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DETAINMENT, ARREST AND CHARGE

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December 2, 1980

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DETAINMENT, ARREST AND CHARGE

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Arrest is not defined in the Criminal Code. The McRuer Commission's Inquiry Into Civil Rights in Ontario defined an arrest as: "Any actual restraint imposed on a person's liberty against his will constitutes an arrest. The restraint may be imposed by the application of force, or by circumstances that imply a threat of force." Mere words will not constitute an arrest unless accompanied by a submission to restraint, or unless the officer is in a position to impose restraint on the accused, if necessary. Lord Devlin has stated:

"Arrest and imprisonment are in law the same thing. Any form of physical restraint is an arrest and imprisonment is only a continuing arrest."

In certain instances, anyone may make an arrest without a warrant (s.449, C.C., covers the situation of the "citizen arrest"). The police officer's powers to arrest without warrant go beyond those of ordinary persons. Section 450(1) states a peace officer may arrest without warrant:

- a) a person who has committed an indictable offence, or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence;
- b) a person whom he finds committing an indictable offence; or,
- c) a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which the person is found.

A peace officer can also arrest any person he finds committing an indictable offence.

Section 450(2) limits the officer's ability to detain persons arrested. Under this section, the officer making the arrest can compel future appearances by the accused either by issuing to him an appearance notice (s.451; s.452(1)(e)), or a summons (s.452(1)(d)). This procedure is to be employed in the following situations:

- a) the offence is an indictable offence mentioned in s.483;
- b) the offence is one for which the person may be prosecuted by indictment or which is punishable on summary conviction;
- c) the offence is one punishable on summary conviction.

An officer is only justified in detaining the accused where he feels that on reasonable and probable grounds it is in the public interest to do so. "Public interest" is ascertainable according to the legislation, by having regard to:

- a) the need to establish the identity of the person;
- b) the need to secure or preserve evidence relating to the offence; and,
- c) the necessity to prevent the continuation or repetition of the offence, or the commission of another offence.

A fear (based on reasonable and probable grounds) that, if released, the person in custody would fail to attend in court to be dealt with according to law, would also justify detaining the individual (s.452(1)(f)(g)). The same considerations as above must also guide the officer in charge into whose custody the suspect is delivered, if the suspect is detained by the arresting officer. (See s.452(1).) Thus, the public interest and the concern that the accused will attend as required by the authorities, are the important considerations.

If the accused is not released either by the arresting officer or officer in charge, he must be taken before a justice to be considered for release "without unreasonable delay and, in any event, within twenty-four hours." Where a justice is not available within twenty-four hours, the procedure must be accomplished as soon as possible (s.454(1)).

Also, a peace officer can arrest without warrant where there exists reasonable and probable grounds for believing that a warrant is in existence, and in force, within the territorial jurisdiction in which the person is found. (See above s.450(1)(c).) Where a person has been arrested without a warrant for an indictable offence alleged to have been committed in Canada, but outside the province in which he was arrested, then he must be taken before a justice within whose jurisdiction he was arrested within the time mentioned in s.454(1). The justice must then release him if he is not satisfied that there are reasonable and probable grounds to believe that the person arrested is the person alleged to have committed the offence (s.454(2)(a)). However, if he is satisfied as to the identity of the person, he may then remand him to the custody of a peace officer to await execution of the warrant for his arrest which will be issued from the province where he is wanted (s.454(2)(b)). If the warrant is delivered, then the justice of the peace may authorize its execution within his jurisdiction by making an endorsement on the warrant (s.461). Unless the warrant for his arrest is executed within six days after the accused is remanded into custody, then he must be released (s.454(2)(b)).

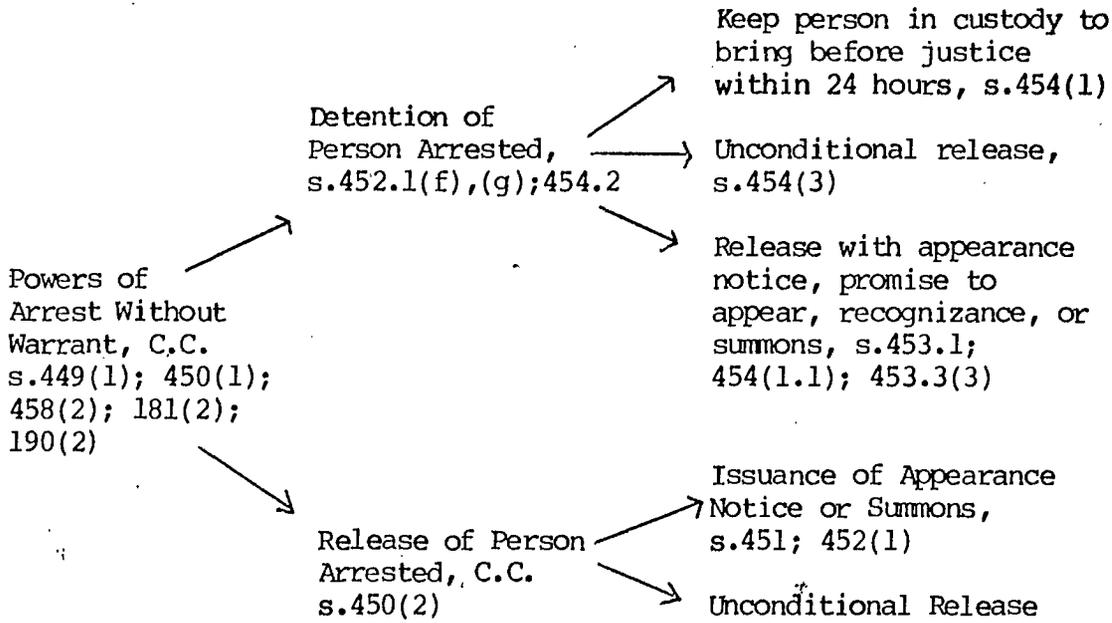
Laying an Information

After an accused has been released by the arresting officer or officer in charge, an information relating to the offence alleged to have been committed or relating to an included or other offence alleged to have been committed, must be laid before a justice of the peace "as soon as practicable" and no later than the time that the accused is required to appear in court (s.455.1). The justice then must (s.455.4(1)):

- a) hear and consider ex parte the allegations of the informant and the evidence of the witnesses where he considers it desirable and necessary;
- b) if a case has been made out, confirm the appearance notice, promise to appear on recognizance and endorse the information;
- c) where a case has not been made out, cancel the appearance notice, promise to appear on recognizance.

If the justice of the peace hears evidence of a witness, he must take it on oath. Also, such evidence must be recorded by stenographer, by deposition or by recording apparatus (s.455.4(2)).

Arrest Without Warrant by Police Officer



Options to police: with respect to each option, examine police/public rights and responsibilities, and the knowledge and practice of these rights and responsibilities.

ARREST WITH WARRANT
CRIMINAL CODE

General Powers

With a warrant, anyone suspected of having committed an indictable offence or offence punishable on summary conviction can be arrested (s.455.3 and 456.1); but a justice of the peace can only issue a warrant where he has reasonable and probable grounds to believe it is in the public interest to do so (s.455.3(4) and 456.1(1)). Before a warrant may be issued, an information must be laid before a justice.

Anyone who has reasonable and probable grounds to believe that a person has committed an indictable offence may lay an information (s.455 and 728). This information is taken down in writing and must be sworn under oath. The justice of the peace must receive the information where it is alleged (s.455):

- a) the accused committed anywhere an offence triable in the province where the justice of the peace resides and the accused is or is believed to be living or residing in the justice's jurisdiction;
- b) the accused committed an offence within the justice's jurisdiction;
- c) the accused has anywhere unlawfully received property that was unlawfully obtained in justice's jurisdiction; or,
- d) the accused is in possession of stolen property in the justice's jurisdiction.

The justice is also required to hear submissions by the informant as to whether or not a summons or warrant of arrest should be issued compelling appearance of accused. If the justice chooses to hear witnesses, evidence must be given under oath in same manner as evidence given at preliminary inquiry (s.455,3(3)).

The proceedings are ex parte; the accused has no right to be present. If the justice feels the case has been made out, he may issue either a summons or a warrant. (Laying of information before justice and issuance of warrant or summons are two distinct steps and whether or not they must be exercised by the same justice is a matter of controversy.)

The contents of a warrant and the manner of execution are set out in the Criminal Code (s.456, 456.2).

A summons instead of a warrant must be issued unless it is in the public interest to issue a warrant (s.455.3(4)). If it is in the public interest to issue a warrant, it can be done even if (s.456.1(1)):

- a) an appearance notice, promise to appear, or recognizance entered into before an officer in charge has been confirmed or cancelled (s.456.1(1));
- b) a summons has been issued previously;
- c) the accused was released unconditionally or with intention of compelling his appearance by summons.

Execution of a Warrant

The peace officer named in the warrant, or any peace officer to whom a warrant is directed, may arrest in the territorial jurisdiction of the issuing justice of the peace, or anywhere if the officer is freshly pursuing the accused (s.456.3). A warrant can be issued and executed Sundays and statutory holidays (s.20 C.C.). The officer must have the warrant with him and must produce it if asked (s.29(1) C.C.). In the question of summary conviction offences, a copy of the warrant must be served on the accused upon arrest unless a summons had been previously issued and served on him (s.728(2)).

If a warrant cannot be executed in accordance with s.459 because the accused is in another province, the peace officer may apply before a justice who has jurisdiction in the territory where the accused is believed to be, to have the warrant endorsed (s.461(1)). The peace officer must prove the issuing justice's signature upon oath or by affidavit before the warrant will be endorsed. Then the justice will endorse the warrant. Then, the original peace officers in the jurisdiction where it is endorsed can arrest the accused and take him back to face the charge in the first jurisdiction.

If the offence is:

- a) punishable on summary conviction; or,
- b) punishable on indictment or on summary conviction; or,
- c) within the absolute jurisdiction of a magistrate; or,
- d) punishable by five years or less;

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When the justice who issues the warrant may authorize the release of the accused by making an endorsement on the warrant in Form 25.1 (s.455.3(6)).

Coroner's Warrant

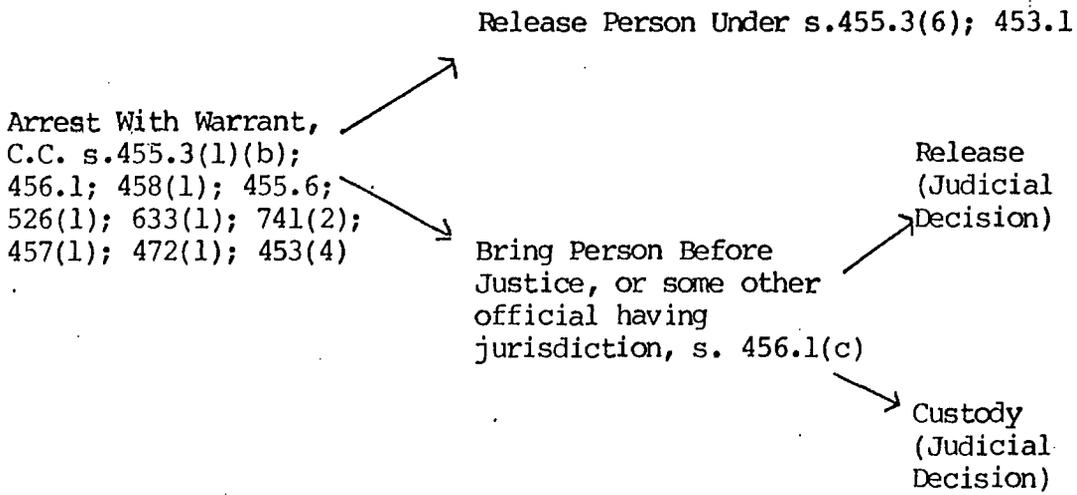
Where there has been a coroner's inquest into the death of a person and jurors have rendered a verdict accusing someone of murder or manslaughter, the coroner may issue a warrant for arrest of the accused (if the accused has not already been charged), or direct that the accused enter recognizances to appear before a justice (s.462(1)).

The accused must be taken as soon as possible before a justice to answer the charge (s.462(1)(a)). Section 462(2) allows evidence taken at the coroner's hearing to be transmitted to the justice before whom the accused is brought.

Arrest With Warrant Where Accused is Already Confined

A judge of a superior court, or a county or district court, or a magistrate in whose jurisdiction the accused is already confined, may issue an order requiring the accused to appear before the proper justice to answer the charge (s.460(1)(a), (b) and (2)). The order can state either to deliver the accused to a named person or to bring the prisoner before the court (s.460(3)). An order can also compel the accused to appear in court and give evidence at a trial (s.460(1)(c)).

Arrest With Warrant



Options to police: With respect to each option, examine police/public rights and responsibilities, knowledge and practice of these rights and responsibilities.

THE SUMMONS
CRIMINAL CODE

Issuance

A summons is an order of a justice of the peace or magistrate addressed to an accused person, directing him to appear at a specified time and place to answer the charge set out in the summons (s.455.5). An information must first be sworn out against the accused (s.455.3). The summons must be signed by the issuing justice and failure to do so nullifies it (s.455.3(5)).

Service of Summons

The service of a summons must be made personally on the accused by a peace officer (s.455.5(2)). If the accused cannot conveniently be found, service may be effected by leaving it for him at his last or usual place of abode with someone who appears to be over 16 (s.455.5(2)). Proof of that service may then be made by the peace officer either by oral evidence before a justice of the peace or by affidavit (s.455.5(3)).

If the accused appears to the summons, he will be deemed to have waived any irregularity in the service of it. Not settled though is whether the appearance constitutes a waiver of any defect in the summons itself.

An information can be received and summons can be issued and executed on any holiday or on a Sunday.

USE OF FORCE AS AN INCIDENT TO ARREST
CRIMINAL CODE

Section 25 of the Criminal Code states that as much force as necessary can be used to effect lawful purpose.

Section 26 discusses criminal responsibility for use of excessive force.

Section 27(a)(i) and (ii) states that as much force as is necessary can be used to prevent the commission of an offence for which an arrest would have been justified (without warrant) were it committed. The same is true in circumstances where the commission of an offence would be likely to cause immediate and serious injury to the person or property of anyone.

Section 27(b) states that so long as an officer (or other person) maintains that his actions were based on reasonable and probable grounds, the use of force is justifiable regardless of ultimate truth of this belief.

Section 28 states that where a peace officer (or other authorized person) executes a warrant to arrest in good faith, and on reasonable and probable grounds, believing the person whom he is arresting is the person named in the warrant and he proves to be in error, the peace officer is not criminally responsible. It is questionable whether a peace officer can be held responsible in a civil suit.

Right to Resist and Obstruct Police in Cases of Unlawful
Police Activity and Right to Repell Excessive Force

Section 34 give the justification for repelling force with force in the case of unlawful assault.

The line between lawful and unlawful conduct is not always clear. The court must sort out the rights and liabilities for most situations.

Sections 118 and 246 are relevant. Section 118 discusses resisting and obstructing a peace officer. Section 246 discusses assaulting a peace officer in execution of his duty.

NOTE: 1. If a peace officer is acting illegally, he is not acting in the execution of his duty.

2. Telling others not to disclose information to a peace officer investigating an offence is obstructing a peace officer in the execution of his duty. However, in the case of the accused himself, the right to remain silent and the right against self-incrimination have to be considered. Also, obstruction must be WILFUL (i.e., in the case of a plainclothes officer trying to break up a fight, he is not considered as an officer and therefore is not "obeyed", there is no liability under sections 118 or 246).

DETAINMENT BY POLICE OFFICERS

1. Detainment without arrest re crime investigation, questioning of suspects. No specific statutory power, but have legal constraints on this police activity.
2. Station-house detainment without arrest, for questioning. Again, no specific statutory power, but have legal constraints on this activity.
3. Detainment of Material Witnesses.
4. Emergency Detainment (to protect person and property).
5. Detainment pursuant to Highway Traffic Acts.
6. Detainment pursuant to Dangerous Offender Legislation.
7. Detainment for Shoplifting.
8. Detainment of Children, Juveniles.
9. Civil Detainment: mental patients and alcoholics detained in asylums or hospitals pursuant to court order.

Examine statute and case law covering these types of situations as well as police/public knowledge and practice of rights and responsibilities in these situations. Different factors influencing knowledge and practices of these rights and responsibilities.

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