



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

Statement by Ombudsman André Marin
Arrest, Detention and the G20:
There is More to Civil Liberties than Freedom From Arrest

- 1** Efforts have been made to downplay the questionable use of Regulation 233/10 during the days surrounding the G20 summit in Toronto, on the basis that only two persons were arrested under its authority. The point is being made that almost all of the arrests that took place were made under the power of the police to arrest persons found “breaching the peace.” It is important when considering this information to understand that while there may have been only two arrests using Regulation 233/10, many people were detained, searched, questioned, and redirected under its authority. That regulation played a huge role in the violations of civil liberties that occurred. Arrests were only a small part of it.
- 2** To appreciate this, it is important to understand that legally, the concept of an “arrest” is narrow and technical. There is an “arrest” when a police officer takes physical control over a person and tells them that they are “under arrest.” Unless those words or similar words are spoken, there will have been no arrest, even if a person is physically overpowered, handcuffed, grabbed by the arm and held by an officer, locked in a police vehicle or in a room, made to stand in the rain by a phalanx of police officers, or made to stand by while an officer searches their purse or pats them down or questions them. None of these people will have been arrested unless words of arrest were spoken, but they will all have been “detained.” Their right to leave and go about their business will have been taken away from them because of a demand or direction made by a police officer. They will have lost the freedom of choice over their movements – the right to walk away or drive away – as a result of the exercise of authority by the state.
- 3** Given the loss of physical control that occurs from detentions that fall short of arrest, the *Charter of Rights and Freedoms* protects people against arbitrary arrest *or* arbitrary detention. Both violations are equally serious. The police have no business detaining anyone without lawful authority, and ordinarily – where no special laws operate – their lawful authority to arrest *or* detain is closely restricted in the interests of civil liberties.
- 4** How limited are police powers of arrest and detention where there is no extraordinary “wartime”-type legislation such as the *Public Works Protection Act* in effect? For minor offences, police officers who do not have a warrant can arrest only those persons they find actually committing an offence. And they are only

meant to arrest those people if arrest is the only way to enforce the law and protect the evidence. Police are expected to ticket and release.

- 5** For more serious offences, police can arrest without warrant if they have information that would support a reasonable conclusion that the person arrested has probably committed or is probably about to commit a serious offence. It is not enough for the officer to reasonably believe that the person *might* have committed a serious offence, or *could* go on to do so. They need a concrete basis for concluding that these things are “*probable*.” In order for the “breach of peace” arrests that occurred at the G20 to have been lawful, the arresting officers would have needed to have had an objective and reasonable basis for believing that these people were probably engaged or about to be engaged in real criminal activity.
- 6** Where there is no special wartime like legislation such as the *Public Works Protection Act* operating, the power to detain persons short of arrest is a bit broader, but not much. A police officer can detain individuals – demand that they stop – in order to ask them questions if the police officer has an objective and reasonable basis for suspecting that the person may have committed an offence. That suspicion has to be fairly specific. It is not satisfied by suspicion of “an offence” in the abstract. The suspicion must relate to some particularized kind of wrongdoing that the person stopped may have engaged in. Even then, this power of detention is extremely limited. It can be used only for the purpose of investigating criminal activity – not for the purpose of controlling crowds or ensuring a powerful police presence. The officer can search the person detained, but not for evidence. The only thing the officer can search for is weapons, and this is allowed for officer safety. And although the person detained does not have to be told so, they are not even legally required to answer the officer’s questions. They are free to remain silent. Finally, the detention has to be short-lived. If the investigation does not produce grounds for arrest in short order, the individual is free to leave.
- 7** In a protest situation, there are other possible powers of detention without special laws. Officers are permitted to exercise reasonable powers that they need in order to be able to perform their duties. Officers have the implied power, for example, to block traffic to check for fleeing suspects. They might also have the power to detain a large group of protestors and passersby if the police have legitimate and reasonable grounds to believe that there are particular suspects hiding in that group. This power has to be exercised reasonably, though. The police cannot make the large group of people stay put for any longer than necessary to seek out those particular suspects and the offences they are investigating had better be serious. And this power would not carry the authority to search persons who are not suspects or to answer questions.
- 8** Things change, of course, when extraordinary legislation such as Regulation 233/10 under the *Public Works Protection Act* is passed. The police gain extensive power over members of the public they would not otherwise have. They gain the

power to detain and search anyone entering or approaching a designated area, even if that person changes their mind and offers to walk away. The police need no grounds or no suspicion. They can just do it. And they gain the power to demand answers to questions – even the right to silence disappears. Anyone who fails to remain or submit to a search or to answer questions demanded by the police commits an offence and can be arrested. Laws like this are a civil liberties game changer.

- 9 In the end, when measuring the impact of Regulation 233/10 on civil liberties, it is far too simple to count the number of people arrested. What also has to be counted is the number of people stopped under its authority – so their identification could be produced or because they were wearing black clothing; the number of people questioned under its authority because they were walking in areas rightly or wrongly considered by officers to be protected by the law; the number of people searched under its authority – who open their purses or endure pat-downs; the number of people who have items seized from them under the authority of the statute; and the number of people who were intimidated from walking in public spaces because officers claim the authority to control their movements using this law, including by telling them they are “banned.” Arrests are, of course, the most extreme intrusion that Regulation 233/10 offered. But counting arrests is a glib sound-bite, not a serious response to the impact this legislation had on Ontario’s citizens.