# Section 10 — Rights Upon Arrest and Detention

Section 10 of the *Canadian Charter of Rights and Freedoms* states:

"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; and c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."[1]

These rights are only engaged once someone has been detained or arrested (see our key term on section 9). They are not engaged where someone has "voluntarily co-operated with the police, for example, by inviting the police into his or her home and answering questions."[2]

## Section 10(a): The Right to Be Informed Promptly of the Reasons Therefor

Subsection (a) serves to ensure that the person who is under arrest can make an informed decision about whether to submit to arrest and exercise their right to counsel.[3]

In order for the decision to be an "informed" one, the individual must be given sufficient information about the reasons for the arrest. In particular, the level of legal jeopardy that the individual faces must be clear; for instance, police cannot mislead the individual about the specific offence they are investigating.[4] Moreover, if there is a significant change in reasons (e.g. if a new charge is being added), the individual must be informed of this.[5]

## Section 10(b): The Right to Retain and Instruct Counsel Without Delay and to be Informed of That Right

The purpose of subsection (b) is to inform a subject of their immediate right to access counsel. Without this right a person would be in a vulnerable position in the face of state power and at higher "risk of involuntary self-incrimination."[6]

The right to counsel is *immediate* and may only be delayed in exceptional circumstances, such as where there is a legitimate safety concern.[7] For example, the Supreme Court has accepted that a delay may be justified for individuals suspected of impaired driving, given the importance of administering roadside breath tests as quickly as possible.

Section 10(b) has two aspects: one ***i****nformational* and one *implementational*.

The informational aspect requires police to inform the individual of their right to counsel and to ensure that they understand that right.[9]

The implementational aspect requires that the individual has a reasonable opportunity to consult with counsel. To provide such an opportunity, the police must refrain from questioning that person until consultation with counsel has occurred.[10]

That said, the individual *can* choose to waive their right to counsel, which must be the result of a clear and informed decision.[11] The right to counsel may also be suspended by an individual's lack of due diligence; for example, if they make no reasonable effort to contact a lawyer.[12]

## Section 10(c): The Right to Have the Validity of the Detention Determined by Way of *Habeas Corpus* and to Be Released if the Detention is Not Lawful

The last right contained in section 10 is subsection (c), which protects an individual's right to *habeas corpus*. This is the right to appear before a court and have a hearing on the validity of the detainment. If there is no basis for continued detention, the court will order the individual's release.[13]

## Section 10 Rights Are Not Absolute

As with all rights under the *Charter*, a person's section 10 rights are subject to limitation under section 1. Section 1 of the *Charter* states that the government can legally impose "reasonable limits" on an individual's *Charter* rights, provided that those limits are "prescribed by law" and can be "demonstrably justified in a free and democratic society."[14]

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 10 [*Charter*].

[2] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2019) at chapter 50-2.

[3] *R v Evans*, [1991] SCJ No 31, 1 SCR 869 at para 31 [*Evans*].

[4] *R v Greffe*, [1990] SCJ No 32, 1 SCR 755.

[5] *Evans*, *supra* note 3 at para 35.

[6] *R v Suberu*, 2009 SCC 33 at para 40.

[7] *R v Debot*, [1989] 2 SCR 1140, SCJ No 118 at para 42.

[8] *R v Thomsen*, [1988] SCJ No 31, 1 SCR 640.

[9] *Evans*, *supra* note 3 at para 44.

[10] *R v Manninen*, [1987] 1 SCR 1233, SCJ No 41 at paras 21-23.

[11] *R v Clarkson*, [1986] 1 SCR 383, SCJ No 20 at para 18.

[12] *R v Smith*, [1989] 2 SCR 368, SCJ No 89 at para 34.

[13] *R v Pomfret*, [1990] 2 WWR 568, MJ No 21.

[14] *Charter*, *supra* note 1, s 1.