) 127, *per* Frankel JA, at para 47
   *R v Sapusak*, [1998] OJ No 3299(*no CanLII links)
   *R v Coulter*, [2000] OJ No 3452 (Ont. Ct. J.)(*no CanLII links) , affirmed [2001] OJ No 5608 (Sup. Ct. J.)
   *R v Padda*, 2003 CanLII 52405 (ON CJ), [2003] OJ No 5502 (Ont. Ct. J.), *per* Duncan J
   *R v Gaudette*, [2005] OJ No 2399 (Ont. Ct. J.)(*no CanLII links) , reversed for other reasons, [2006] OJ No 3732 (Sup. Ct. J)
   *R v Kisil*, 2009 ONCJ 424 (CanLII), [2009] OJ No 3821, *per* Nadel J
   *R v Prentice*, 2009 ONCJ 708 (CanLII), [2009] OJ No 6001, *per* Schwarzl J
   *R v Key*, 2011 ONCJ 780 (CanLII), [2011] OJ No 5972, *per* Robertson J
   *R v Baxter*, 2012 ONCJ 91 (CanLII), [2012] OJ No 796, *per* Schwarzl J
2. *R v Donald*, 2010 SKPC 123 (CanLII), 79 CR (6th) 93, *per* Kalmakoff J, at para 48
3. *Donald*, *ibid.*, at para 48
   *R v Pashovitz*, 1987 CanLII 4629 (SK CA), 59 Sask R 165, 59 CR (3d) 396, *per* Sherstobitoff JA
   *R v Sapusak*, [1998] OJ No 4148 (Ont. C.A.)(*no CanLII links)
4. *R v Marcil*, 2015 SKQB 79 (CanLII), 470 Sask R 307, *per* McMurtry J, at para 11

### Impaired Driving Investigations

Factors that the police should consider when deciding whether to release a detainee in an impaired driving investigation include:[1]

1. the accused's blood alcohol level,
2. whether the accused was charged with impaired operation,
3. his or her level of comprehension,
4. that the accused is prohibited by statute from driving a motor vehicle (the administrative license suspension),
5. that the accused's vehicle would have been impounded,
6. whether there was a responsible person available to pick up the accused although the officer-in-charge has no authority to bind the responsible person as a surety would be bound,
7. whether the accused had a criminal record and if so, its contents,
8. whether the accused had outstanding charges,
9. his or her attitude and that by drinking and driving the accused has recently exhibited poor judgment.

The analysis should not simply be limited to the BAC level results.[2]

1. *R v Price*, 2010 ONSC 1898 (CanLII), 212 CRR (2d) 2449, *per* Durno J, at para 93
2. *Price*, *ibid.*, at para 93

## Release Persons About to Commit Indictable Offence

503
[*omitted (1), (1.1), (2), (2.1), (2.2), (2.3), (3) and (3.1)*]

**Release of person about to commit indictable offence**

(4) A peace officer having the custody of a person who has been arrested without warrant as a person about to commit an indictable offence shall release that person as soon as practicable after the officer is satisfied that the continued detention of that person is no longer necessary in order to prevent that person from committing an indictable offence.

[*omitted (5)*]
R.S., 1985, c. C-46, s. 503; R.S., 1985, c. 27 (1st Supp.), s. 77; 1994, c. 44, s. 42; 1997, c. 18, s. 55; 1998, c. 7, s. 3; 1999, c. 25, s. 7(Preamble); 2019, c. 25, s. 217.

– CCC

This provision came into force on December 18, 2019.

## Timing of Release ("As soon as practicable")

*See also Right Against Arbitrary Detention*

Under both s. 497 and 498, a peace officer or officer in charge must release a suspect "as soon as practicable".

If the suspect is being held for court, s. 503 requires that police bring him to court "without unreasonable delay".

Post-arrest detention is permissible under the exceptions listed in s. 497(1.1)(a) and s. 498(1.1)(a). This includes detention for the purpose of "securing" evidence including obtaining a statement from the accused.[1]

Fsilure to comply with the duty in s. 503 to bring the accused as soon as practicable to the justice can be factor in determining voluntariness of a statement.[2]

1. *R v Viszlai*, 2012 BCCA 442 (CanLII), 293 CCC (3d) 127, *per* Frankel JA (3:0), at paras 61 to 62
2. *R v Koszalup*, (1974), 27 CRNS 226(*no CanLII links) at 236

## Timing of Laying an Information ("As soon as practicable")

Once an accused is released, the officer is required under s. 505 to lay an information "as soon as practicable":

> **Time within which information to be laid in certain cases**
>
> 505 If an appearance notice has been issued to an accused under section 497 [*appearance notice by peace officer*], or if an accused has been released from custody under section 498 [*release by peace officer (warrantless arrest)*] or 503 [*taking person before justice after arrest*], an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by them shall be laid before a justice as soon as practicable after the issuance or release, and in any event before the time stated in the appearance notice or undertaking for their attendance in court.
>
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

## Attendance from Release

If an accused is released by summons, appearance notice, promise to appear, or undertaking, as discussed above, and the accused fails to attend on the date specified, the justice may issue a warrant under s. 502 for the arrest of the accused. The warrant may be "endorsed" pursuant to s. 507(6) otherwise the warrant will be considered "unendorsed".

If the accused attends before the justice, at which point the information will have been laid, the judge will either confirm the "process" (that is, the release mechanism used to compel attendance) or else will cancel it under s. 508.

## Contents and Conditions of Undertaking

> **Contents of undertaking**
>
> 501 (1) An undertaking under paragraph 498(1)(c) [*release from custody – arrest without warrant – undertaking to peace officer*], 499(b) [*release by peace officer (warrant arrest) — undertaking*] or 503(1.1)(b) [*continued re-evaluation of 24 hour detention – release on undertaking*] must set out
>
> (a) the name, date of birth and contact information of the accused;
> (b) the substance of the offence that the accused is alleged to have committed; and
> (c) a summary of subsections 145(4) [*failure to comply with undertaking*] and (6) [*provisions re failure to comply – no excuse where offence wrongly described*], sections 512 and 512.2 and subsection 524(4) .
>
> **Mandatory conditions**
>
> (2) The undertaking must contain a condition that the accused attend court at the time and place stated in the undertaking and to attend afterwards as required by the court.
>
> **Additional conditions**

(3) The undertaking may contain one or more of the following conditions, if the condition is reasonable in the circumstances of the offence and necessary, to ensure the accused's attendance in court or the safety and security of any victim of or witness to the offence, or to prevent the continuation or repetition of the offence or the commission of another offence:

(a) report at specified times to the peace officer or other specified person;
(b) remain within a specified territorial jurisdiction;
(c) notify the peace officer or other specified person of any change in their address, employment or occupation;
(d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, except in accordance with any specified conditions;
(e) abstain from going to any specified place or entering any geographic area related to any person referred to in paragraph (d), except in accordance with any specified conditions;
(f) deposit all their passports with the peace officer or other specified person;
(g) reside at a specified address, be at that address at specified hours and present themselves at the entrance of that residence to a peace officer or other specified person, at the officer's or specified person's request during those hours;
(h) abstain from possessing a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, and surrender those that are in their possession to the peace officer or other specified person and also any authorization, licence or registration certificate or other document enabling them to acquire or possess them;
(i) promise to pay an amount specified in the undertaking, which shall not be more than $500, if they fail to comply with any condition of the undertaking;
(j) deposit, with the peace officer specified in the undertaking, money or other valuable security whose value does not exceed $500 if, at the time of giving the undertaking, the accused is not ordinarily resident in the province or does not ordinarily reside within 200 kilometres of the place in which they are in custody; and
(k) comply with any other specified condition for ensuring the safety and security of any victim of or witness to the offence.

**Attendance for purposes of *Identification of Criminals Act***

(4) The undertaking may require the accused to appear at the time and place stated in it for the purposes of the *Identification of Criminals Act* if the accused is alleged to have committed an indictable offence and, in the case of an offence designated as a contravention under the *Contraventions Act*, the Attorney General, within the meaning of that Act, has not made an election under section 50 of that Act.

**Money or other valuable security to be deposited with justice**

(5) If the accused has deposited an amount of money or other valuable security with a peace officer, the officer shall, without delay after the deposit, cause the money or valuable security to be delivered to a justice for deposit with the justice.

**Signature of accused**

(6) The accused shall be requested to sign in duplicate their undertaking and, whether or not they comply with that request, one of the duplicates shall be given to them. If they fail or refuse to sign, the lack of their signature does not invalidate the undertaking.

R.S., 1985, c. C-46, s. 501; R.S., 1985, c. 27 (1st Supp.), s. 76; 1992, c. 47, s. 69; 1994, c. 44, ss. 41, 94; 1996, c. 7, s. 38; 2008, c. 18, s. 15; 2019, c. 25, s. 215.
[*annotation(s) added*]

– CCC

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This provision came into force on December 18, 2019.

**Attendance**

The requirement to attend goes beyond mere physical presence and must include making oneself known to the court.[1]

**Incomplete Text**

An undertaking that does not contain the complete text of a provision does not affect the jurisdiction of the court over the accused.[2]

**Fingerprinting**

The Crown is permitted to delay electing a mode of trial until such time as the accused has attended for finger prints.[3]

**Constitutionality**

The discretionary authority under s. 501(3) to require attendance for fingerprinting is does not violate s. 7.[4]

## Varying Conditions on Consent

**Variation of undertaking on consent**

502 (1) The undertaking in respect of which an accused has been released under section 498 [*release by peace officer (warrantless arrest)*], 499 [*release by peace officer (warrant arrest)*] or 503 [*taking person before justice after arrest*] may, with the written consent of the accused and the prosecutor, be varied and the undertaking so varied is deemed to be an undertaking given under section

498 [*release by peace officer (warrantless arrest)*], 499 [*release by peace officer (warrant arrest)*] or 503 [*taking person before justice after arrest*], as the case may be.

**Replacement by justice of undertaking with order**

(2) The accused or the prosecutor may, in the absence of consent between them, apply to a justice for a release order under subsection 515(1) [*release order without conditions*] or (2) [*release order with conditions*] to replace an undertaking given by the accused under paragraph 498(1)(c) [*release from custody – arrest without warrant – undertaking to peace officer*], 499(b) [*release by peace officer (warrant arrest) — undertaking*] or 503(1.1)(b) [*continued re-evaluation of 24 hour detention – release on undertaking*] with the order. If the prosecutor applies for the order, the prosecutor must provide three days notice to the accused.

R.S., 1985, c. C-46, s. 502; 1992, c. 47, s. 70; 1996, c. 7, s. 38; 1997, c. 18, s. 5; 2019, c. 25, s. 215.
[*annotation(s) added*]

– CCC

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This provision came into force on December 18, 2019.

## Duration of Conditions

**Period for which appearance notice, etc., continues in force**

523 (1) If an accused, in respect of an offence with which they are charged, has not been taken into custody or has been released from custody under any provision of this Part, the appearance notice, summons, undertaking or release order issued to, given or entered into by the accused continues in force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that was received after the appearance notice, summons, undertaking or release order was issued, given or entered into,

(a) where the accused was released from custody pursuant to an order of a judge made under subsection 522(3) [*release of accused on s. 469 offences*], until his trial is completed; or
(b) in any other case,

(i) until his trial is completed, and
(ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of section 673 [*Pt. XXI — appeals — definitions*] is imposed on the accused unless, at the time the accused is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence.

[*omitted (1.1), (1.2), (2) and (3)*]
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.

– CCC

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This provision came into force on December 18, 2019.

## Compelling Attendance for Identification

- Taking Photographs and Fingerprints of Accused Persons

## Powers to Release on Warrant Arrest

### Endorsed Arrest Warrant Under s. 519

**Release of accused**

519 (1) If a justice makes a release order under section 515 [*judicial interim release provisions*],

(a) if the accused thereupon complies with the order, the justice shall direct that the accused be released

(i) forthwith, if the accused is not required to be detained in custody in respect of any other matter, or
(ii) as soon thereafter as the accused is no longer required to be detained in custody in respect of any other matter;

(b) if the accused does not thereupon comply with the order, the justice who made the order or another justice having jurisdiction shall issue a warrant for the committal of the accused and may endorse thereon an authorization to the person having the custody of the accused to release the accused when the accused complies with the order

(i) forthwith after the compliance, if the accused is not required to be detained in custody in respect of any other matter, or
(ii) as soon thereafter as the accused is no longer required to be detained in custody in respect of any other matter;

and if the justice so endorses the warrant, he shall attach to it a copy of the order; and
(c) any condition in the order that an accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions, is effective from the moment it is made, whether or not the accused has been released from custody.

**Discharge from custody**

(2) Where the accused complies with an order referred to in paragraph (1)(b) [*power to issue warrant with endorsement to release by police*] and is not required to be detained in custody in respect of any other matter, the justice who made the order or another justice having jurisdiction shall, unless the accused has been or will be released pursuant to an authorization referred to in that paragraph, issue an order for discharge in Form 39 [*forms*].

**Warrant for committal**

(3) Where the justice makes an order under subsection 515(5) [*detention in custody*] or (6) [*reverse onus offences*] for the detention of the accused, he shall issue a warrant for the committal of the accused.
R.S., 1985, c. C-46, s. 519; R.S., 1985, c. 27 (1st Supp.), s. 85; 2019, c. 25, s. 228.
[*annotation(s) added*]

– CCC

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This provision came into force on December 18, 2019.

### Unendorsed Warrant

Under s. 503, an officer arresting someone on a warrant may either detain them in custody to be brought to a justice within 24 hours or, release the person "conditionally" on a promise to appear or recognizance.

1. *R v Anderson*, 1983 ABCA 264 (CanLII), 9 CCC (3d) 539, *per* Kerans JA
2. *R v Gougeon*, 1980 CanLII 2842 (ON CA), 55 CCC (2d) 218, *per* Morden JA
3. *R v Abarca*, 1980 CanLII 2958 (ON CA), 57 CCC (2d) 410, *per* Lacourciere JA
4. *R v Beare; R v Higgins*, 1988 CanLII 126 (SCC), [1988] 2 SCR 387, *per* La Forest J

## Definitions

**Definitions**

493 In this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*],
...
**"warrant"**, when used in relation to a warrant for the arrest of a person, means a warrant in Form 7 [*forms*] and, when used in relation to a warrant for the committal of a person, means a warrant in Form 8 [*forms*]. (mandat)
R.S., 1985, c. C-46, s. 493; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 5, c. 17, s. 12; 1992, c. 51, s. 37;1994, c. 44, s. 39; 1999, c. 3, s. 30; 2002, c. 7, s. 143; 2015, c. 3, s. 51; 2019, c. 25, s. 209.

– CCC

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This provision came into force on December 18, 2019.

For definition of "accused", see Accused in Court.

2 In this Act,
...
**"appearance notice"** means a notice in Form 9 [*forms*] issued by a peace officer; (citation à comparaître)
...
**"intimate partner"** with respect to a person, includes their current or former spouse, common-law partner and dating partner; (partenaire intime)
...
**"recognizance"** means a recognizance in Form 32 [*forms*] entered into before a judge or justice; (engagement)

**"release order"** means an order in Form 11 [*forms*] made by a judge as defined in section 493 [*compelling appearance of accused before a Justice and interim release – definitions*] or a justice; (ordonnance de mise en liberté)
...

**"summons"** means a summons in Form 6 [*forms*] issued by a judge or justice or by the chairperson of a Review Board as defined in subsection 672.1(1) [*mental disorders – definitions*]; (sommation)

...

**"undertaking"** means, unless a contrary intention appears, an undertaking in Form 10 [*forms*] given to a peace officer; (promesse)

...

R.S., 1985, c. C-46, s. 2; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 2, 203, c. 31 (1st Supp.), s. 61, c. 1 (2nd Supp.), s. 213, c. 27 (2nd Supp.), s. 10, c. 35 (2nd Supp.), s. 34, c. 32 (4th Supp.), s. 55, c. 40 (4th Supp.), s. 2; 1990, c. 17, s. 7; 1991, c. 1, s. 28, c. 40, s. 1, c. 43, ss. 1, 9; 1992, c. 20, s. 216, c. 51, s. 32; 1993, c. 28, s. 78, c. 34, s. 59; 1994, c. 44, s. 2; 1995, c. 29, ss. 39, 40, c. 39, s. 138; 1997, c. 23, s. 1; 1998, c. 30, s. 14; 1999, c. 3, s. 25, c. 5, s. 1, c. 25, s. 1(Preamble), c. 28, s. 155; 2000, c. 12, s. 91, c. 25, s. 1(F); 2001, c. 32, s. 1, c. 41, ss. 2, 131; 2002, c. 7, s. 137, c. 22, s. 324; 2003, c. 21, s. 1; 2004, c. 3, s. 1; 2005, c. 10, s. 34, c. 38, s. 58, c. 40, ss. 1, 7; 2006, c. 14, s. 1; 2007, c. 13, s. 1; 2012, c.1, s. 160, c. 19, s. 371; 2013, c. 13, s. 2; 2014, c. 17, s. 1, c. 23, s. 2, c. 25, s. 2; 2015, c. 3, s. 44, c. 13, s. 3, c. 20, s. 15; 2018, c. 21, s. 12; 2019, c. 13, s. 140; 2019, c. 25, s. 1.

– CCC

## See Also

- Release by Police (Until December 18, 2019)

# Procuring the Attendance of a Prisoner

This page was last substantively updated or reviewed *January 2018*. (Rev. # 79568)

< Procedure and Practice < Compelling the Accused to Attend Court
< Procedure and Practice < Judicial Interim Release

## General Principles

A person who is in the custody of a prison may be brought to court by way of a *pickup*, *transport* or *production* order issued by either a provincial court or superior court judge.

**Procedure to Procure Attendance of a Prisoner**
**Procuring attendance**

527 (1) A judge of a superior court of criminal jurisdiction may order in writing that a person who is confined in a prison be brought before the court, judge, justice or provincial court judge before whom the prisoner is required to attend, from day to day as may be necessary, if

(a) the applicant for the order sets out the facts of the case in an affidavit and produces the warrant, if any; and
(b) the judge is satisfied that the ends of justice require that an order be made.

**Provincial court judge's order**

(2) A provincial court judge has the same powers for the purposes of subsection (1) [*power to procure attendance of prisoner*] or (7) [*transfer of prisoner by superior court*] as a judge has under that subsection where the person whose attendance is required is within the province in which the provincial court judge has jurisdiction.

**Conveyance of prisoner**

(3) An order that is made under subsection (1) [*power to procure attendance of prisoner*] or (2) [*provincial court orders same as superior court orders*] shall be addressed to the person who has custody of the prisoner, and on receipt thereof that person shall

(a) deliver the prisoner to any person who is named in the order to receive him; or
(b) bring the prisoner before the court, judge, justice or provincial court judge, as the case may be, on payment of his reasonable charges in respect thereof.

**Detention of prisoner required as witness**

(4) Where a prisoner is required as a witness, the judge or provincial court judge shall direct, in the order, the manner in which the prisoner shall be kept in custody and returned to the prison from which he is brought.

**Detention in other cases**

(5) Where the appearance of a prisoner is required for the purposes of paragraph (1)(a) [*power to procure attendance of prisoner – set out facts*] or (b) [*power to procure attendance of prisoner – ends of justice*], the judge or provincial court judge shall give appropriate directions in the order with respect to the manner in which the prisoner is

(a) to be kept in custody, if he is ordered to stand trial; or
(b) to be returned, if he is discharged on a preliminary inquiry or if he is acquitted of the charge against him.

**Application of sections respecting sentence**

(6) Sections 718.3 [*degrees of punishment limitations*] and 743.1 [*penitentiary for sentences of 2 years or more*] apply where a prisoner to whom this section applies is convicted and sentenced to imprisonment by the court, judge, justice or provincial court judge.

**Transfer of prisoner**

(7) On application by the prosecutor, a judge of a superior court of criminal jurisdiction may, if a prisoner or a person in the custody of a peace officer consents in writing, order the transfer of the prisoner or other person to the custody of a peace officer named in the order for a period specified in the order, where the judge is satisfied that the transfer is required for the purpose of assisting a peace officer acting in the execution of his or her duties.

**Conveyance of prisoner**

(8) An order under subsection (7) [*transfer of prisoner by superior court*] shall be addressed to the person who has custody of the prisoner and on receipt thereof that person shall deliver the prisoner to the peace officer who is named in the order to receive him.

**Return**

(9) When the purposes of any order made under this section have been carried out, the prisoner shall be returned to the place where he was confined at the time the order was made.

R.S., 1985, c. C-46, s. 527; R.S., 1985, c. 27 (1st Supp.), ss. 92, 101(E), 203; 1994, c. 44, s. 50; 1995, c. 22, s. 10; 1997, c. 18, s. 62; 2015, c. 3, s. 52(F).

– CCC

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An accused who is in custody on other matters and is brought before a court on new charges without arrest, notice or summons, can still be ordered remanded under s. 527(5) and be denied bail after a bail hearing.[1] The accused may also be made to go to a show cause hearing under s. 515 in these circumstances.[2]

**Exempt From Provisions of Part XXII of the Code**

The provisions of s. 527 take precedent over any of the provisions within Part XXII (s. 697 to 715.2) of the Code.[3]

**No Transport Orders Relating to Persons Serving Sentencing**

Where a suspect is serving a sentence in a correctional facility, the superior court has no jurisdiction to order their transport without it relating to on-going court proceedings.[4]

1. *R v Katirtzogloy*, 1989 CarswellOnt 1933, [1989] OJ No 1872(*no CanLII links)
   *R v Goikhberg*, 2014 QCCS 3891 (CanLII), QJ 8164, *per* Cournoyer J, at paras 21 to 41
2. *Katirtzogloy*, *ibid.*
   *R v Lalo*, 2002 NSSC 157 (CanLII), 645 APR 250, *per* Robertson J, at para 66
3. see s. 697: "Except where section 527 applies, this Part applies where a person is required to attend to give evidence in a proceeding to which this Act applies. R.S., c. C-34, s. 625."
4. *R v Dechamp*, 2017 NSSC 207 (CanLII), *per* Duncan J

# Transfer of Matters to Other Provinces or Territories

This page was last substantively updated or reviewed *August 2017*. (Rev. # 79568)

< Procedure and Practice < Jurisdiction of the Courts

## General Principles

The process of "waiving jurisdiction", permitting charges to be plead to and sentenced for the offence in a province other than the original jurisdiction.[1]

**Offence committed entirely in one province**

478 (1) Subject to this Act, a court in a province shall not try an offence committed entirely in another province.
[*omitted (2)*]

**Idem**

(3) An accused who is charged with an offence that is alleged to have been committed in Canada outside the province in which the accused is may, if the offence is not an offence mentioned in section 469 and

> (a) in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, if the Attorney General of Canada consents, or
> (b) in any other case, if the Attorney General of the province where the offence is alleged to have been committed consents,

appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the province where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not plead guilty, the accused shall, if the accused was in custody prior to appearance, be returned to custody and shall be dealt with according to law.
[*omitted (4) and (5)*]
R.S., 1985, c. C-46, s. 478; R.S., 1985, c. 27 (1st Supp.), ss. 64, 101(E); 1994, c. 44, s. 33(E).

– CCC

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Where charges are transferred to a different jurisdiction pursuant to s. 478(3) for the purpose of entering guilty pleas, but "guilty pleas are not taken by the court of the transferee province, the charges should be transferred back to the originating province".[2]

1. *R v Graham*, 2012 BCCA 376 (CanLII), *per curiam*, at para 3
2. *R v Gallagher*, 2009 MBQB 160 (CanLII), 241 Man R (2d) 135, *per* Greenberg J, at para 25

## Youth Court

**Transfer of charges**

133 Despite subsections 478(1) [*offence committed entirely in one province*] and (3) [*offence committed entirely in one province – ordered into custody*] of the *Criminal Code*, a young person charged with an offence that is alleged to have been committed in one province may, if the Attorney General of the province consents, appear before a youth justice court of any other province and

(a) if the young person pleads guilty to that offence and the youth justice court is satisfied that the facts support the charge, the court shall find the young person guilty of the offence alleged in the information or indictment; and
(b) if the young person pleads not guilty to that offence, or pleads guilty but the court is not satisfied that the facts support the charge, the young person shall, if he or she was detained in custody prior to the appearance, be returned to custody and dealt with according to law.

– YCJA

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## Transfer of Matters to Other Territorial Divisions Within the Province

**Offence outstanding in same province**

479. Where an accused is charged with an offence that is alleged to have been committed in the province in which he is, he may, if the offence is not an offence mentioned in section 469 and

(a) in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, the Attorney General of Canada consents, or
(b) in any other case, the Attorney General of the province where the offence is alleged to have been committed consents,

appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the place where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not plead guilty, the accused shall, if the accused was in custody prior to appearance, be returned to custody and shall be dealt with according to law.
R.S., 1985, c. C-46, s. 479; R.S., 1985, c. 27 (1st Supp.), s. 65; 1994, c. 44, s. 34(E).

– CCC

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## Time Limitations

## See Also

- Out of Province Arrest Warrants