

SEARCH AND SEIZURE LAWS IN CANADA: FIREARMS

The police, and some other peace officers, have powers under both the common law and the *Criminal Code of Canada* allowing them to detain, search, and seize firearms on persons, and in residences, vehicles, buildings, and storage facilities. You have the right for a search conducted by police and any arrest or detention associated with the search to be lawful and valid. Individual rights against unlawful search and seizure and arbitrary detention and arrest are protected under the *Charter of Rights and Freedom*. Police powers are limited by the *Charter*, specifically per sections 8 and 9.

WHAT SHOULD YOU DO IF POLICE WANT TO SEARCH YOUR RESIDENCE OR VEHICLE?

- If the police detain you, ask to speak with a lawyer.
- Do not make any statements, explain circumstances, or provide any information besides your identity and proof of identity.
- If the police ask you to consent to a search of your person, vehicle, or residence, or ask you to sign a consent form, do not give your consent.
- If police tell you they want to conduct a search of your person, vehicle, or residence, tell them that you do not consent to the search.
- Do not assist in the search or provide unsolicited information to the police.
- Do not interfere with the investigation or argue with police authority to search, even if the search is warrantless.
- If the police tell you they have a warrant to conduct the search, ask to see the warrant.
- Review the warrant for information regarding scope of police search power, including the nature and location of the search.
- Do not engage with the police if you observe them acting outside the scope of their authority in the warrant, instead make a note of it.
- Ask for the names of any officers involved.
- Make detailed notes of the events including specific information on what each officer did and/or said after the conclusion of the search.

POLICE POWERS ARE LIMITED BY THE *CHARTER* DURING THE SEARCH AND SEIZURE OF A FIREARM

Section 8 of the *Charter* protects the individual right to be free of unreasonable search and seizure. According to *R v Collins*, [1987] 1 SCR 265, 1987 CanLII 84, a search is reasonable if: (a) it is authorized by law, (b) the law itself is reasonable, and (c) the way the search was carried out is reasonable. A search is often authorized by law through a warrant issued by a justice of the peace. A search may also be reasonable if it is authorized by: (a) statute, such as through *Criminal Code* provisions, (b) common law, such as through search incident to arrest or the plain view doctrine, or (c) exigent circumstances, in the event of an emergency.

According to *Hunter v Southam*, [1984] 2 SCR 145, 1984 CanLII 33, when a search and seizure is unreasonable, the onus shifts to the party seeking to justify the warrant to rebut the presumption of unreasonableness. The prosecution must show either complete compliance with (a) statute or (b) common law to establish that the search was reasonable, and the evidence obtained subsequent to the search, such as a firearm, should be admitted.

Section 9 of the *Charter* guarantees that everyone has the right not to be arbitrarily detained or imprisoned. If a detention is not authorized by law, the detention is arbitrary, and it violates section 9. According to *R v Grant*, 2009 SCC 32, the purpose of section 9 is to ensure the protection of individual liberty against unlawful state interference.

Sections 8 and 9 of the *Charter* are important to police investigations for firearms. A search and seizure of a firearm may occur in the context of a search authorized by a warrant or a search subsequent to detention or arrest. An arrest or a search must therefore be authorized by law for the police to be able to conduct it legally.

Police cannot enter your private residence without consent or a warrant. In *R v Le*, 2019 SCC 34, the accused was arrested, among other offences, for possession of a firearm. The police entered the private backyard of a townhouse where the accused and four of his friends were just talking. The Supreme Court of Canada found that the police breached the section 8 and 9 *Charter* rights of the accused. The police entered without warrant or consent, even when the police could have spoken to the people from outside of their private property.

POLICE CAN OBTAIN A SEARCH WARRANT SPECIFYING THE PARAMETERS OF THEIR SEARCH

Section 117.04 of the *Criminal Code* specifically addresses the search and seizure of firearms in the context of exigent, or emergency, circumstances. Otherwise most firearm cases involve the search of a residence, storage facility, or a motor vehicle. The search of a residence will usually require a warrant, absent exigent circumstances.

A search warrant is permission given by a judicial official to an agent of the state, usually a police officer, to examine and/or take a thing from a person without that person's consent. The warrant to search and/or seize may: (a) address specific things or information, (b) relate to a specific offence, or (c) specify a person or location to be searched.

A search warrant authorized by a judicial official is deemed to be valid and lawful. To challenge the validity of the lawful search, the person from whom a firearm was seized would need to convince the Court that the warrant should not have been granted. According to *R v Garofoli*, [1990] 2 SCR 1421, 1990 CanLII 52 the reviewing judge does not substitute his or her own analysis, but rather will determine whether based on the evidence before the authorizing judge, he or she could have granted the warrant. It is difficult to prove that a warrant should not have been issued. Even if the warrant is found to be unlawful, the Court can still decide to admit the firearm into evidence regardless of the section 8 breach per s. 24(2) of the *Charter*.

The standard of proof for a warrant authorized through the *Criminal Code* most often requires police to have reasonable and probable grounds that an offence has been committed. According to *Baron v Canada*, [1993] 1 SCR 416, 1993 CanLII 154, reasonable grounds entails a credibly based probability, or that there is a likelihood that the thing sought will be found beyond a mere possibility. The probability should be practical, non-technical and common sense depending on the facts in any given circumstances.

Police cannot conduct a search which ventures outside the scope of an issued warrant. In *R v Arnault*, 2019 SKCA 109, the accused was arrested with multiple weapons-related offences. The police had obtained a warrant to search the home of the person with whom the accused resided. The Court of Appeal of Saskatchewan held that the accused was entitled a reasonable expectation of privacy in his own home that is not diminished by a search warrant against another person in the same home. The police should have obtained the consent of the accused as a third party cannot waive another person's privacy interest.

POLICE CAN CONDUCT A WARRANTLESS SEARCH IN CERTAIN CIRCUMSTANCES

The search of a motor vehicle is usually warrantless. An individual may be subject to an investigative detention, which may lead to grounds to search the vehicle. In a warrantless search, the search is deemed to be unlawful. The prosecution must prove that the police conducted a lawful search, authorized by law.

According to *R v Mann*, 2004 SCC 52, police can detain an individual if there are reasonable grounds to suspect that the individual is connected to a crime and the detention is necessary, considering the specific circumstances. Police are only authorized to conduct a pat-down search in the context of an investigative detention only to ensure their safety and the safety of others.

During an investigative detention stemming from a motor vehicle stop, police may form reasonable and probable grounds to conduct a more thorough search of the person and the vehicle. Whether the search will be deemed authorized by law depends on the specific facts of each case.

In *R v Keller*, 2019 ABCA 38, the accused was arrested for firearm possession offences. The police stopped an elevator carrying nine people, including the accused, for approximately 6 minutes prior to the arrest of the accused. The Court found that the accused was arbitrarily detained. The trial judge held that the fact that at least one of the officers had a hunch or suspicion that the accused may have been breaching conditions was insufficient to meet the reasonable grounds to suspect standard necessary for detention.

POLICE CAN CONDUCT A SEARCH IF THEY HAVE OBTAINED THE OWNER'S CONSENT

You should not consent to a search without consulting a lawyer. The NFA advises against consenting to a search when police request it.

Police may ask the owner of a residence or motor vehicle for consent to search his or her premises or vehicle. Police may also request that the owner complete a form verifying his or her consent. A search can be lawful if police obtain consent even if they do not have reasonable and probable grounds to conduct the search.

According to *R v Wills*, [1992] 7 OR (3d) 337, 1992 CanLII 2780 (ON CA), there are guidelines which the prosecution must establish to show that there was consent provided for a search. The guidelines include: (a) there was an express or implied consent, (b) the person consenting had the

authority to give consent, (c) the consent was voluntary, with no undue influence from police, (d) the person consenting understood to what he or she was consenting, (e) the person consenting knew he or she could say no, (f) the person consenting understood the consequences of his or her consent.

In *R v Iniguez*, 2020 ONSC 677, the accused was arrested for multiple firearm possession offences. The officers entered the home of the accused without a warrant and on the presumption of his consent. The Superior Court of Ontario found that police violated the section 8 *Charter* rights of the accused by conducting a warrantless search without consent. The investigating officer could not recall the words he used to ask for consent to search the home of the accused, nor could he recall the response of the accused. The officer also did not tell the accused he could refuse the search, that he could speak to a lawyer, or that he may be facing potential jeopardy.

FISH AND WILDLIFE OFFICERS CAN CONDUCT SEARCHES AND INSPECTIONS OF FIREARMS

Firearms owners have a reduced expectation of privacy when they possess firearms or ammunition while in a public place or on Crown Land. Provincial wildlife acts often allow fish and wildlife officers to inspect firearm and ammunition to ensure hunter comply with hunting and statutory regulations.

The *Albert Wildlife Act* includes provisions which allows officers to request that an individual produce a weapon, ammunition, or projectile if it is in plain sight. The *Act* also states that an officer may search land, premises, or transport without a warrant if an officer has reasonable and probable grounds that an offence is being committed in contravention of the *Act*, and certain factors such as urgency and evidence loss are at issue.