

# CED: An Overview of the Law

---

## Criminal Law – Procedure – Arrest

BY: Marian E. Bryant, B.A. (Hons.), LL.B; David W. Guenter, LL.B.

### III.1: Arrest

[Click HERE](#) to access the CED and the Canadian Abridgment titles for this excerpt on Westlaw Canada

#### III.1(a): Definition

**See** Canadian Abridgment: CRM.VII.9.a Criminal law — Pre-trial procedure — Arrest — Elements

“Arrest” consists of the actual seizure or touching of a person’s body with a view to his or her detention. The mere pronouncing of words of arrest is not an arrest unless the person sought to be arrested submits to the process and goes with the arresting officer. An arrest may be made either with or without a warrant. The length of reasonable notice is not to be determined by a trial judge in light of what he or she thinks the parties would have agreed to at the time the contract was made, the so-called implied intention approach.<sup>4</sup>

#### III.1.(b): Notice

**See** Canadian Abridgment: CRM.VII.9.b.vi Criminal law — Pre-trial procedure — Arrest — Arrest with warrant — Miscellaneous

Anyone who arrests a person, whether with or without warrant, must give notice to that person, where feasible, of the warrant or the reason for the arrest.

#### III.1.(c): Arrest without Warrant

##### III.1.(c).(i): By Any Person

**See** Canadian Abridgment: CRM.VII.9.c.i.B Criminal law — Pre-trial procedure — Arrest — Arrest without warrant — Who may arrest — Citizen

A person may arrest without warrant anyone whom he or she finds committing an indictable offence.

A person may arrest without warrant anyone who he or she believes on reasonable and probable grounds has committed a criminal offence and is escaping from and being freshly pursued by persons with lawful authority to arrest that person.

# CED: An Overview of the Law

---

For the purpose of arrest without warrant, a police officer from one territorial jurisdiction has, in a different jurisdiction, only the same powers of arrest as a private citizen.

“Indictable offences” include Crown election, or “hybrid”, offences.

A “criminal offence” is any summary conviction or indictable offence under the Criminal Code, or any breach of any other federal statute.

## **III.1.(c).(ii): By Owner of Property**

**See Canadian Abridgment:** CRM.VII.9.c.i.B Criminal law — Pre-trial procedure — Arrest — Arrest without warrant — Who may arrest — Citizen

Property-owners and persons in lawful possession of property may arrest without warrant anyone found committing a criminal offence on or in relation to the property.

## **III.1.(c).(iii): Delivery to Peace Officer**

**See Canadian Abridgment:** CRM.VII.9.c.i.B Criminal law — Pre-trial procedure — Arrest — Arrest without warrant — Who may arrest — Citizen

A person other than a peace officer who arrests a person without warrant must forthwith deliver that person to a peace officer.

## **III.1.(c).(iv): By Peace Officer**

### **III.1.(c).(iv).A: General**

**See Canadian Abridgment:** CRM.VII.9.c.i.A Criminal law — Pre-trial procedure — Arrest — Arrest without warrant — Who may arrest — Peace officer

A peace officer may arrest without warrant: a person who has committed an indictable offence or who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offence; a person whom the officer finds committing a criminal offence; or a person for whom the officer has reasonable grounds to believe a warrant of arrest or committal is in force within the territorial jurisdiction in which the person is found.

Aside from the provisions of the Criminal Code, peace officers have a power at common law to arrest for an apprehended breach of the peace.

### **III.1.(c).(iv).B: Reasonable and Probable Grounds**

# CED: An Overview of the Law

---

**See** Canadian Abridgment: CRM.VII.9.c.ii.E Criminal law — Pre-trial procedure — Arrest — Arrest without warrant — When power may be exercised — Reasonable grounds for belief that accused committed indictable offence; CRM.VII.9.c.ii.F Criminal law — Pre-trial procedure — Arrest — Arrest without warrant — When power may be exercised — Reasonable grounds for belief that indictable offence about to be committed

The determination of reasonable and probable cause does not depend upon the actual existence of a set of circumstances which would justify the course pursued, but rather upon a reasonable, bona fide belief in the existence of such circumstances.

## **III.1.(c).(iv).C: Protection of Peace Officer**

**See** Canadian Abridgment: CRM.VII.9.c.ii.G Criminal law — Pre-trial procedure — Arrest — Arrest without warrant — When power may be exercised — Miscellaneous

A peace officer effecting an arrest without warrant is deemed to be acting lawfully and in the execution of his or her duty unless and until it is established otherwise by the person alleging that the peace officer did not comply with the requirements of the statute.

## **III.1.(c).(iv).D: Civil Liability**

**See** Canadian Abridgment: CRM.VII.9.e.vi Criminal law — Pre-trial procedure — Arrest — Legality — Miscellaneous

A peace officer who is a defendant in civil proceedings for false arrest or false imprisonment must establish that he or she acted reasonably.

## **III.1.(c).(iv).E: Exceptions for Specific Types of Offence**

**See** Canadian Abridgment: CRM.VII.9.c.ii.G Criminal law — Pre-trial procedure — Arrest — Arrest without warrant — When power may be exercised — Miscellaneous

A peace officer may not arrest a person without warrant for an indictable offence that falls within the absolute jurisdiction of a Provincial Judge, for a summary conviction offence or for a dual proceeding offence unless there are reasonable grounds to believe that the arrest is required in the public interest to establish the identity of the person, to secure or preserve evidence concerning or related to the offence, or to prevent a continuation or repetition of the offence or the commission of another offence, and there is reason to believe that, if the officer does not arrest the person, the person will fail to appear in court.

## **III.1.(c).(iv).F: Arrest on Outstanding Warrant**

**See** Canadian Abridgment: CRM.VII.9.c.ii.G Criminal law — Pre-trial procedure — Arrest —

# CED: An Overview of the Law

---

## Arrest without warrant — When power may be exercised — Miscellaneous

A peace officer who has reasonable and probable grounds to believe that a warrant is outstanding in the territorial jurisdiction has a duty to have it with him or her wherever feasible.

### **III.1.(d): Powers of Peace Officer Incidental to Arrest**

#### **III.1.(d).(i): Search**

*See Canadian Abridgment: CRM.VII.9.f Criminal law — Pre-trial procedure — Arrest — Miscellaneous*

The common law power of search incident to arrest is an exception to the ordinary requirements for a reasonable search in that it requires neither a warrant nor independent reasonable and probable grounds. The right to search arises from the fact of a lawful arrest. The power does not impose a duty. The search must be for a valid objective in pursuit of the ends of criminal justice and must not be conducted in an abusive fashion. In short, the search must be incidental to the arrest.

The three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial.

If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. The police must be able to explain, within the purposes recognized in the jurisprudence or by reference to some other valid purpose, why they conducted a search. They do not need reasonable and probable grounds. However, they must have subjectively had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference that the search is not sufficiently connected. That inference may be rebutted by a proper explanation.

The search incidental to arrest of any cell phone or similar device is subject to a modified version of the common law test, to account for its potential to constitute a more significant invasion of privacy. Such a search will be justified where the arrest is lawful; where the search is truly incidental to arrest; where there is an objectively reasonable purpose for conducting the search, including the protection of the police, accused or public, or preserving or discovering evidence; where the nature and the extent of the search are tailored to the purpose of the search; and where the police take detailed notes of what they have examined on the device and how it was searched.

# CED: An Overview of the Law

---

A strip search may be justified as being incidental to arrest, but in order to be constitutionally valid, the arrest must be lawful, the search must be conducted for the purpose of discovering weapons or evidence on the body of the arrested person related to the reason for the arrest, the search must be based on reasonable and probable grounds for concluding a strip search is necessary in the circumstances of the arrest, and the search must be conducted in a reasonable manner.

Although the common law enabled a peace officer to search an arrested person, no right existed to search individuals found in a place where a legally-obtained search warrant was executed, as such persons are not necessarily arrested.

However, a peace officer, acting on reasonable and probable grounds in arresting an accused for drug trafficking, has the right to search the accused's throat for drugs, forcibly if necessary. Such force is justifiable even if no drugs are found.

There is no automatic right to search a vehicle incident to an arrest. Whether such a search is valid will depend on whether there is a valid purpose connected to the offence for which the arrest is made. Otherwise, the accused's reasonable expectation of privacy in the vehicle will make the search a contravention of Section 8 of the Canadian Charter of Rights and Freedoms.

## **III.1.(d).(ii): Use of Force**

**See Canadian Abridgment:** CRM.VII.9.f Criminal law — Pre-trial procedure — Arrest — Miscellaneous

Anyone who is authorized by law to do anything in the administration or enforcement of the law, and acts on reasonable and probable grounds, is justified in using as much force as is necessary for that purpose; however, use of excessive force may result in civil and criminal liability.

## **III.1.(d).(iii): Entry Upon Property**

**See Canadian Abridgment:** CRM.VII.9.f Criminal law — Pre-trial procedure — Arrest — Miscellaneous

A warrant for arrest or apprehension may authorize a peace officer to enter a dwelling-house described in the warrant if the judge or justice is satisfied that there are reasonable grounds to believe that the person to be arrested or apprehended is or will be present in the dwelling-house. A peace officer may not enter the dwelling-house pursuant to a warrant unless the peace officer has, immediately before entering the dwelling-house, reasonable grounds to believe that the person to be arrested or apprehended is present in the dwelling-house. A judge or justice may authorize a peace

# CED: An Overview of the Law

---

officer to enter a dwelling-house without prior announcement if there are reasonable grounds to believe that prior announcement of the entry would (a) expose the peace officer or any other person to imminent bodily harm or death; or (b) result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence.

A peace officer may enter a dwelling-house without a warrant authorizing the entry only if (a) the peace officer has reasonable grounds to believe that the person is present in the dwelling-house, and the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant; or (b) the peace officer is in hot pursuit. Exigent circumstances include circumstances in which the peace officer (a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or (b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence. A peace officer who enters a dwelling-house without a warrant must make prior announcement, unless the peace officer has, immediately before entering the dwelling-house, (a) reasonable grounds to suspect that prior announcement of the entry would expose the peace officer or any other person to imminent bodily harm or death; or (b) reasonable grounds to believe that prior announcement of the entry would result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence. In sum, the police are allowed a certain amount of latitude in the manner in which they decide to enter premises.