

Trespass To Property Act

[Trespass To Property Act, R.S.O. 1990, c. T.21](#)

The law of trespass in Canada is composed of tort law, provincial legislation, and criminal law. This section will focus on the provincial legislation relevant to security guards when dealing with this relatively minor offence.

Understanding Trespass to Land

Trespass to land is one of the oldest torts in law. As discussed in Module 8, Topic 2, tort law aims to redress a wrong done to a person and provide relief from the wrongful acts of others. Historically, trespass to land occurs when there is an unauthorized physical intrusion onto someone else's private property, or when an individual engages in unauthorized activities on the property.

Key Aspects of Trespass

Trespass also includes situations where a person remains on someone's land after permission has been revoked or notice has been given to leave. It's important for security guards to recognize these scenarios to manage trespassing incidents effectively.

Liability and Intent in Trespass Cases

A person can be ejected or found liable for trespassing even without proof of damage. The key factor is the intent behind their presence. If an individual is on the property with malicious intent, such as to intimidate the owner, they may be liable for punitive damages.

Punitive Damages

Punitive damages are payments that a defendant found guilty of an offence is ordered to pay. For instance, if an organization like Greenpeace trespasses on private property for their cause but causes damage, they could be ordered to pay money to the landowner as punitive damages. This underscores the importance of respecting private property rights.

By understanding the nuances of the Trespass to Property Act, security guards can effectively handle incidents of trespass and uphold the law while protecting property owners' rights.

Trespass Legislation in Canada

In Canada, every province except Quebec and the Territories has specific trespass legislation. Quebec relies on Napoleonic common law, while the territories follow common law. The

primary purpose of trespass legislation is to grant owners or tenants greater control over entry or use of their premises and provide penalties and remedies for breaches of the Act.

Definition and Scope of Trespassing

Trespassing is generally defined as the unlawful entry onto the private land of another. It also includes performing unlawful activities on the land and refusing to leave when instructed. Examples include someone riding a snowmobile on private property without permission or hunters illegally hunting on private land.

Reverse Onus in Trespassing

In Canada, trespassing is subject to reverse onus. This legal provision requires the accused person to prove or disprove an element of an offence or defence. In trespassing cases, a person is presumed to be trespassing if found on the property without lawful excuse.

Lawful Excuses for Trespassing

As a security guard, it is crucial to differentiate between someone with a lawful excuse and someone without. Lawful excuses might include police officers pursuing a suspect through the property or by-law officers performing their duties.

Defences Against Trespassing Charges

There are several defences available for individuals charged under provincial trespass legislation. A person may be found not guilty if they provide a fair and reasonable explanation for being on the land, such as having a job, an appointment, or any other legitimate reason.

By understanding the intricacies of trespass legislation, security guards can effectively manage trespassing incidents and ensure the enforcement of property rights.

Practical Applications of Trespass Legislation

Understanding and applying trespass legislation effectively is critical for security guards. Here are some scenarios and principles to illustrate the nuances of the law.

Scenario: Trespassing with Lawful Excuse

Consider this situation: A person banned from a shopping mall is seen approaching the mall by two security guards. The guards recognize him, confront him at the door, and a confrontation ensues, resulting in the individual being subdued. From the ground, the individual claims he has a job interview at a photo kiosk inside the mall.

Validity of Trespassing Notice

In this case, the question arises: how valid is the trespassing notice if the individual has a lawful excuse to be there? The answer is that the trespassing notice is not valid if the individual has a legitimate reason for being there. In Ontario, even if a person has been asked to leave and given notice not to return, they may still have a lawful reason to enter the property, and must be allowed entry.

Implied Permission and Explicit Notices

There is an implied permission for individuals to approach the door of a building unless a notice explicitly warns them to stay away. For example, if a homeowner places a "No Trespassing" sign on their front gate, people, including delivery drivers and mail carriers, cannot legally approach the front door. Property owners have the right to ban anyone from their private property.

After-Hours Restrictions

If a property is closed and locked up at night, signs should indicate that no entrance is allowed after a certain time. For instance, a shopping mall, while accessible to the public during operating hours, must have clear signage if entry is restricted after hours.

Public vs. Private Property in Malls

A common misconception is that shopping malls are public places. While the public is generally allowed to enter when the doors are open, malls are private properties owned by corporations. This distinction allows security guards to ban individuals from the premises. The mall becomes public property by right of access when open, but the ownership remains private, granting the ability to enforce bans.

By understanding these principles, security guards can ensure they are enforcing trespass laws appropriately, respecting the rights of individuals, and maintaining the security of the property they are protecting.

When Does Trespassing Become Criminal?

Trespassing transitions from a civil to a criminal offence under specific circumstances, particularly concerning private land at night.

Trespassing at Night

If an individual enters private land at night, the situation is treated differently from daytime trespassing. Implied permission does not cover trespassing at night, and it is considered a criminal offence. This regulation primarily applies to dwelling spaces, meaning places where people live, and does not extend to commercial properties, malls, or office buildings.

Criminal Code Provisions

The Criminal Code of Canada specifically addresses this type of offence. It makes it illegal to loiter or prowl at night on someone else's property near a dwelling-house situated on that property. This section, often referred to as the "peeping Tom" law, explains why such actions are criminal rather than merely civil trespassing.

Key Points for Security Guards

- **Nighttime Trespassing:** Understand that trespassing at night on residential properties is criminal. This does not apply to commercial properties.
- **Dwelling Spaces:** The criminal provisions apply strictly to areas where people reside.
- **Criminal Intent:** The Criminal Code targets activities like loitering or prowling near homes, recognizing the potential for invasion of privacy and security risks.

By knowing these distinctions, security guards can better handle situations involving trespassing, especially during nighttime, ensuring they uphold both property rights and legal standards.

Let's take a minute to review a key point:

Key Points on Trespassing

Reverse Onus

Trespassing is treated as reverse onus, meaning it is presumed that a person found on the property without lawful purpose is trespassing unless proven otherwise. A person must either have a lawful reason to be on the property or have been properly notified not to be there.

Recap: Ban Notices and Lawful Purpose

A critical question to consider is: Can a person who has been served with a ban notice still legally be on your property? The answer is yes, if they can prove it is for a legal reason.

Guidelines for Security Guards

As a security guard, it is essential to remember that even if someone has been served a ban notice, they might have a lawful purpose to be on the property. If you are not 100% certain about the legality of their presence, the best course of action is not to engage.

Law Society's Perspective

From a legal standpoint, the primary offence under trespassing laws is failing to leave the property when asked. This is the main actionable offence under the law.

Importance of Understanding Trespass Laws

Given the importance of the Trespass to Property Act in a security guard's duties, it is advisable to continually review and understand what constitutes trespassing.

By keeping these key points in mind, security guards can effectively manage and respond to trespassing incidents, ensuring they act within the bounds of the law and respect the rights of individuals.

Elements of the Offence of Trespassing

Understanding and applying trespass legislation effectively is crucial for security guards. This section delves into the comprehensive elements of trespassing offences, highlighting the nuances and detailed steps required to handle such situations appropriately across Canadian provinces.

1. Proper Notice

The first essential element in dealing with trespassing is ensuring that the person in question has been given proper notice to leave the property. Proper notice can be delivered in several distinct ways:

- **Verbal Notification:** According to trespass legislation, verbal notification is a mandatory step. As a security guard, you should document this action meticulously in your notebook. This documentation serves as a crucial record that you indeed informed the individual verbally to leave the premises.
- **Written Notice:** In many cases, written notices are more formal and can take the shape of a banning notice. This type of notice can be served personally to the individual or sent via registered mail. The written notice provides clear evidence that the individual was officially informed of their ban from the property.
- **Signage:** Proper signage is another effective method of delivering notice. Signs must be prominently displayed around the property, clearly indicating that trespassing is prohibited. Such signs serve as a constant reminder and legal notice to anyone entering the property.

2. Efforts to Remove

Once proper notice has been given, it is imperative to ensure that all reasonable efforts to cause the individual to leave the property have been exhausted. This includes a range of actions:

- **Verbal Requests:** Repeated verbal requests to leave, documented in your notebook.

- **Escalation:** If the individual does not comply with verbal requests, you should escalate the situation by contacting the police. This step is necessary to show that all possible measures were taken to handle the situation peacefully and lawfully.

3. Reasonable Time to Leave

Allowing the individual a reasonable amount of time to leave the premises is another critical component. The law does not permit the use of physical force to expedite this process.

For instance, consider a scenario where a person, after being asked to leave, starts walking very slowly towards the exit, deliberately taking short steps to delay their departure. Despite their apparent intention to provoke frustration, you must not hurry them up by physical means, such as pushing or pulling them.

Example Scenario:

- **Did you ask the person to leave?** Yes.
- **Did you identify yourself as a property agent?** Yes.
- **Has the person been properly served with a notice?** Yes.
- If the person begins to leave, even if slowly, their behavior is considered compliant. You must not engage physically. Instead, follow them at a safe distance, ensuring they do not feel threatened. As long as they are moving towards the exit, maintain your composure and allow them to proceed at their own pace.

Using Force on a Compliant Person

You are unequivocally **not allowed** to use force on a compliant person. Allow them the space and time to leave the premises voluntarily.

4. Assessing Further Action

If, after the initial steps, the individual stops walking and sits down on a bench or a chair within the property, you need to assess the situation further by asking yourself the following questions:

- **Is the trespasser going to hurt themselves?**
- **Is the trespasser going to hurt someone else?**
- **Is the trespasser going to damage the property?**

If the answer to all these questions is no, then there is no immediate urgency to engage further.

Tactic for Non-compliant Individuals

In such situations, a useful tactic is to pretend to call for backup. For example, use your radio without pressing the button and act as if you are calling your supervisor, mentioning that you have a non-compliant person and need the police. Let the individual see and hear you doing this. In many cases, this will prompt them to leave voluntarily to avoid further hassle. If the person challenges this and insists on staying, then you should genuinely call dispatch to request police assistance and step back, waiting for their arrival.

Policies and Procedures

Always follow your employer's policies and Standard Operating Procedures (SOPs) when dealing with trespassers. Be mindful that your actions are likely being recorded by someone's cell phone, so conduct yourself professionally and lawfully at all times.

Arrest Guidelines

When to Arrest:

- Follow your employer's policies regarding arrests. If the policy states that you should not make arrests for trespassing, then adhere strictly to that policy.
- Ensure that proper notice has been given, and the individual has been asked to leave.
- If necessary, call the police to handle the situation.

Court Considerations for Arrests:

If you do decide to make an arrest, be aware that the court will ask the following questions:

- **Is the person going to hurt themselves or others before the police arrive?**
- **Is the person going to damage property and possibly cause injury in the process?**
- **Can the arrest be done safely? Consider factors such as intoxication or mental illness that might escalate the situation.**

The courts will always prefer that arrests be avoided if possible. They do not want citizens, including security guards, taking the law into their own hands, especially when less confrontational methods can resolve the situation.

Authority to Arrest

Provincial Law: Trespassing is a provincial offence, not a criminal one. Therefore, the authority to make an arrest for trespassing comes from provincial law, not the Criminal Code of Canada.

Case Law: The use of force in making an arrest for trespassing is supported by case law, specifically the [*R. v. Asante-Mensah*](#) case. This Supreme Court decision provides the legal precedent for security guards to use reasonable force under certain conditions when making an arrest for trespassing.

By understanding and adhering to these detailed principles and guidelines, security guards can effectively manage trespassing incidents, ensure compliance with the law, and maintain the safety and security of the property they are protecting.

Provincial Trespass vs. Defense of Property

(Provincial Legislation vs. Criminal Law)

[Section 35\(1\) Defense of Property](#)

In 2012, Section 35(1) of the Criminal Code came into law, setting specific guidelines for property owners and security guards regarding the defense of property. This section requires that a property owner or security guard must now prove the necessity and reasonableness of their actions when preventing theft, damage, violence, or other criminal activities on their properties, including dealing with trespassers.

Justifying Actions in Court

Security guards must be prepared to explain to the court why their actions were necessary before justifying any use of force in the protection of property. Failure to adequately justify these actions could result in being charged with assault. Section 35 begins by stating that you will not be charged with an offence for protecting property, provided the actions were reasonable and necessary.

Scope of Force in Section 35

Section 35 allows for a certain level of force to protect property against theft, mischief (damage to property), or break and enter. However, it does not explicitly allow the use of force solely to defend against trespassers. The assumption within this section is that if a person is on the property to commit a criminal act, they are inherently a trespasser. This implication, while clear for criminal activities, does not directly relate to the more specific provincial trespass laws.

Section 34(1) of the Criminal Code

Security guards should also be aware of Section 34(1) of the Criminal Code. This section states that an individual can use force to defend themselves or others if they have reasonable grounds to believe that force is being used or threatened against them or others. The force used must be reasonable under the circumstances.

Distinguishing Criminal from Provincial Trespass

Simple trespass is not criminal in nature. It falls under provincial legislation, which outlines the scope of authority for security guards. Security guards are not permitted to exceed this authority by invoking provisions of the Criminal Code or Common Law in situations that provincial legislation covers.

Court Decisions and Caution

Court decisions consistently underline a crucial caution: Do not take the law into your own hands if it is more prudent to wait or proceed by other, less violent means. The courts expect security guards and property owners to act within the bounds of the law and to use the least amount of force necessary to address a situation.

Key Points for Security Guards

- 1. Understand Section 35(1) and Section 34(1):**
 - Know the legal grounds for using force in protecting property and defending oneself or others.
 - Be prepared to justify your actions in court, explaining why they were necessary and reasonable.
- 2. Distinguish Between Criminal and Provincial Trespass:**
 - Recognize that simple trespass is a provincial matter and does not typically involve criminal law.
 - Follow provincial legislation for dealing with trespassers and do not exceed this scope.
- 3. Exercise Caution and Prudence:**
 - Always opt for the least violent means to handle trespassing or other property-related incidents.
 - Avoid taking the law into your own hands unless absolutely necessary.
- 4. Document Actions Thoroughly:**
 - Keep detailed records of all interactions and actions taken, especially when dealing with trespassers or using force.
 - Proper documentation can serve as evidence to support your actions in court.

By adhering to these guidelines and understanding the legal distinctions, security guards can effectively and lawfully manage incidents involving trespassers and other threats to property. This ensures compliance with both provincial legislation and the Criminal Code, maintaining the safety and security of the property while respecting the legal rights of individuals.

The Bottom Line of Trespassing

Arrests by citizens or security guards are often unnecessary and risky, as they can escalate into more violent behavior or resistance. While the courts recognize the right of landowners and security guards to use a certain level of force to defend property, this right must be exercised

with caution, especially considering Section 35 of the Criminal Code, which imposes a reverse onus.

Key Considerations for Security Guards

1. Necessity of Action:

- **Should you be doing this at all?**
- **If so, why?**
- **Is this a reasonable choice given all other options?**

As a security guard, you must weigh all factors involved in each case. Consider the potential outcomes if what you perceive as a trespassing offence turns out to be a legitimate visit to the property. How will you know at the outset? You likely won't, so choose your words carefully and avoid insisting, blocking, trapping, or using force to detain the person until you are sure of their intent.

Communication Considerations

- Do not assume that the person you are confronting speaks or reads English, French, or any other language you speak.
- Avoid asking questions that solicit only yes or no answers, as these may be the only words they know.
- Do not assume that if they can speak the language, they can also read the signage or documents you are pointing to.

Key Points to Remember

1. **Reverse Onus:** All trespassing in Canada is subject to reverse onus, meaning the onus is on the trespasser to prove they are not trespassing. The mere presence on someone else's property makes them guilty until they prove they have a lawful purpose.
2. **Provincial Legislation:** Trespassing is an offence under provincial legislation.
3. **Enforcement Preparation:** Before enforcing any trespass legislation or act, determine whether the individual has been banned from the premises in the past, knows someone on the premises, or has lawful permission to be there.
4. **Criminal Offence at Night:** Trespassing is considered a criminal offence at night and around dwelling spaces only.
5. **Failing to Leave:** The primary actionable offence in trespassing cases is failing to leave when asked.
6. **Methods of Notification:** Verbal notices, written notices, and signs are valid methods for notifying people about private property.
7. **Reasonable Time to Leave:** Once a trespasser has acknowledged the notice, they must be given a reasonable amount of time to leave.
8. **Considerations for Arrest:**
 - Will this person hurt themselves?

- Will this person hurt someone else?
 - Will this person damage any property?
 - Can you perform the arrest safely?
9. **Emotional Control:** Do not let your emotions dictate your responses. Maintain professionalism and composure at all times.

By adhering to these guidelines, security guards can ensure that they handle trespassing incidents lawfully and effectively, minimizing risks and maintaining property security.

Relevant Sections of the Trespass to Property Act

Below are the critical sections of the Trespass to Property Act (TPA) that security guards should be familiar with. For a complete understanding, refer to the entire Act through the provided link at the beginning of this lesson.

Section 2 - Entry on premises: Defines what constitutes trespassing and the conditions under which a person is considered to be trespassing.

Section 3 - Arrest without warrant: Provides guidelines on when and how an arrest without a warrant can be made for trespassing offences.

Section 5 - Penalties: Outlines the penalties for trespassing offences.

Section 7 - Notice: Details the acceptable methods for providing notice to potential trespassers, including verbal, written, and signage.

By familiarizing yourself with these sections and adhering to the guidelines provided, you can effectively manage trespassing situations while ensuring compliance with the law and maintaining safety.

Trespassing as an Offense

Definition of Trespassing

Under the law, any individual who does not possess a legal right or authority and:

(a) Without the explicit permission of the occupier (with the burden of proof resting on the defendant),

1. Enters premises where entry is explicitly prohibited by this Act, or
2. Engages in activities on premises that are explicitly prohibited by this Act; or

(b) Fails to leave the premises immediately after being instructed to do so by the occupier or an authorized person,

is committing an offense. Upon conviction, the individual is subject to a fine of up to \$10,000. This is stipulated under the Revised Statutes of Ontario (R.S.O. 1990, c. T.21, s. 2 (1); 2016, c. 8, Sched. 6, s. 1).

Colour of Right as a Defence

Legal Defence for Trespassing Charges

Under subsection (1), a valid defence against a trespassing charge involving land is if the accused person had a reasonable belief that they possessed title to or had an interest in the land, which justified their actions. This is articulated in the Revised Statutes of Ontario (R.S.O. 1990, c. T.21, s. 2 (2)).

Prohibition of Entry

Conditions for Prohibiting Entry

Entry onto premises can be prohibited through explicit notice. Additionally, entry is automatically prohibited without notice on premises that:

- (a) Consist of a garden, field, or other cultivated land, including lawns, orchards, vineyards, areas with young trees under two meters in height, and woodlots primarily used for agricultural purposes; or
- (b) Are enclosed in a way that clearly indicates the occupier's intent to keep people off the premises or to contain animals within the premises.

This is specified in the Revised Statutes of Ontario (R.S.O. 1990, c. T.21, s. 3 (1)).

Implied Permission to Use Approach to Door

Presumption of Access

It is generally assumed that access for lawful purposes to the door of a building on premises, using a provided and customary means of access, is not prohibited. This presumption is found in the Revised Statutes of Ontario (R.S.O. 1990, c. T.21, s. 3 (2)).

Limited Permission

Restrictions on Activities

If notice is given that only specific activities are permitted on the premises, all other activities and entry for other purposes are prohibited. Any additional notice stating that entry or a particular activity is prohibited serves only to clarify this restriction further (R.S.O. 1990, c. T.21, s. 4 (1)).

Limited Prohibition

Prohibition of Specific Activities

When entry on premises is not generally prohibited under section 3 or if notice is given that only certain activities are permitted, and notice is given that a particular activity is prohibited, then that specific activity and entry for that purpose are prohibited. All other activities and entry for other purposes are not prohibited (R.S.O. 1990, c. T.21, s. 4 (2)).

Method of Giving Notice

Forms of Notice

Notice under this Act can be given: (a) Orally or in writing; (b) By signs posted visibly in daylight under normal conditions at each ordinary access point to the premises; (c) By a marking system as described in section 7 (R.S.O. 1990, c. T.21, s. 5 (1)).

Substantial Compliance

Substantial compliance with the visibility requirements for signs or markings (clauses (1) (b) or (c)) is considered sufficient notice (R.S.O. 1990, c. T.21, s. 5 (2)).

Form of Signs

Permitted Activities

A sign naming an activity or showing a graphic representation of it is sufficient to indicate that the activity is permitted (R.S.O. 1990, c. T.21, s. 6 (1)).

Prohibited Activities

A sign naming an activity with an oblique line drawn through it, or a graphic representation of an activity with an oblique line, is sufficient to indicate that the activity is prohibited (R.S.O. 1990, c. T.21, s. 6 (2)).

Red and Yellow Markings

Red Markings

Red markings made and posted according to subsections (3) and (4) are sufficient to indicate that entry on the premises is prohibited (R.S.O. 1990, c. T.21, s. 7 (1)).

Yellow Markings

Yellow markings made and posted according to subsections (3) and (4) indicate that entry is prohibited except for specified activities, and serve as notice of the permitted activities (R.S.O. 1990, c. T.21, s. 7 (2)).

Size and Posting

Markings must be large enough to contain a circle with a 10 cm diameter and be placed so they are clearly visible in daylight from each ordinary access point to the premises (R.S.O. 1990, c. T.21, s. 7 (3), (4)).

Notice Applicable to Part of Premises

Specific Areas

Notice or permission under this Act can apply to specific parts of the occupier's premises (R.S.O. 1990, c. T.21, s. 8).

Arrest Without Warrant on Premises

Authority to Arrest

A police officer, the occupier of the premises, or an authorized person may arrest without a warrant anyone believed on reasonable grounds to be in contravention of section 2 (R.S.O. 1990, c. T.21, s. 9 (1)).

Delivery to Police Officer

If the arresting person is not a police officer, they must promptly call for police assistance and transfer custody of the arrested person to the police (R.S.O. 1990, c. T.21, s. 9 (2)).

Deemed Arrest

The police officer receiving custody is deemed to have arrested the person under the provisions of the Provincial Offences Act regarding release, continued detention, and bail (R.S.O. 1990, c. T.21, s. 9 (3)).

Arrest Without Warrant Off Premises

Grounds for Arrest

A police officer may arrest without a warrant a person believed to have contravened section 2 if they have recently left the premises and refuse to give their name and address, or if there are reasonable grounds to believe the provided information is false (R.S.O. 1990, c. T.21, s. 10).

Motor Vehicles and Motorized Snow Vehicles

Offenses Involving Vehicles

If an offense is committed using a motor vehicle or motorized snow vehicle, the driver is liable to the fine provided under this Act. If the driver is not the owner, the owner is liable unless the driver is convicted or the vehicle was used without the owner's consent (2000, c. 30, s. 11).

Damage Award

Judgement for Damages

If a person is convicted of an offense under section 2 and has caused damage during the commission of the offense, the court shall, at the prosecutor's request and with the damaged party's consent, determine and award damages against the convicted person (R.S.O. 1990, c. T.21, s. 12 (1); 2016, c. 8, Sched. 6, s. 2).

Costs of Prosecution

Private Prosecution Costs

If a private prosecutor conducts the prosecution and the defendant is convicted, the court shall determine and order the defendant to pay the actual, reasonable costs incurred by the prosecutor, unless the prosecution was deemed unnecessary for the occupier's protection (R.S.O. 1990, c. T.21, s. 12 (2)).

Damages and Costs in Addition to Fine

Additional Penalties

Judgments for damages or costs awarded are in addition to any fines imposed under this Act (R.S.O. 1990, c. T.21, s. 12 (3)).

Civil Action

Extinguishment of Civil Action Rights

A judgment for damages extinguishes the right to bring a civil action for the same facts (R.S.O. 1990, c. T.21, s. 12 (4)).

Right to Civil Action

Failure to request or refusal to grant a judgment for damages does not affect the right to bring a civil action (R.S.O. 1990, c. T.21, s. 12 (5)).

Enforcement

Filing for Enforcement

Judgments for damages and cost awards can be filed in the Small Claims Court and are enforceable as if they were judgments or orders of that court (R.S.O. 1990, c. T.21, s. 12 (6)).