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TRESPASS TO PROPERTY IN ONTARIO



17 March 2020



TRESPASS

Trespassing, Arrest and Use of Force to Protect Private Property in Ontario.

- The law of trespass in Canada is made up of **tort law, provincial legislation, and criminal law**. We will discuss all three, but focus on **Provincial legislation** and what you should know in how to deal with this relatively minor offence.



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- Trespass to land is one of the oldest torts known in law. Historically, it has been held to occur whenever there has been an **unauthorized physical intrusion onto the private property of another**. Trespass also occurs when a person remains on an individual's land after permission has been withdrawn



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- Trespass to land is actionable "**per se**". This means that someone can be sued and found liable for trespassing even if there is no proof of damage. In a trespass case, if the incident was for particularly malicious purposes, such as to intimidate the land owner, even punitive damages may apply. Again, civil law (tort of wrong doing) is mostly about money or recovering costs for damages etc. Not so, with the simple offence of Trespassing under Provincial legislation.



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- While trespassing is usually defined as the unlawful entry onto the private land of another, it **also includes performing an unlawful activity on the land and refusing to leave when told to do so.** In some provinces, such as Ontario, there is a **reverse onus provision.** A person is presumed to be trespassing simply if they are found on the property without any lawful excuse.



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- Offenders may be fined, in some cases up to ten thousand dollars in Ontario. There are a number of defences available to a person charged under provincial trespass legislation however. **If there is a fair and reasonable supposition that an accused had a right to be on the land, such as for a job, an appointment etc., the person may be acquitted.** (Paper delivery, canvassing, Municipal employees etc.)

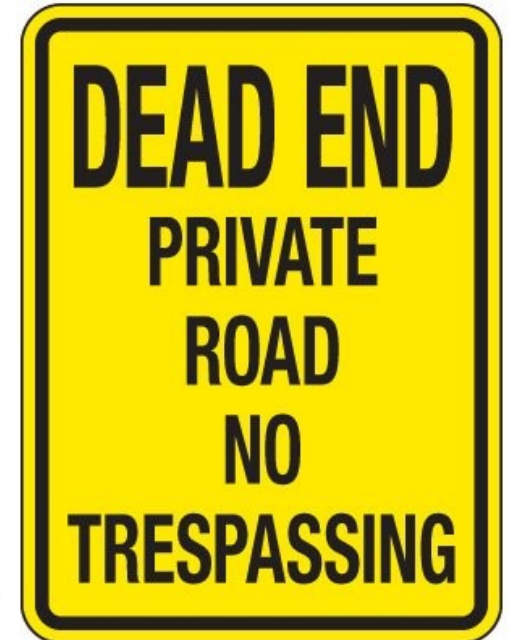


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- There is also an **implied permission to approach a door of a building unless there is a notice warning people to stay away**. In other words, they must enter onto the property by the means provided such as the sidewalk or driveway **UNLESS** there are signs etc. that prohibit entry.



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TRESPASS

- Do not get Provincial Trespassing confused with the Criminal offence of "**Trespass by Night.**" The Criminal Code makes it an offence to loiter or prowl at night on the property of another person **near a dwelling space** situated on that property. (This is critical to understand as this is what makes the offence criminal and not a simple Provincial Trespassing offence.)



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- **"Night"** is defined by the Criminal Code and case law. Usually it is **one half hour after sunset to one half hour before sunrise**. In northern locations where the sun either never sets or sets later, that definition can be interpreted differently by the local courts.



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- "**Dwelling-house**" is defined by the Criminal Code as a permanent or temporary residence and anything attached to it. This would include temporary dwellings such as trailers or tents.



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- The essence of "**loitering**" is wandering about apparently without a precise destination. It is conduct which essentially has nothing reprehensible about it as long as it does not take place on private property where the loiterer has no business. The substance of "**prowling**" is to move about stealthily, furtively, secretly, and clandestinely or move in small degrees.



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- The bottom line here, and the reason the offence exists in the Criminal Code at all is this; it was considered a precursor to sexual or property related criminal offenses such as Voyeurism or even break and enter. **Proving Criminal intent is the crux of the offence here.**



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- The prosecutor does not have to prove that the accused was looking for an opportunity to carry out an unlawful purpose. Where prowling is proved, it is **up to the accused to prove he had a lawful excuse for being there.**
- Remember, this is **Criminal Trespass, not Provincial**. Trespass by night can **ONLY be committed on or near a dwelling house**, not commercial properties.



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- **Key point:** Trespass in Ontario, is treated as "**reverse onus.**" In other Provinces, it is strict liability offence. (Either you are or aren't on the property for a lawful purpose and have been properly notified not to be there.)



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- Can a person properly served with a ban notice still legally be on your property? The short answer is **yes** they can **IF they are on the property for a lawful reason.** **Example:** a person is banned but returns for job related reasons or has an appointment on your property. This normally applies to commercial locations or properties open to the public.



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As far as the law society is concerned **there is only ONE real offence – failing to leave**, but here are the criteria as set down by the court:

1. You must identify yourself as an agent for the property owner **AND** proper notice must be given (...and reasonably, it must be understood.)
 - This means verbally and documented, written and properly served or by way of signs.
2. All other efforts to cause the person to leave have failed. (This includes calling police and waiting.)
3. Actionable after the lapse of a reasonable amount of time. (As determined by the court on a case by case basis.)



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After steps 1 to 3 are completed, ask yourself the following questions; (**because the court will!**)

- **Q.1** Is this person going to hurt themselves or others before the police arrive?
- **Q.2** Is the person going to damage property and possible cause injury to themselves or others in the process?
- **Q.3** Is an arrest necessary for safety reasons or are there other unknown factors at play i.e.: intoxication, mental illness etc. that may cause the situation to escalate?
- **Q.4** What will happen if I watch and wait instead of intervening?



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Trespassing and Arrest in Ontario. Go to this link:

<https://www.canlii.org/en/on/laws/stat/rso-1990-c-t21/latest/rso-1990-c-t21.html>

- **Section 2** outlines the offence of Trespassing however....only the court can interpret what it means and how it is to be applied. For context...there is NO such offence as "prohibited acts or entry where entry is prohibited." These are simply reasons to get to the "**fails to leave**" offence. There is plenty of case law on this point, not to mention that Ontario is the **ONLY** Province in Canada that mentions these two points as actual offences.



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- Where does the authority come from in law to use force to make a citizen's arrest under Provincial trespassing laws? How much force can be used to effect the arrest? Valid questions.
- Read **section 9** of the T.P.A. on your linked page. It is the civilian authority to make arrests of trespassers. Section 10 is for the police, but pay attention to the criteria they have to follow.



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Question: Can a trespasser be chased off the property and arrested?

- **Answer:** No. Think about it ... your problem is solved when the trespasser is off the property isn't it? If the police have a strict criteria for arrest off the property, its because they are more highly trained with greater powers to act. **You don't have those powers.**
- Section 9 arrest without warrant does **NOT** give you the authority to use force to effect that arrest.



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- Go to the resource section and download the Asante Mensah case. Read it and send your instructor a synopsis of the key lessons learned from this case. There are a number of key points in this case that will apply to you.
- Case law SCC 2003 (Asante-Mensah) tested this validity of this authority for a civilian to use force to effect an arrest for Trespassing. For greater clarification, the Criminal Code still also governs rules of reasonableness and limitations on how much force can be used however, the primary underlying question to be answered is “should you be doing this at all?” This was the main point of the court in Asante Mensah.



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- The Criminal Code also changed in 2013 to include a specific section on Defence of Property, section 35. This section is for Criminal offences, not simple trespassing. There is nothing more implied in section 35 than is written there. Case law tells us that you cannot read authorities into the law that are not clearly spelled out there. Only the court can interpret what the section means and how it is to be applied.



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- Section 35, Defence of Property is also reverse onus (**on YOU!**) You must explain to the court **why your actions were necessary** first before justifying any uses of force in the protection of property. Fail in your reasoning and the results are that you'll probably be **charged with assault**. The defence of property is not meant to deal with simple trespassing. It does **NOT** give you the right to physically eject a trespasser. Provincial law is not superseded by this section.



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- Simple trespass is **NOT** criminal in nature. Where Provincial legislation within your trespassing legislation specifically outlines the scope of your authority, you are not permitted to exceed that by invoking provisions of the Criminal Code or Common Law.



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- All the court decisions underline the same caution: **Do not take law into your own hands** if it is more prudent to wait or proceed by other, less violent, means. This was one of the key messages within the Asante Mensah case.
- **Arrests by citizen**, or security guards etc. are, in most cases, **unnecessary and risky** in that they can lead to more violent behaviour/resistance. The courts do not deny the right for land owners and their agents to use a level of force to defend property, however consider section 35 of C.C. which is now also reverse onus.



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- We must take into account ALL the factors involved in each case including the overriding questions; Should you be doing this at all? If so, why? Is that a reasonable choice given all the other choices that may exist?



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END OF MODULE

Please proceed to the online quiz