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A legal guide for activists

This guide is intended to provide you with an overview of your rights when dealing with the police. Knowing your basic rights and the common charges that are levelled against protesters can help you in your interactions with the police.

However, our rights in theory are very different from our rights in practice. It is important to recognize that the police often disregard our rights. Police may try to intimidate or threaten protesters who try to assert their rights, or may act friendly in order to gain information or persuade you to waive your rights. When dealing with the police it is important to stay calm and politely assert your rights. Never physically interfere with the police if they decide to search, detain or arrest you. Try to gather as much information as you can, including the names and badge numbers of the officers involved, and whether the police intend to lay any charges against you. Use your good judgment, know your rights and have fun!

Before the Protest:

- Write down a lawyer's number on your body in permanent marker. (police may take paper from you, or you could forget the number due to stress or injury)
- Don't bring drugs, weapons, your address book or any other sensitive materials with you to the protest.
- Make sure that someone (friend, family, or member of an affinity group) knows you are going to the demonstration. Make a plan to check in with that person after you have left the protest. That way your friend can contact the legal support team if they suspect you have been arrested. Make sure that your friend knows the legal number to find out information in case of arrest. Let your friend know if your work or family should be contacted, if pets need to be fed, if child care needs to be arranged and so on.
- Be aware that certain people face increased risk of being targeted by the police because they are a member of a marginalized group, because of their political beliefs, or because of how they look. If you are at increased risk of being singled out by the police, make sure you communicate this to your friends, family and/or members of your affinity group. Examples of those who face an increased risk are people with disabilities, people of colour, visibly queer or trans/intersexed people, psych survivors and people with mental health issues, parents or caregivers, people with criminal records, and those with precarious immigration status.

During and After the Protest:

- If you have an encounter with the police, write down what happened to you as soon as you can. You may want to take down the names, badge numbers or division numbers of the police involved, as well as names and contact information for anyone who might have witnessed your encounter with the police.
- If you think your rights have been violated, consult with a lawyer. Even if you have not been charged with an offence, it is a good idea to consult with a lawyer right away if you were detained, searched or assaulted by the police, particularly if you were injured.

What if I am stopped by the Police?

If you are on foot:

If you are stopped by the police while you are walking, you are usually free to walk away from the police at any time. Before you walk away it is a good idea to politely ask:

“Am I free to go?” or “Am I being arrested or detained?”

If the police tell you that you are free to go or that you are not being arrested or detained, the police do not have a right to hold you and you can just walk away. If you are not being arrested or detained, you do not have to identify yourself to the police or answer any of their questions.

If you are riding a bicycle:

If you are on a bicycle, the police can stop you if they think that you have broken a provincial or municipal traffic law. If this happens you must stop and give them your name and address. If you refuse, they can arrest you. If you lie about your name or address, you can be charged with an offence such as obstructing justice or obstructing the police. These charges usually involve harsher penalties than a traffic ticket.

If you are stopped on your bicycle, you don't have to give the police any other information other than your name or address. The police are not allowed to search you if you are on a bicycle, unless they are arresting you for some other reasons. If this happens, politely say that you do not consent to the search, but do physically not interfere, and ask the police to speak to a lawyer right away.

If you are driving:

The police can stop you anytime if you are driving. They are allowed to ask you for your driver's license, your vehicle registration and insurance. If you do not show them these documents, you can be charged with a provincial offence. The police are not allowed to search your vehicle unless they are arresting you, or they see something illegal in your car, such as drugs or open liquor. If the police ask to search you or your vehicle, say that you do not consent to the search, but do not physically interfere, and ask the police to speak to a lawyer right away. Passengers in your car are not required to identify themselves to the police.

Assaulting a peace officer/resist arrest

This is an assault of a peace officer engaged in the execution of his or her duty or a person acting in aid of such an officer. This offence includes resisting or preventing the lawful arrest or detention of you or another person. If the officer exceeds his or her powers so far as to exceed his or her duty and authority, the officer is no longer acting in the execution of duty.

Mischief

Includes wilfully destroying or damaging property, rendering property dangerous, useless, inoperative or ineffective, or obstructing, interrupting or interfering with the lawful use, enjoyment or operation of property. This would include spraypainting or chaining doors shut, as well as blockading entrances.

Assault

This offence involves any application of force on another person without their consent – mere touching is enough. It also includes attempting or threatening, by acts or gestures, to apply force to another person.

Assault by trespasser

You are deemed to have committed assault if you trespass on property and resist an attempt by the owner or someone acting under the owner's authority, to prevent your entry or to remove you. The owner must be in peaceable possession of property, meaning that the possession must not be seriously challenged by others.

Awaiting trial or 'what happens next'?

Once you have been released from custody and you understand your charges and conditions, the next steps are getting in touch with your fellow arrestees, getting a lawyer and getting disclosure. We encourage defendants to organize collectively and help each other with fundraising, sharing legal information, and organizing political support. Supporting each other is resisting the oppressive, isolating and de-mobilizing impact of criminal charges. The MDC may be able to assist with referrals to good, experienced counsel with experience in activist and political cases.



Riot

This is an unlawful assembly that in fact “has begun to disturb the peace tumultuously”. If a sheriff or sheriff’s deputy etc., reads certain magic words after a riot has started and you are still around after 30 minutes you will have committed a much more serious offence. This is also true if you interfere with the reading of the magic words.

Note: Both riot and unlawful assembly are crimes of mere presence. All the Crown needs to demonstrate is that you were part of the “common purpose” (e.g., you were participating in the demo or action), and that you stayed when it became an unlawful assembly. You don’t actually have to have done anything to contribute to the “tumultuous” nature of the assembly. Although the police will usually announce that an assembly has become unlawful (usually by ordering you to disperse) it is not an essential part of the offence.

Resisting or obstructing a peace officer

You can be charged with this offence if you resist or wilfully obstruct a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer.

This includes resisting arrest – going limp or refusing to unlock is not resisting. Holding onto a pole or struggling against arrest is resisting. Locking down when the officer has placed you under arrest is resisting. As a general rule, anything you do more than you would do if you were unconscious that is not cooperating with the arresting officer is probably resisting arrest.

Anything you do to interfere with an officer in the lawful execution of their duty is considered obstruct police. This could include laying down in front of a police car or getting in the way of an arrest. You could also be charged with this offence if you uncover an undercover officer.

Contempt of court

Contempt of Court covers a number of things that are considered disrespectful or disobedient of the court. These can range from things done in the courtroom (like swearing at the judge) to disobeying a court order (eg: an injunction).

Civil Contempt: Usually, when someone disobeys a court order, the court will just assess damages against the person (make them pay every time they disobey the order).. If the officer exceeds his or her powers so far as to exceed his or her duty and authority, the officer is no longer acting in the execution of duty.

Criminal Contempt: The court has the power to convict someone for contempt under criminal law. In the case of an injunction, the court will only convict you if: 1) you knew about the injunction; and 2) you disobeyed it in a public, flagrant and continuous way.

The punishment for contempt is not for the action itself (eg: blocking a road) but because you are not respecting the rule of law (you are publicly saying you don’t care what the court says).

If the injunction includes Jane Doe, John Doe and persons unknown, it applies to you, even if you were not a party to the original injunction. The injunction applies even if it was made a long time ago, unless it was an interim injunction (with an expiry date).

What if I am detained by the Police?

If the police tell you that you are not free to go, it probably means that you are being “detained.” The police are allowed to detain you without putting you under arrest. In order to detain you they must have reasonable grounds to suspect that you are connected to a crime. If you are detained, you are not allowed to walk away.

If you are detained, ask the police why you have been detained. You have a right to know the reasons for your detention.

When you are detained you do not have to answer any police questions. If the police try to question you, politely assert your right to stay silent and ask to speak to a lawyer. If you are detained, you have the right to speak to a lawyer immediately, even if you are simply being detained on the street or in public space like a mall or a park.

You might want to say something like:

“I’d prefer not to answer any questions until I speak to my lawyer,” or

“I want to remain silent.”

Even after you speak to your lawyer, do not answer any police questions.

If the police are detaining you for the purpose of giving you a ticket, you may decide to give them your name and address. Sometimes the police will simply detain you in order to ticket you (for example for trespassing), but let you go afterwards without bringing you to a police station. If the police decide to ticket you and you refuse to give your name and address, they are allowed to arrest you and bring you to a police station in order to find out your name and address.

When Can the Police Arrest Me?

The police can only arrest you if:

- they have seen you committing a criminal offence;
- they have a warrant for your arrest;
- they have reasonable grounds to believe you have committed or about to commit a criminal offence;
- they have reasonable grounds to believe that there is a warrant for your arrest;
- you have broken a law (including provincial laws and city bylaws) and you won’t give the police your name and/or address;
- you have breached the peace or are about to breach the peace;
- you are intoxicated and are a danger to yourself or others;

What if I am arrested by the police?

If you are arrested by the police, you have to give them your name, address and date of birth. If you lie about this personal information, you can be charged with obstructing justice or obstructing the police.

If you are arrested, you have a right to be told the reasons for your arrest. You can ask the police: “Why am I being arrested?” or “Am I being charged with anything?” Later on in this guide you will find a list of criminal charges typically laid against protesters.

You have the right to speak to a lawyer immediately upon arrest. You also have the right to decide which lawyer you want to speak to, and to speak to them in private. You have the right to make more than one phone call in order to reach a lawyer, if necessary.

If you are between 12 – 17 years old:

You have the right to talk to a lawyer *and your parents or another adult* before you make any statements; and the right to have a lawyer and your parents or another adult with you if the police question or interrogate you, whether or not you decide to make a statement. If you are arrested, the police are required by law to notify your parent(s) whether you want them to or not. Before charging you with an offence the police are also supposed to consider whether it would be appropriate in the situation to release you with a warning or caution you (or your parents) on the spot or at the police station. They can also refer you to a community program, if you agree.

Asserting Your Right to Silence:

Upon arrest, when you consult with your lawyer, he or she will probably tell you to remain silent and not say anything to the police. This is very good advice. It never helps your case to speak to the police if you are arrested.

Both before and after you have had a chance to speak with your lawyer, the police will try to question you. They will probably continue to ask you questions even after you say you want to remain silent. They might threaten or harass you, or they may try to act like your friend. It is very difficult to stay silent, but it is very important that you do. You have the right to remain silent at all times and do not have to answer any questions. Exercising your right to remain silent cannot be held against you in court, although the police might try to convince you otherwise.

Do not make any statements to the police and do not sign any declarations. Do not discuss your case with anyone while being held in jail, and do not ask others about their cases. The police may have someone planted in the cells posing as prisoners, or a prisoner may act as an informer to get some benefit for themselves.

Release with conditions continued...

Common release conditions include not associating with co-accused (which can be avoided if you can show that you cannot help but do so because they're your housemate/lover/co-worker etc), not returning to the scene of the crime (again, if you can argue that this is impossible, you may be able to avoid it) and keeping the peace and being of good behaviour. A lawyer should be able to argue against blanket prohibitions on attending demonstrations, but courts may impose more specific limitations. Decide in advance what conditions you are willing to sign in the worst case scenario; release conditions can be varied in court after release, but this procedure can be complicated and may take some time. It is best not to sign conditions that you cannot or will not follow. Breaching your release conditions may make a simple protest-related charge much more difficult to fight.

Cash deposit bail requirements are not that common in Canada. It is much more common for you to be released to a “surety.” A surety is a person who knows you and who will take responsibility for ensuring that you show up for trial. The surety will probably be asked to show that they have assets of a certain value, and may be asked to pledge some money. This money will only be seized if the accused person violates their bail conditions and the Crown can prove at a hearing that the surety failed to live up to their obligations. The surety usually has to be an individual, not an organization, although there are some limited exceptions, such as bail programs for homeless defendants in some larger cities.

Note that the Crown can ask for conditions of release, a surety and/or cash bail simply on the basis that an accused lives outside the province or more than 200 km away from the place where they are in custody. For those from the US, there are no bail bondsmen in Canada, and the provision of such services is actually illegal.

Common Charges:

Breach of the Peace

This gives the police the right to arrest you to prevent a breach of the peace but isn't a charge in itself. There is no record of the charge. They will usually release you soon after the event or action, and in any case within 24 hours.

Causing a disturbance

This offence includes fighting, screaming, shouting, swearing, singing, using insulting language, impeding or molesting people, or loitering in a public place and obstructing people. It has to be in or near a public place.

Unlawful assembly

You can commit this offence by getting together with at least two other people, intending to carry out some common purpose, in a manner that causes people nearby to fear that you will “disturb the peace tumultuously”, or without a reasonable cause, provoke others to “disturb the peace tumultuously”. Tumultuous involves an element of violence.

What Happens After I am Arrested?

You are required to have a bail hearing within 24 hours or 'as soon as practicable' of being detained. In Ontario, this is usually in front of a justice of the peace, not a judge. It is also quite common to be released from the police station (in ordinary circumstances), if you have identified yourself, have no other outstanding charges, have no criminal record (or a very limited and/or old one) and the cops believe that you will show up for trial.

If you are between 12 and 17 years old:

You will generally be held in a separate place from where adults are being held. You may be in the same buildings as adults but you must be separated. You also may be eligible for diversion or 'extrajudicial sanctions' if you have been charged with a less serious offence. You should consult with your lawyer or ask Duty Counsel about this possibility.

Release from the Police Station:

You might be released from the police station either by the "officer in charge" or by a justice of the peace if one is brought to the station. The police will give you a notice to appear in court, or you may be asked to sign a promise to appear in court. The police may try to attach conditions to your release from the station, such as not engaging in protest and keep the peace and be of good behavior. Consult with a lawyer before you agree to any release conditions.

Release Following a Bail Hearing:

Alternatively, you may be released following a bail hearing. Your hearing will be held before a justice of the peace. At the bail hearing it is up to the Crown Attorney (the prosecutor) to show why you should not be released. The court may refuse to release you if it believes that you are likely to commit an offence or you will not show up for trial. However, the presumption is supposed to be in favour of release. You have a right to reasonable bail, unless there are special circumstances, for example you have another case pending or you are a nonresident of Canada.

If you have a bail hearing, you may have to post bail, have a surety sign for you, or agree to conditions. Again, make sure you consult with a lawyer before agreeing to any conditions of release. If you decide not to identify yourself or provide your address when you are arrested, you will likely be held for a bail hearing. You may also be charged with obstructing justice.

Release Conditions:

Unless it's a very serious offence or you already out on bail, the presumption is for bail being granted without conditions. The Crown Attorney has to 'show cause' why you should be detained or why release conditions are necessary. Nonetheless, you will most likely be asked to sign conditions for release and you should not do so without getting legal advice.

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Your rights with Immigration officers:

Canada Border Services Agency (CBSA) officers (immigration enforcement) do not have powers to arrest citizens.

Protected persons (people who have won their refugee claims) and Permanent Residents (landed immigrants) can only be arrested by CBSA if they have a warrant. Ask to see the warrant, make sure your name is on it and that it is signed.

People without status (foreign nationals) can be arrested with or without a warrant if CBSA has reason to believe that you are a danger to the public or unlikely to show up for hearings, appointments or removal. They can also arrest and detain you *without a warrant* if they are uncertain of your identity.

You do not have to answer any questions from CBSA/CIC outside an immigration examination or hearing. If you are stopped you should politely ask why you are being stopped. If the officers have no reason to stop you as above, you can say you want to leave.

However, exercising your rights will not necessarily stop officers from arresting you. It is a good idea to be polite and calm since if you upset the officer, they may decide to arrest you.

If you are arrested by the CBSA they must tell you why and inform you of your right to consult a lawyer. You should tell them you want to speak to your lawyer, immigration consultant or a community member who can help you for free (someone from your community group, mosque, church, etc) BEFORE you answer any questions or sign anything. If you ask to talk to a lawyer, consultant or community member, they are supposed to stop asking you questions (but they can continue to hold you in the meantime).

Accommodation for people with disabilities

In some circumstances, people with disabilities may require special arrangements or "accommodations" from the police. While you are dealing with the police, you have the right to equal treatment, and to be free from discrimination, as protected by the *Ontario Human Rights Code*. For the *Code*, "disability" covers a broad range and degree of conditions, some visible and others not. If you are a person with a disability and you need "accommodation" from the police, make sure that you use the term "accommodation" or "disability" or "Human Rights Code". It is important:

- to make your request for accommodation clearly;
- as early in the process as possible (but you can make a request for accommodation at any time, since you might not know that you require accommodation at the beginning of the process); and
- in the presence other people (including other officers, people who are taking notes).

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Legal rights of people with disabilities continued...

The police may not accept your request for accommodation. You may be asked to provide supporting information about your disability-related needs. If you think that this might happen, you might want to bring prescriptions, letter from a health professional, your health care provider's contact information etc.. If you are a person with an invisible disability, including mental health issues, you should consider whether revealing your need for accommodation may lead to targeting or harassment (by the police, or others around you) because of your disability.

It is likely that personal aid/mobility devices will be taken away if you arrested and it will be difficult to get them back. People with serious health issues, including anaphylactic allergies may be put in segregation if they go to jail because they are waiting on a bail hearing or denied bail. Police are known to refuse over the counter medications, even with a medical note or prescription. Prescription medications are supposed to be provided to you as prescribed but this is not always the case. If you take medications that may provide private information to the police and possibly lead to your being targeted (eg. psych meds, AIDS meds, etc.) decide if you want to have it on you or risk not having it. If you do not have it on you, make sure someone who is not attending the demonstration has it and can deliver it to the police station if needed.

Can the Police Search Me?

The police can only search you and your personal possessions (ie. pockets, backpack, purse, car) in certain limited circumstances. If the police try to search you, tell the police that you do not consent to the search, but never physically interfere. It is a good idea to politely say that you do not consent to the search even if in you think the search might be lawful. It is sometimes hard to tell whether or not the police have a legal right to search you, so it is best to tell the police that you do not consent.

All police searches, whether lawful or not, must be conducted in a reasonable manner. If the police search you in an abusive or aggressive fashion, this may be a violation of your rights. If this happens, write down what happened and consult with a lawyer as soon as possible.

The police can search you without your permission if:

- You are arrested. If you are arrested the police can do a full search of you and your possessions (such as your pockets, purse, backpack). They can also search your immediate surroundings, such as a car. The purpose of this search is to find and prevent the destruction of evidence and to maintain police officer safety.
- You are detained. If you are detained the police are allowed to pat you down to check for weapons. Depending on the circumstances, they may also be able to look in your bag. The purpose of this search is to maintain officer safety.

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Police can search you without permission continued:

- You have a search clause as a condition of probation.
- The police have a search warrant. If the police say they have a warrant that permits them to search a particular location, you have the right to see the warrant.
- There are reasonable grounds to believe you have evidence and there are exigent circumstances that make it impractical to get a warrant. Urgent or exigent circumstances includes when officer safety is at issue or when there is an urgent need to prevent evidence from being destroyed.

Strip Searches:

Strip searches are more invasive and there are stricter rules about when you can be strip searched. They are not supposed to be a routine procedure. However, police often use strip searches as a tool to intimidate activists. Strip searches are usually conducted at a police station, unless safety concerns make it necessary to conduct a strip search before going to a station.

Any strip search must be done in a way that doesn't put your health and safety at risk. For example, if you have drugs in or near a body cavity, the police should give you a chance to take the drugs out yourself, or ask for help from a medical professional.

The police should also try to arrange to have you strip searched in a private place and by a police officer who is the same gender as you. Individuals who self-identify to police as either trans or intersex are protected under human rights legislation and should be offered the option of being strip-searched by male officer(s) only, female officer(s) only, or a split search. However, there is no absolute right in the above situations, and the police may not accommodate such requests.

If the police ask you to agree to a strip search, ask to speak to a lawyer right away. If the police insist on searching you, say that you do not consent, but do not physically interfere.

Perimeter Searches:

Often the police will set up a blockade around a known protest area (such as a park) and say that you have to consent to a search in order to enter the area. This is probably illegal. However, there is little guidance from courts as to whether this is against the law. Use your common sense in deciding what to do in this scenario. Don't physically interfere and state loudly that you do not consent to the search. If you decide that you have no choice but to "consent" to the search, be aware that the police may arbitrarily seize your belongings. Always try to take down the name and badge number of the officer who searched you.