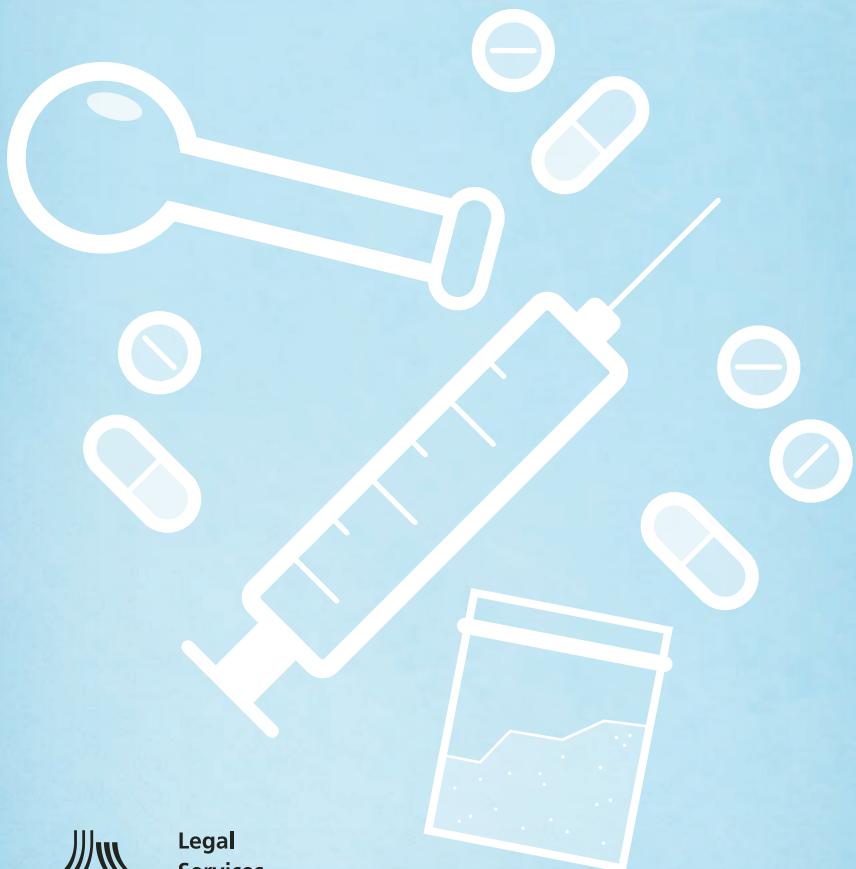


Defending Yourself

Possession of an Illegal Drug



Legal
Services
Society

British Columbia
www.legalaid.bc.ca

September 2019



After you've been charged: A step-by-step chart

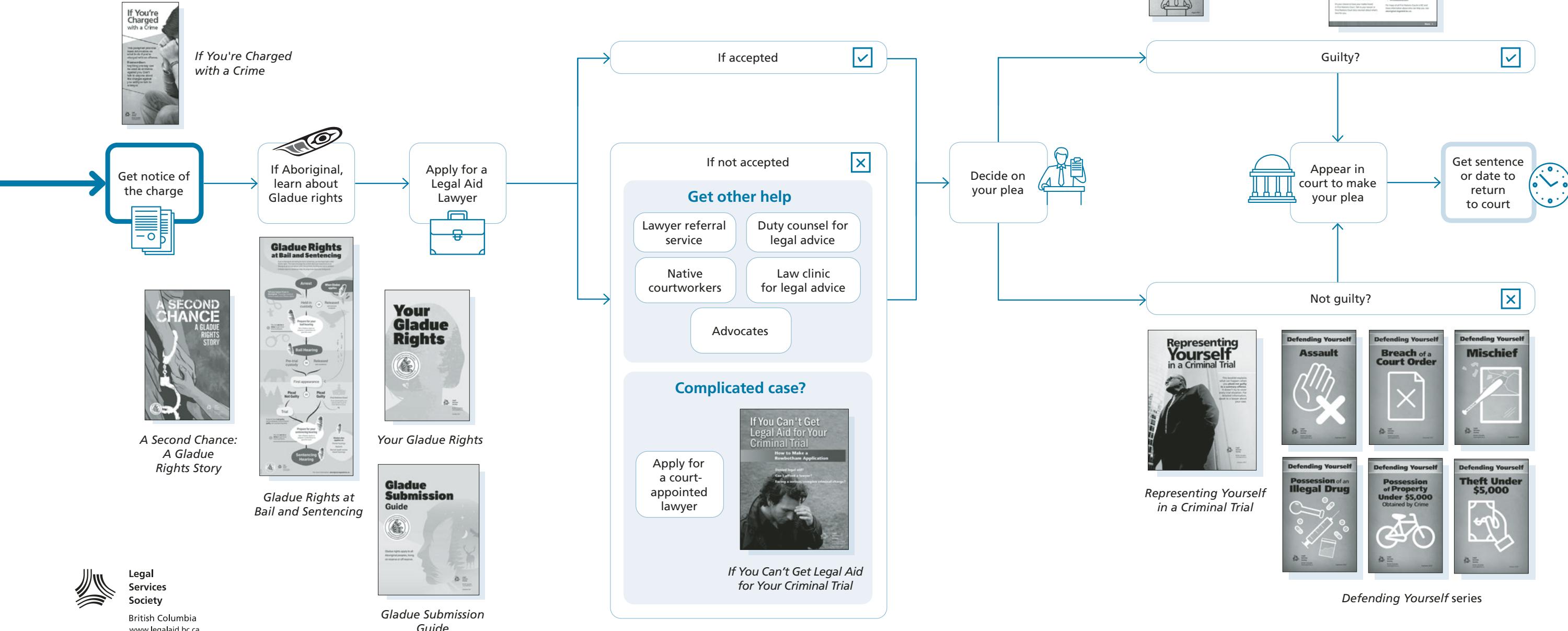
The flowchart under this flap shows how you can get help after you've been charged with a crime, including the free legal aid publications to help you at each stage.

Get these publications as soon as you can and read them before you go to court. Ask for them at the same place where you got this one or at any legal aid location.

You can also read these and other legal aid publications online at legalaid.bc.ca/read.

Legal Aid BC publications to help you

From your criminal charge to your trial



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Acknowledgements

Editor: Judy Clarke

Designer and illustrator: Danette Byatt

Legal reviewer: Camran Chaichian

Development coordinator: Patricia Lim

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This booklet explains the law in general. It isn't intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help. The information in this booklet is up to date as of September 2019.

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This guide is for people who want to plead **not guilty** to a charge of **possession of an illegal drug**. Use this guide if you **don't qualify for legal aid**, **you can't afford a lawyer**, and **you plan to represent yourself** (be your own lawyer) in court.

You should represent yourself *only* if you don't qualify for legal aid and you can't afford a lawyer. If you choose to do this, be sure to talk to a lawyer for advice before your trial. Some legal help is better than none. See "Where can I get legal help?" on page 15.

This guide explains how to defend yourself when you're charged with possession of an illegal drug. It doesn't try to cover every situation. For detailed information, speak to a lawyer about your case.

Are you Aboriginal?

If you're Aboriginal, you have certain rights under the Criminal Code of Canada, often called **Gladue rights**. These rights apply to all Aboriginal peoples: status or non-status Indians, First Nations, Métis, or Inuit. They also apply whether you live on or off reserve. The judge must consider your Gladue rights when sentencing you. This includes considering all options other than jail. For more information, ask for the publications below at the same place where you got this one. Or go to the website Aboriginal Legal Aid in BC at aboriginal.legalaid.bc.ca.



Gladue Rights at Trial and Sentencing

The poster provides an overview of Gladue rights, including:

- What are Gladue rights?
- How do Gladue rights affect sentencing?
- What are the steps in a trial?
- What are the steps in sentencing?
- What are the outcomes of sentencing?



Introduction

What is possession of an illegal drug?

Possession of an illegal drug is a criminal offence under the Controlled Drugs and Substances Act. The act lists many types of illegal drugs, such as heroin, cocaine, fentanyl, oxycodone, morphine, etc. If you're **convicted** (found guilty) of possession of an illegal drug, it means that you had the substance, you knew you had it, you knew what it was, and you had some control over it.

There are three ways you could have possessed the illegal drug:

- **personal possession** (you physically had the illegal drug — meaning you handled it or had control over it — and you knew you had it, and you knew what it was),
- **joint possession** (you knew someone else physically had it and you had some control over it), or
- **constructive possession** (you knew it was in a place over which you had control for your own use or the use of another person, whether or not that place belonged to or was occupied by you).

Being charged with a drug-related offence can have very serious consequences. If you're convicted, you'll likely get a criminal record, which can limit the kinds of jobs you can get and where you can travel.

For the full definition of possession of an illegal drug, see section 4 of the Controlled Drug and Substances Act.

Could I go to jail?

Depending on the details of what happened and your criminal record, the Crown prosecutor (the lawyer who presents the case against you) can choose to charge you with either a **summary** or **indictable** offence. You could get a jail sentence for either type of offence.

A summary offence is a less serious crime. If the prosecutor proceeds “summarily,” the maximum jail sentence a judge could give you for a first offence is six months in jail and/or a fine of \$1,000. If you’ve been convicted of this same offence before, the maximum jail term is one year and/or a \$2,000 fine.

These are maximums: the judge could give you a shorter sentence or a sentence that doesn’t include jail at all (especially if you don’t have a criminal record).

An indictable offence is a more serious crime. If the prosecutor proceeds “by indictment,” the judge could give you a longer jail sentence of up to seven years, depending on the type of drug. Possession for the purposes of producing, trafficking, or importing illegal drugs carries much higher maximum sentences (including life) and mandatory minimum sentences. If you’re charged with any of those offences, be sure to talk to a lawyer.

The first time you’re in court, ask the prosecutor if they’re proceeding “summarily” or “by indictment.” The prosecutor should also say whether they’re asking for a jail sentence.

What to do if your sentence could be strict

If the Crown prosecutor says they'll:

- proceed "by indictment,"
- ask for a sentence that includes jail, or
- ask for a sentence that will have other serious consequences for you,

immediately ask the judge to **adjourn** (postpone) your case so you can get legal help.

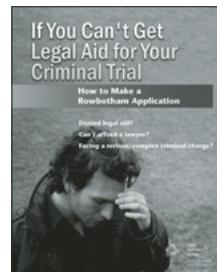
If the prosecutor proceeds "by indictment" (or is asking for a jail sentence), you'll usually have a better chance of getting legal aid — so be sure you understand how the prosecutor will proceed. Legal Aid BC may change its decision to not cover your case.

You can ask the court to appoint a government-funded lawyer to your case (**a Rowbotham application**) if:

- you can't afford a lawyer and were denied legal aid;
- the prosecutor says that they'll seek a jail sentence if you're found guilty, or will seek any other type of sentence that will have serious consequences for you; and
- your case is too complicated for you to handle.

For more information, see the guide

If You Can't Get Legal Aid for Your Criminal Trial.





Before the trial

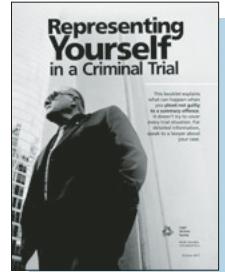
Prepare your defence

When you prepare your defence, think about what **evidence** (information about the crime) you can use. Evidence includes witnesses, documents, videos, recordings, or your own personal **testimony** (telling your story under oath, in court).

Make sure the Crown prosecutor gave you all the evidence that they'll use (called the **disclosure**), such as drug analysis reports or witness statements. The prosecutor should also tell you who they'll call as a witness. You can send them a letter or email asking for this information. (See a sample letter in the guide *Representing Yourself in a Criminal Trial*.)

Prepare to give truthful and relevant evidence to the court. For more information about the trial process, such as how to use witnesses, prepare questions, and decide whether to **testify** (speak) yourself, see *Representing Yourself in a Criminal Trial*.

To defend yourself against a charge of possession of an illegal drug, you may be able to use one (or more) of the following five points if they're true:



“I didn’t know about the drug.”

The prosecutor must prove that you knew about the drug (you knew it existed). But you may not have known about the drug. For example, suppose that when the police stopped you, they found the drug in your jacket pocket. If you’d just borrowed the jacket from a friend, you may not have known about the drug.

“I had no control over the drug.”

The prosecutor must also prove that you had control (or could have had control) over the drug — so lack of control is also a good defence. For example, perhaps you were riding in someone else’s car with two friends. They started smoking crack, but you refused. In a situation like this, you may argue that you had no control over the drug as long as you didn’t cooperate with them in any way related to the drug use.

“I didn’t know that the substance was an illegal drug.”

You can argue that you made a mistake of fact. For example, maybe your son gave you a jar for the spice rack, telling you that it was baking powder. When the substance was analyzed, it turned out to be cocaine — but you really believed that it was baking powder.

If the police found any drug supplies or equipment in your house, this defence probably won’t work. All the related circumstances have to support your argument if you want to claim that you didn’t know the substance was an illegal drug.

For example, if you say that you believed a white powdery substance in your possession was talcum powder, but the police found scales and crack pipes in your house, this defence will probably fail because the circumstances don’t support your argument.

“I only had a trace of the drug on me.”

You may be able to use this defence if you possessed only a trace (a very tiny amount) of the drug. For example, maybe the police found only a trace of methamphetamine residue in a pipe.

In order for this defence to work, the quantity of the drug has to be very small. As well, there can be no other evidence that you possessed the drug that left the trace. It's best to speak to a lawyer before using this defence.

“My Charter rights were violated.”

If the police got evidence of the possession by violating your rights under the Charter of Rights and Freedoms, the judge might not let the Crown prosecutor use that evidence. And if that happens, and there is no other evidence proving your guilt, you can ask the judge to dismiss the charge against you.

For example, if you were a passenger in a car that was stopped for speeding, and the police decided to search you on only a suspicion that you had an illegal drug, you can say that was an unreasonable search.

Or, if the police found the drugs during a search without a warrant, you may be able to say they violated your rights. The police usually aren't allowed to search you, your house, or your car without a warrant.

Under the Charter, the police must do the following when they arrest you:

- o tell you immediately what they've arrested you for;
- o tell you immediately that you can talk to a lawyer, and let you do so in private before questioning you or taking any samples;
- o give you access to a phone; and
- o tell you that you can get legal help for free.

(Legal Aid BC has lawyers available 24 hours a day to talk over the phone for free to people in police custody. This is called the “Brydges Line.”)

If the police didn't do all of these things (or other things that the Charter requires such as get a search warrant before searching your house or belongings), you can argue that they violated your rights. You would then argue that the prosecutor shouldn't be able to use any statements you made or other evidence that the police got by violating your rights.

However, the judge won't automatically throw out the evidence in question. You must also show that accepting the evidence will reflect badly on how justice is carried out in Canadian courts.

If you plan to argue that your Charter rights were violated, talk to a lawyer before your trial. Using the Charter is complicated and usually requires legal research. You must *tell the prosecutor in advance* if you plan to use this type of argument.



At the trial

What must the prosecutor prove?

At the trial, before you present your defence, the Crown prosecutor presents the **Crown's case** against you.

The prosecutor must prove **beyond a reasonable doubt** that you're guilty of all the parts (the **elements**) that make up the crime of possession of an illegal drug. To do this, the prosecutor presents evidence to the court, using videos, recordings, witnesses, or documents.

If the prosecutor tries to use evidence that they didn't tell you about in advance, you can object and ask the judge to dismiss the case or postpone the trial.

You can **cross-examine** (question) the prosecutor's witnesses. But you'll normally do so only if you disagree with their information. For details about how to cross-examine, see the guide *Representing Yourself in a Criminal Trial*.

For a judge to find you guilty of possession of an illegal drug, the prosecutor must prove the following things:

Your identity

The Crown prosecutor must prove that you're the person who committed the crime. To do this, the prosecutor will



call witnesses, including police officers, to give evidence. The witnesses will probably describe the person they saw commit the crime. Then the prosecutor will ask the witnesses to say if that person is in the courtroom.

The evidence, either from the witnesses or from other sources (such as fingerprints or videotapes), must show that you're the person who committed the crime.

Jurisdiction

The prosecutor must prove:

- that the crime happened in BC,
- the date of the crime, and
- the specific location where it happened.

These details are included on the **Information**. This is the official court form (listing the date, place, and type of offence) that the prosecutor gives you before the trial. The prosecutor must still *prove* these details at the trial.

Usually the prosecutor calls a witness to give evidence about the date and place of the crime. This witness will likely be the investigating police officer.

You possessed the drug

The prosecutor must prove that you had an illegal drug in your possession. To show that you had the substance, the prosecutor will call witnesses, including the investigating police officer.

The prosecutor will usually argue that you had personal possession of the drug. For example, suppose the police officer found cocaine in your jacket pocket. The prosecutor would argue that you had personal possession because you had physical control over the drug.

Sometimes the prosecutor will argue that you had constructive possession of the drug. For example, maybe the police officer found cocaine in your bathroom (and

you live alone). The prosecutor would argue that you had constructive possession because you knew about the drug and had some control over it — even though you weren't actually carrying or holding it.

In some cases, the prosecutor will argue that you had joint possession of the drug. For example, suppose the police officer found cocaine in the bedroom that you share with your spouse. The prosecutor would argue that you had joint possession because you and your spouse both had control over the drug and you knew about it.

If you're being charged with constructive or joint possession and the drug was found in your house or car, the prosecutor may use fingerprint evidence. Your fingerprints will be taken and examined to see whether they match the fingerprints found on the container that held the drug.

Keep in mind that anything you say (or write) can be used against you. For example, suppose the police stopped and searched you and they found the drugs on you. If you said to them, "Yes, that's my stuff," the prosecutor may be able to use this **statement** at the trial to show proof of possession.

The substance is an illegal drug

A substance isn't an illegal drug simply because you or the police say that it is. The prosecutor must prove that the substance is a drug by getting a government expert to analyze it. After testing the substance, the expert will prepare a certificate of analysis (a document that confirms what the substance is).

The prosecutor will use this certificate to prove that the substance was an illegal drug. The prosecutor must give you a copy of the certificate before the trial. They must give you reasonable notice (usually seven days) that they will use it at the trial.

When using the certificate as evidence, the prosecutor doesn't need to have the expert speak in court. If you want to cross-examine the expert, you must ask the judge to have this person come to court. It's best to make this application before the trial starts and as soon as you receive the notice.



Don't plead guilty to the charge of possession of an illegal drug if the analysis hasn't been completed. You may be pleading guilty to a criminal offence that doesn't exist if it turns out that the substance isn't an illegal drug. Don't plead guilty without talking to a lawyer.

Present your case

After the Crown prosecutor finishes presenting the Crown's case, it's your turn.

You now have your chance to use the points you've prepared to use as your defence. You can use your gathered evidence, call witnesses, and, *if you want to*, give evidence as a witness yourself. You have the right to *not* testify. Ask a lawyer whether you should or not. See *Representing Yourself in a Criminal Trial* for more details.

Close your case

After you finish presenting your defence, you close your case. Tell the judge why you think the Crown prosecutor didn't prove that you're guilty beyond a reasonable doubt. Mention if you think the prosecutor's case was weak or inconsistent in any area. This summary is called your **submission**. See *Representing Yourself in a Criminal Trial* for more details.



What if the judge finds me guilty?

Once you and the Crown prosecutor finish speaking, the judge decides if you're guilty or not. If the judge finds you guilty, you'll get a sentence. The sentence you get depends on the details of the offence and your criminal record. It could be any of the following:

- an **absolute discharge** (your record won't show a conviction)
- a **conditional discharge** (you'll be regarded as not having been convicted if you meet conditions that the judge sets)
- **probation** (a "suspended sentence" including, for example, community service)
- a fine
- a **conditional sentence** (most often means house arrest, which is like a jail term, but you serve it in the community)
- a **jail term** (maximum of one year for a summary offence, or six months for a first offence; maximum of seven years for an indictable offence)

(Note that a judge usually only grants a discharge when an accused person pleads guilty and doesn't have a previous criminal record.)

Speaking to the judge before you're sentenced

You get a chance to speak to the judge before they decide your sentence. (This is called **speaking to sentence**.) The judge will give you a chance to explain why you committed the crime, why you won't do it again, and whether you need help for any problems you may have that were connected to the crime. Speaking to sentence is important because it gives you a chance to explain your situation to the judge. You can ask for a lower sentence than what the Crown prosecutor is asking for.

Get the brochure *Speaking to the Judge Before You're Sentenced* and read it before you go to court.



Paying a fine

The maximum fine for a summary possession offence is \$2,000.

If the judge fines you, you can ask for time to pay. Tell the judge how much you can pay each month. Later, if you find you can't pay on time, get the brochure *If You Can't Pay Your Court Fine on Time*. Do this as soon as possible.



Surcharge

You'll usually also have to pay a victim surcharge, which is thirty percent of your fine, or \$100 for a summary offence, or \$200 for an indictable offence. The judge can reduce the amount or drop the surcharge completely if you show that paying it would cause you **undue hardship**. For example, this could be because you:

- are unemployed,
- are homeless,
- don't have assets, or
- have significant expenses for your dependent(s).

Being in jail isn't considered an undue hardship.

Checklist: How well did the prosecutor do?

Use this checklist at your trial to see if the prosecutor makes the case against you.

The prosecutor must prove all of these things:

- your identity** (you were the one who possessed the drug)
- jurisdiction**
 - crime happened in BC
 - date of the crime (for summary offences, the Information must be sworn within one year of the date of the crime)
 - town, city, or municipality where the crime took place
- you possessed the drug:**
 - you knew about the drug
 - you had control over the drug
 - type of possession (personal, constructive, or joint)
- substance is an illegal drug**



Remember:

- If the Crown prosecutor's case is weak or inconsistent in one of the above areas, mention this in your submission (see page 11) when you close your case.



Where can I get legal help?

Even if you can't afford a lawyer to represent you in court, it's a good idea to talk to a lawyer before your trial.

To find one:

- Speak to a duty counsel lawyer at the courthouse where you're charged. Duty counsel are lawyers who give free legal advice. When they're available, they can give you brief, summary advice about the charges against you, court procedures, and your legal rights. Duty counsel can also speak on your behalf the first time you appear in court, but they can't act as your permanent lawyer.

Call Legal Aid BC at **604-408-2172** (Greater Vancouver) or **1-866-577-2525** (elsewhere in BC) or your local courthouse to find out when duty counsel will be there. (See the Provincial Court of BC website at provincialcourt.bc.ca/locations-contacts for links to courthouse locations.)

- Contact a lawyer in private practice. Find out if the lawyer is willing to help and what it will cost. Even if you pay for just two meetings to get basic advice about your particular case, it could be worth the cost.
- If you don't know a lawyer who handles criminal cases, contact the Lawyer Referral Service (run by Access Pro Bono). They'll give you some suggestions. You can meet for free with a lawyer they recommend for a half hour. You can see whether you want to hire the lawyer and how much it would cost.

Call the service at **604-687-3221** (Greater Vancouver) or **1-800-663-1919** (elsewhere in BC).

- Access Pro Bono also runs free legal advice clinics throughout the province. To make an appointment, call **604-878-7400** or **1-877-762-6664**.

- If you live in Greater Vancouver, you may be able to get help from the University of British Columbia's Law Students' Legal Advice Program (LSLAP). You can get free legal advice or help from LSLAP if you're charged with a summary offence and the Crown prosecutor isn't asking for a jail sentence if you're found guilty. Call **604-822-5791** to find the location of the nearest LSLAP clinic.
- If you live in Victoria, the Law Centre may be able to help you. Call **250-385-1221** for more information.
- You can get support from a Native Courtworker. The Native Courtworkers and Counselling Association of BC helps Aboriginal people involved in the criminal justice system. Call **604-985-5355** (Greater Vancouver) or **1-877-811-1190** (elsewhere in BC).
- A legal advocate can also support you. Find a local organization on the HelpMap at clicklaw.bc.ca/helpmap.
- For more information about the law, go to clicklaw.bc.ca. Clicklaw has links to legal information, education, and help. You can find out about your rights and options, get toll-free numbers for law-related help, and learn about the law and the legal system.



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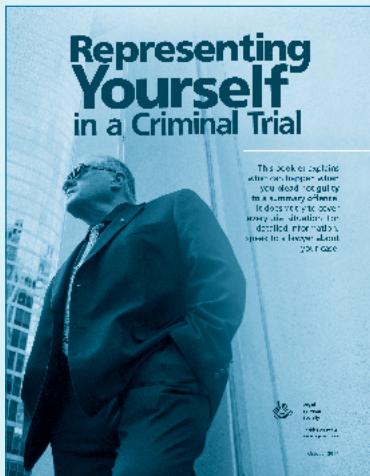
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