

Palestinian Human Rights Issues in Canada: A Legal & Tactical Guide

CHAPTER 3: CRIMINAL ISSUES YOU MAY FACE



Just Peace Advocates
Mouvement Pour Une Paix Juste

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3 CRIMINAL

ISSUES YOU MAY FACE

A QUICK GLANCE

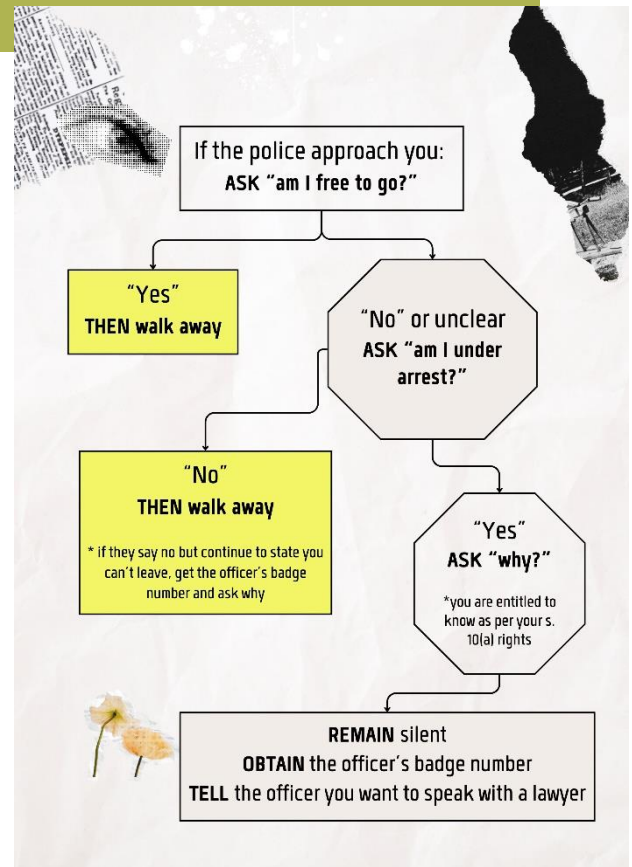
ENCOUNTERING THE POLICE

If the police attempt to interact with you, follow this flowchart.⁹⁴

If you are arrested, you must provide your **name and address** to the police if they request it. They have a right to conduct a search of your “immediate surroundings” (e.g., clothing, things you’re carrying such as a backpack, cellphone, and your vehicle). You have the right to remain silent and the right to speak with a lawyer.⁹⁵ If you do not have a lawyer, you have the right to speak with a legal aid lawyer for free and the police **must allow you** to contact them.

If the police attempt to conduct a search (or your person, home, computer, etc.), consider the following:⁹⁶

- Police can only search if:
 - You consent to a search (**do not consent**)
 - They have a warrant to search you.
 - You have been detained (see above).
- Police must give notice of presence (knock or ring doorbell), notice of authority (identify as law enforcement), and notice of purpose (lawful reason for entry)
- Police can only enter without an announcement in exigent circumstances and the onus is on exigent and the onus is on the police to explain the necessity
- Criminal Code* s. 25(1) allows the police to use force, and the police cannot be expected to know the exact amount of force needed ahead of time
- Police must have the warrant with them; it is sufficient if at least one person has a copy.
- Criminal Code* s. 488 requires warrants to be executed by day (6am-9pm); night searches are presumed unreasonable, and the state must have specific authorization



TL;DR (too long; didn't read)

Ask the police if you are free to go, if yes, leave. If you are detained, remain silent, and ask for a lawyer. Do not consent to a search. If the police say they have a warrant, ask to see it, and look at what it allows them to search. Make notes on any interactions with police, in particular if there are any breaches of the rules above.

⁹⁴ This chart is adapted from Pivot Legal Society's "Street Stop Flowchart" and the original version of this guide. See PLS, *supra* note 80.

⁹⁵ *R v Manninen*, 1987 CanLII 67 (SCC); *R v Suberu*, 2009 SCC 33.

⁹⁶ *R v Cornell*, 2010 SCC 31.

IN-DEPTH: Criminal Issues You May Face

Charter s. 8

**EVERYONE HAS THE RIGHT TO BE
SECURE AGAINST UNREASONABLE
SEARCH OR SEIZURE.**



RIGHT TO PRIVACY

S. 8 acts as a limitation on the search and seizure powers of the government, including police and other government investigators. The purpose of s. 8 is the protection of a person's privacy interests, not the protection of property.

WHAT IS A "SEARCH"?

Police actions will only constitute a "search" where they intrude on an individual's **reasonable expectation of privacy**. A person's expectation of privacy varies depending on the environment, and there are some situations where the expectation of privacy is stronger. There are 3 zones:

(A) Bodily Privacy

People have high expectations of privacy in relation to searches of the body/person. While all body searches breach bodily integrity, the more invasive the search (e.g., DNA samples, strip searches), the higher the expectation of privacy.

(B) Informational Privacy

The greatest protection is given to information about biological attributes or that which reveals intimate details of a person's lifestyle, health information, and/or personal choices.

- Internet search history: There is a reasonable expectation of privacy in search history / IP address information.⁹⁷
- Text messages: It is reasonable to expect private communications to remain private. A person does not lose control over information under s. 8 just because another person can possess or access it.⁹⁸

(C) Territorial Privacy

The more a place shares the quality of being a home, the higher the expectation of privacy. Places like airports or public parks have much lower expectations of privacy.

- Shared space: The law is not resolved, but the concurring opinion is that police have a common law power under the ancillary power doctrine to enter a shared residence without a warrant. It is limited by some restraints, including: offering alternatives if available, the purpose is limited to taking a statement in connection with criminal investigation, no search/seizure without the necessary grounds, only enter common areas, must be invited in by a resident with the authority to consent – and must be voluntary and continuous – and a limited duration.⁹⁹
- Abandoned material: There is no reasonable expectation of privacy in abandoned material (i.e., garbage). "Abandonment" is an issue of fact: has the claimant acted in a way that would lead the reasonable and independent observer to conclude that the 'continued assertion of a privacy interest is unreasonable in the totality of the circumstances.'"¹⁰⁰
- If law enforcement asks to search you or your home, you can say explicitly "I do not consent to a search." You may be deemed to have consented to a search by your actions (e.g., by opening the door, letting them in, etc.) If they come to your home and you do not want to talk to them or let them in, you may talk through the door or step outside and tell them your lawyer will contact them.

A NOTE ON CONSENT

To waive their rights, an individual must have the "requisite informational foundation."¹⁰¹ The degree of awareness will be case-dependent, based on the facts.¹⁰² The individual must have the implications of what they are consenting to (i.e., know specific purposes for what/why the search is being conducted).¹⁰³ When police perform a vehicle check stop, if police do not have reasonable suspicion to perform a search and the

⁹⁷ *R v Spencer*, 2014 SCC 43.

⁹⁸ *R v Marakah*, 2017 SCC 59.

⁹⁹ *R v Reeves*, 2018 SCC 56.

¹⁰⁰ *R v Patrick*, 2009 SCC 17 at para 25.

¹⁰¹ *R v Borden*, 1994 CanLII 63 (SCC) at para 34.

¹⁰² *Ibid* at para 40.

¹⁰³ *Ibid*.

items they are looking for in plain view, they require informed consent.¹⁰⁴

WHAT IF THERE IS A “SEARCH”?

If there is a search, it must meet the following criteria:

- (a) Authorized by law (statute or common law);
- (b) Authorizing the law reasonable; and
- (c) Search carried out in a reasonable manner.

The onus is on the accused to prove the search contravened s. 8 rights.¹⁰⁵ In considering whether the search was carried out reasonably, consider that:

- (a) Police must give notice of presence (knock or ring doorbell), notice of authority (identify as law enforcement), and notice of purpose (lawful reason for entry).¹⁰⁶
- (b) Police may only enter without an announcement in exigent circumstances and the onus is on exigent circumstances¹⁰⁷ and the onus is on the police to explain the necessity.¹⁰⁸
- (c) s. 25(1) of the *Criminal Code* allows the police to use force, and the police cannot be expected to know the exact amount of force needed ahead of time.¹⁰⁹

(A) What is a Search Warrant?

A warrant is a document that police obtain from a justice of the peace or judge that gives them legal authority to search a particular place for a particular item or items. The general requirements for obtaining a warrant are set out in s. 487 of the *Criminal Code*. Other sections of the *Criminal Code* address special types of warrants, such as warrants for wiretaps (s. 186) and DNA (s. 487.05).

In order to obtain a warrant, a police officer must appear before a justice of the peace (or judge) and swear an information – that is, they must provide evidence to show why the police need to conduct the search. This can be done over the phone in special circumstances (s. 487.1). The evidence must specify where the police intend to search, what they intend to search for, and why the search is necessary for their investigation.

In order to issue a warrant, the justice of the peace must be satisfied that there are reasonable and probable grounds to believe that the items sought exist and will be found in the place police want to search. The justice of the peace must also be satisfied that there are grounds for believing a criminal offence has been committed, and that evidence of that offence will be found in the place to be searched. If the justice of the peace is satisfied by the police officer’s evidence, the warrant will be issued.

If law enforcement has a search warrant, you can demand to see it before letting them in. Police must have the warrant with them; it is sufficient if at least one person has a copy.¹¹⁰ To make sure it is a valid warrant, check for a judge’s or justice of the peace’s signature, specific language about where and what the search is for, and the correct name and/or address. You could

be charged with obstruction of justice if you try to stop an authorized search from taking place. If you believe a search is not authorized, tell law enforcement but do not try to stop them. You can say “I do not consent to this search” and can challenge the search later if anything they find is used against you, and/or make a complaint. Be sure to record the officers’ names and badge numbers and what they did during the search.

Criminal Code s. 488 requires warrants be executed by day (6am-9pm); night searches are presumed unreasonable, and the state must have specific authorization.

(B) Warrantless searches

Police can conduct a search without a warrant if urgent and compelling (exigent) circumstances exist and would make it impracticable to obtain a warrant.¹¹¹

Exigent circumstances may include: entry was compelled by urgency, calling for immediate police action to preserve evidence, and officer or public safety. Impracticable requires police to show that urgency existed whereby taking the time to obtain a warrant would post a serious risk.¹¹²

(C) Search incident to arrest

It is important to note that police have an additional search power, commonly called “search incident to arrest.” This power is an exception that allows for less stringent requirements. Search incident to arrest arises from the the assumption that the arrest itself is made on reasonable and probable grounds. However, if the arrest is found to be invalid (illegal), the search will also be ruled invalid.¹¹³ Notably, this power does not impose a duty.

Additionally, the search must be for a valid objective. The main purposes of a search incident to arrest are safety of the police/public, protecting evidence, or discovering evidence.¹¹⁴

Cell phones can be searched incident to arrest, if conducted reasonably and police believe it is practically necessary for investigation. Only recent files may be examined, and it is generally justified only for serious crimes. The search should only happen when an investigation would be stymied or significantly hampered, and police must take detailed notes of what they examine.¹¹⁵

(D) Surveillance and law enforcement issues

Law enforcement (local police, provincial police, RCMP) can use a number of methods to spy on you, some of which require permission from courts. Assume that your activities and communications may be monitored without your knowledge, in ways that don’t require a court order, or under a court order that you don’t know about, or even by private surveillance or intrusion. Be aware of the risks of different types of communication. Experts repeatedly warn that there is no such thing as “secure” electronic communication. Law enforcement and private

¹⁰⁴ *R v Mellenthin*, 1992 CanLII 50 (SCC).

¹⁰⁵ *Cornell*, *supra* note 96 at para 17.

¹⁰⁶ *Ibid*, citing *Eccles v Bourque et al*, 1974 CanLII 191 (SCC)

¹⁰⁷ *Ibid*.

¹⁰⁸ *Cornell*, *supra* note 96.

¹⁰⁹ *Ibid* at para 24.

¹¹⁰ *Cornell*, *supra* note 96.

¹¹¹ *Criminal Code*, *supra* note 4, s 487(11).

¹¹² *R v Paterson*, 2017 SCC 15 at para 37.

¹¹³ *R v Caslake*, 1998 CanLII 838 (SCC) at para 13.

¹¹⁴ *Ibid* at para 19.

¹¹⁵ *R v Fearon*, 2014 SCC 77 at para 83.

organizations often monitor activists' online activities and use the information against them in criminal cases or otherwise.

- Infiltration of organizations by undercover agents or informants is common. Be aware of people who suggest and encourage violent/unlawful action, whose background you don't know, who are divisive, or who appear suddenly and become actively engaged without prior known activism in the area. **Agents may perform illegal activities and lie to you without penalty.**
- If confronted by law enforcement, You are not required to say anything else, even if pressured to do so. If you decide to speak to law enforcement, be aware that anything you say can be used against you, your community, or group. If you decide not to talk to law enforcement, state clearly that you do not wish to talk (i.e., that you would like to remain silent, as is your right pursuant to s. 7 of the *Charter*) and would like to speak with a lawyer. Even if you want to speak with law enforcement, it is best to have a lawyer present, especially if you are under investigation or under arrest.
- Do not lie or provide false documents to the police. **Silence and a lawyer may be best in situations involving law enforcement potentially investigating you.**
- If you want to find out what information the government is collecting about you, consider using tools like the federal Access to Information and Privacy (ATIP) Online Request¹¹⁶ under the *Access to Information Act*¹¹⁷ and/or provincial, territorial, and municipal public records request laws to discover information/records that federal, state or municipal government agencies or officials have about you or your group. These requests can also be used in other contexts to expose communications and documents coming from government actors, government or public university contracts, investments, or other relationships with target companies, etc. Sustained follow-up may be needed to obtain requested documents if the public agency is resistant to your request and to follow up on delays, etc. Contact us for resources to help you with such requests.
- Despite all of these warnings, **be smart, rather than paranoid — do not let it hamper your activism!**

Charter s. 9

EVERYONE HAS THE RIGHT NOT TO BE ARBITRARILY DETAINED OR IMPRISONED.

ARREST AND DETENTION

A violation of s. 9 requires i) an arrest or detention and ii) that detention to be arbitrary. In practice, if you are detained/arrested, consider the following:

- Police have lawful power to arrest even in cases of good faith mistake of fact. Only the court can determine if the arrest is lawful.¹¹⁸ A charge for resisting arrest is valid even if the arrest was a good faith mistake of fact.¹¹⁹ Therefore, don't resist arrest even if you think it's arbitrary/unlawful.
- An arrest based on a mistake of law is unlawful and infringes s. 9.¹²⁰
- An arrest is arbitrary if it i) is based on a mistake of law; ii) exceeds the parameters of the warrant; iii) occurs in a dwelling home and done without a warrant or contravenes *Criminal Code* s. 529; and iv) is warrantless and unlawful per s. 495 (e.g., no reasonable grounds to believe).
- *Criminal Code* s. 25 authorizes police and/or ordinary citizens to use force in particular circumstances. ss. 1 justifies use of force by a police officer if they believe on reasonable and probable grounds that it is necessary, and they only use as much force as needed. ss. 3 establishes a presumption that force "intended or likely to cause death or grievous bodily harm" is prohibited unless the officer has an objectively reasonable belief that the amount of force used is necessary for self-protection or for protection of another person.¹²¹

Charter s. 10

EVERYONE HAS THE RIGHT ON ARREST OR DETENTION:

- a) To be informed promptly of the reasons therefor
- b) To retain and instruct counsel without delay and to be informed of that right

RIGHT TO COUNSEL

(A) What is the right to counsel?

- (1) Police must inform the individual of the existence and availability of legal aid and duty counsel.¹²²
- (2) Police must provide a reasonable opportunity to exercise the right to retain and instruct counsel.¹²³
 - What constitutes a reasonable opportunity depends on surrounding circumstances including availability of duty counsel services in jurisdiction, whether evidence may cease to be available as result delay;
 - Police must "hold off", meaning refrain from questioning or attempting to elicit evidence until they've had a reasonable opportunity;
 - Where only available during office hours, police must hold off until reasonable opportunity.¹²⁴

¹¹⁶ "Make and Access to Information or Personal Information Request" *Treasury Board of Canada Secretariat* (27 May 2024), online: <Link>.

¹¹⁷ RSC, 1985 c A-1.

¹¹⁸ *The Queen v Biron*, 1975 CanLII 13 (SCC).

¹¹⁹ *Ibid*; *Criminal Code*, *supra* note 4, s. 34(3);

¹²⁰ *R v Tim*, 2022 SCC 12.

¹²¹ *R v Nasogaluak*, 2010 SCC 6.

¹²² *R v Brydges*, 1990 CanLII 123.

¹²³ *Ibid*.

¹²⁴ *R v Prosper*, 1994 CanLII 65 (SCC).

- (3) The police are required to communicate the right to counsel and, where an accused states they do not understand, facilitate the understanding.¹²⁵
- (4) The standard for waiving this right is very high (clear and unequivocal, with full knowledge of rights and the effect the waiver will have on those rights).¹²⁶
- (5) Once this has been satisfied (inform, reasonable opportunity, hold off), the interrogation may continue. It does not require counsel to be present during the interrogation.¹²⁷
- (6) If there is a fundamental and discrete change in the purpose of the investigation (different, unrelated, or more serious), the police must reiterate right to counsel.¹²⁸
 - Factors could include new procedures involving the detainee (i.e., lineup or polygraph), change in the jeopardy facing the detainee (new or more serious turn), or reason to believe the first information provided was deficient (i.e., doesn't understand, police undermine).¹²⁹
- (7) If a detainee changes their mind about wanting counsel, police are required to tell the detainee of the right to reasonable opportunity to contact, and obligation of police to hold off.¹³⁰

(B) When is the right available?

The right is required at the point of detention; it does not require an arrest.¹³¹

- Without delay means immediately;
- The “immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations” prescribed by law and justified under s 1.¹³²

If you are not a Citizen of Canada, and you are arrested, you should contact immigration counsel, not just criminal counsel. Criminal Convictions can have immigration consequences. If during arrest or after arrest you are contacted by or detained by immigration enforcement (Canada Border Services Agency) you must contact immigration counsel. **If you are detained, you can contact the Refugee Law Office at (416) 977-8111** for free and confidential assistance.

For more information go to the [Migrants Know Your Rights Guide](#)

ANTI-TERRORISM ACT, 2015¹³³

This Act (ATA) was adopted into Canadian law on June 18, 2015 despite strong opposition. The International Civil Liberties Monitoring Group (ICLMG) provides a breakdown of some of the Act's most problematic components:¹³⁴

- Alongside Bill C-44, the ATA significantly extends CSIS' powers, including allowing judges to grant warrants that violate *Charter* rights.
- It facilitates information sharing amongst 17 governmental agencies regarding "activities that undermine the security of Canada."¹³⁵

The ATA also led to a codified version of the "No Fly List" through the *Secure Air Travel Act*¹³⁶ and "allows the preventive arrest and detention of a person if it is 'likely' to prevent a terrorist activity that a 'peace officer' reasonably believes 'may' be carried out."¹³⁷ The use of "terrorism" to target Palestinian supporters is not limited to the ATA. For example, in October 2024, the Canadian Government listed Samidoun (Palestinian Prisoner Solidarity Network) onto Canada's terrorist entity list. As ICLMG stated, "The consequences of listing are severe. Assets are frozen, any use of property owned or controlled by the listed organization is a crime, as is providing any form of financial or in-kind support. Moreover, there is the stigmatization of being listed, tagging the organization, and anyone accused of being associated with it as being a "terrorist," regardless of their personal actions, without ever laying criminal charges or proving guilt in court... The terrorist entities list is a political instrument, often used in discretionary ways to further the geopolitical interests of Canada and its allies."¹³⁸

For more information, check out our webinar, "[Canada's Terror List Enables Israeli Terror](#)."

OTHER LEGAL RESOURCES

There are additional resources available online. For example, take a look at Pivot Legal Society's guide for People Attending Wet'suwet'en Solidarity Actions.¹³⁹ While some of this information may be specific to Wet'suwet'en solidarity actions and/or British Columbia, there is valuable information that applies nationally at various types of solidarity actions.

**Legal
Information
for People
Attending
Wet'suwet'en
Solidarity
Actions**

PIVOT
LEGAL SOCIETY

¹²⁵ *R v Evans*, 1991 CanLII 98 (SCC).

¹²⁶ *Brydges*, *supra* note 122, citing *Korponay v Attorney General of Canada*, 1982 CanLII 12 (SCC).

¹²⁷ *Brydges*, *supra* note 122.

¹²⁸ *Evans*, *supra* note 125.

¹²⁹ *R v Sinclair*, 2010 SCC 35.

¹³⁰ *R v Prosper*, 1994 CanLII 65 (SCC).

¹³¹ *Suberu*, *supra* note 95; *R v Lafrance*, 2022 SCC 32.

¹³² *Suberu*, *supra* note 95.

¹³³ SC 2015, c 20 [ATA].

¹³⁴ "C-51, The Anti-terrorism Act, 2015", ICLMG (n.d.), online: <[Link](#)>.

¹³⁵ ATA, *supra* note 133, s 5(1).

¹³⁶ SC 2015, c 20, s 11.

¹³⁷ "Understanding Bill C-51 in Canada: The Anti-Terrorism Act, 2015", *Canadian Civil Liberties Association* (19 May 2025), online: <[Link](#)>, citing ATA, *supra* note 133, s 17.

¹³⁸ "Canadian Civil Liberties Coalition Calls for an End to Terrorist Entities Listing Regime", ICLMG (17 October 2024), online: <[Link](#)>.

¹³⁹ PLS, *supra* note 80.

ABOUT

Just Peace Advocates is a Canadian, independent organization promoting the human rights of the Palestinian people and those who stand in solidarity for the human rights of the Palestinian people. Its vision is to provide a civil society voice focused on governmental, institutional, and societal accountability to the rule of law, and the standards of international human rights and humanitarian law for the rights of Palestinian people.

The work of Just Peace Advocates is accomplished through research, monitoring, education, communications, advocacy, programs, and service provision.

DISCLAIMER

This guide is meant to provide basic information on legal issues that Palestinian rights activists may face, and tips on how to navigate them. It provides some generally applicable information and some campus-specific information for student activists.

Any legal information in this resource is intended for general educational purposes and is NOT a substitute for legal advice – federal and provincial laws differ, laws may change, and the application of all laws depends on the specific facts of a case. Make sure to consult with a lawyer before relying on any information you find here.

For legal advice on your campaign or about a specific issue you are facing, or to report incidents of repression of your activism, please email info@justpeaceadvocates.ca.

We are also glad to provide workshops or schedule meetings to discuss your particular needs, whenever possible.

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Just Peace Advocates thanks Palestine Legal for allowing us to have access to their existing resources and giving us permission to update them to the applicable Canadian legal context. For more information about Palestine Legal, see palestinelegal.org.

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