

This guide explains what normally happens when you are charged with **possession of an illegal drug**. It does not try to cover every situation. For detailed information, speak to a lawyer about your case.

Who can use this guide?

This guide is for people who want to plead **not guilty** to a charge of **possession of an illegal drug**. You can use this guide if:

- you do not qualify for legal aid,
- you cannot afford a lawyer, and
- you plan to represent yourself in court.

You should represent yourself only if you do not qualify for legal aid and you cannot afford a lawyer. If you choose to represent yourself, be sure to talk to a lawyer before your trial for advice. Some legal help is better than none. See “Where can I get legal help?” at the end of this booklet.

What information will I find here?

This guide describes:

- what possession of an illegal drug is,
- what the prosecutor must prove in court,
- how you can defend yourself, and
- the sentence you could get if the judge finds you guilty.

At the end of this guide, you will find a checklist. Use this at your trial to help you figure out if the prosecutor has proven all the necessary parts of the offence.

reasons for using this guide

what this guide explains

other helpful guides

For more information on offences, trials, and sentencing, see these other guides:

- *If You Are Charged with a Crime*
- *Representing Yourself in a Criminal Trial*
- *Speaking to the Judge Before You Are Sentenced*

Ask for them at the same place where you got this one. Read them before you go to court.

criminal offence

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, marijuana (*cannabis*), and hashish (*cannabis resin*). If you are **convicted** (found guilty) of possession of an illegal drug, this means that:

possession and knew drug was illegal

- you had possession of the drug (in other words, you had the substance and you had some control over it) and
- you *knew* the drug was illegal.

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

types of possession

- **personal possession** (you knew you had the illegal drug because you had control over it and you actually handled it),
- **joint possession** (you and someone else both knowingly possessed the illegal drug), or
- **constructive possession** (you had control over the place where the illegal drug was found or someone else was holding the illegal drug for you, but you knew about it and had some control over it).

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

Which type of offence am I charged with?

The prosecutor will usually treat possession of an illegal drug as a **summary offence**, which is a less serious crime. Otherwise, he or she may treat it as an **indictable offence**, which is a more serious crime that normally involves a stricter sentence.

The first time you are in court, ask which type of offence the prosecutor is charging you with, and whether he or she will be seeking jail if you are convicted.

Usually, the prosecutor will say that he or she is “proceeding summarily” (which means that you are being charged with a summary offence). But you might hear that the prosecutor is “proceeding by indictment” (which means that you are being charged with an indictable offence), and/or that the prosecutor is seeking a jail sentence. If that happens, you should immediately ask the judge or justice of the peace to **adjourn** (delay) your case so that you can get legal help.

If you are charged with an indictable offence, you usually have a better chance of getting legal aid — so be sure you know what type of offence you are being charged with. Legal aid may change the decision to not cover your case.

For more information on summary and indictable offences, see the guide *Representing Yourself in a Criminal Trial*.

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

- you cannot afford a lawyer and were denied legal aid coverage,
- the prosecutor says that he or she will seek a jail sentence if you are convicted, or will seek any other type of sentence that will have serious consequences for you, and
- you feel that your case is too complex for you to handle.

For more information about having a lawyer appointed to your case, see the guide *If You Can't Get a Lawyer for Your Criminal Trial*.

*summary or
indictable
offence*

*if indictable,
ask for delay
and speak to a
lawyer*

*when to
ask for a
government-
funded lawyer*

*prosecutor
must prove you
are guilty*

*you can
question
witnesses*

*you are the one
who committed
the crime*

*place and date
of crime*

What must the prosecutor prove?

The prosecutor must prove beyond a reasonable doubt that you are guilty of all the parts that make up the crime of possession of an illegal drug. To do this, the prosecutor will present **evidence** (information about the crime) to the court, using witnesses or documents.

You can **cross-examine** (question) the prosecutor's witnesses. But you will 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:

1. Identity

The prosecutor must prove that you are the person who committed the crime. To do this, the prosecutor will call witnesses, including the investigating police officer, to give evidence. The witnesses will probably describe the person they saw committing 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), must show that you are the person who committed the crime.

2. 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** (the official court form listing the date, place, and type of offence) that the prosecutor will give you before the trial.

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

3. 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 marijuana in your jacket pocket. The prosecutor would argue that you had personal possession because you had control over the drug.

personal possession

Sometimes the prosecutor will argue that you had constructive possession of the drug. For example, maybe the police officer found marijuana in the bathroom of your house (and you live there alone). The prosecutor would argue that you had constructive possession because you had some control over the drug — even though you were not carrying or holding it.

constructive possession

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

joint possession

If you are 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.

fingerprint evidence

Keep in mind that anything you say (or write) voluntarily can be used against you. For example, suppose you were stopped and searched by the police, who found the drugs on you. If you said to them, “yes, that’s my dope,” the prosecutor can mention this **voluntary statement** at the trial to show proof of possession.

voluntary statement

substance must be tested

4. The substance is an illegal drug

A substance is not 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).

certificate of analysis

The prosecutor will use this certificate to prove that the substance was an illegal drug. The certificate will describe the substance physically. Marijuana, for example, would be described as a “green, plant-like material” and called by its technical name (*cannabis*).

you get copy of certificate

The prosecutor must give you a copy of the certificate before the trial, and must give you reasonable notice (usually seven days) that this will be used at the trial.

Instead of using the certificate as evidence, the prosecutor may have the expert come to speak in court. If you want to cross-examine the expert, you can also ask the judge to have this person come to court.

danger of pleading guilty

Don't plead guilty to the charge of possession of an illegal drug if the analysis has not been completed: you may be pleading guilty to a criminal offence that does not exist if it turns out that the substance is not an illegal drug after all.

no-evidence motion

How do I defend myself?

Remember that the prosecutor must prove that you committed the crime. If the prosecutor does not prove all the parts of the crime, tell the judge you want to make a **no-evidence motion**. You do this after the prosecutor finishes presenting his or her case (often called the **Crown's case**). Tell the judge what it is that the prosecutor did not prove. If the judge agrees with you, you will be found **not guilty** and the trial will end.

If the judge does not agree with your no-evidence motion (or if you do not make one), the trial will

continue. No-evidence motions often do not work because the prosecutor usually has *some* evidence for each part of the crime — so be ready to defend yourself.

Preparing your defence

In preparing your defence, think about what evidence you have to use. Evidence can include documents, witnesses, or your own personal testimony (telling the court your side).

Use any kind of evidence *only* if it helps you more than it could hurt you. It can hurt you because once you offer something as evidence, the prosecutor can use it *against* you to help fill in weak spots in the Crown's case.

For more information about how to use witnesses, prepare questions, and decide whether to speak yourself, see the guide *Representing Yourself in a Criminal Trial*.

To defend yourself against a charge of possession of an illegal drug, you may be able to argue one of the following points:

1. "I did not know about the drug."

The prosecutor must prove that you had knowledge of the drug. 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 had just borrowed the jacket from a friend, you may not have known about the drug.

2. "I had no control over the drug."

The prosecutor must also prove that you had control over the drug — so lack of control is also a good defence. For example, perhaps you were riding in a car with two friends. They were smoking marijuana, but you refused. In a situation like this, you had no control over the drug.

3. "I did not 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 contained homegrown oregano. When the substance was analyzed, it turned out to be marijuana — but you really believed that it was oregano.

*your own
evidence can
hurt you*

get the guide

*did not know
about the drug*

*did not have
control over
the drug*

*thought it was
something else*

If the police found any drug supplies or equipment in your house, this defence probably will not work. All the surrounding circumstances have to support your argument if you want to claim that you did not know the substance was an illegal drug.

For example, if you say that you believed a green, plant-like substance in your possession was an herb, but the police found rolling papers and hashish pipes in your house, this defence will probably fail because the circumstances do not support your argument.

only a trace

4. "I only had a trace of the drug on me."

You can use this defence if you possessed only a trace of the drug. For example, maybe the police found a trace of hashish resin in a pipe. In order for this defence to work, the quantity of the drug has to be very small. It is best to speak to a lawyer before using this defence.

*your rights
under the
Charter*

5. "My Charter rights were violated."

If the police got evidence by violating your rights under the Charter of Rights and Freedoms, the judge might not let the prosecutor use that evidence. And if that happens, 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 mere suspicion of possession of an illegal drug, you can say that was an unreasonable search.

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

*police must
respect your
rights*

- tell you immediately what they have arrested you for,
- tell you immediately that you can talk to a lawyer, and let you do so in private before questioning you or taking any samples,
- give you access to a telephone, and
- tell you that you can get legal help for free. (The Legal Services Society has lawyers available 24 hours a day to talk over the phone for free to people who are in police custody.)

If the police did not do all of these things, you can argue that they violated your rights. You would then argue that the prosecutor should not be able to use any statements you made or other evidence that the police got by violating your rights.

However, the judge will not 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. Judges expect you to *tell the prosecutor in advance* if you plan to use this type of argument.

Closing your case

After you have finished presenting your defence, you will close your case by telling the judge why you think the prosecutor did not prove that you are guilty beyond a reasonable doubt. This summary is called your **submission**. See the guide *Representing Yourself in a Criminal Trial* for more details on preparing submissions.

What if the judge finds me guilty?

If the judge finds you guilty, you will receive a sentence. It could be any of the following:

- an absolute discharge (your record will not show a conviction)
- a conditional discharge (your record will not show a conviction if you meet conditions that the judge sets)
- probation (including, for example, community service)
- a restitution order (you must pay money to someone, usually the victim)
- a fine
- a conditional sentence (like a jail term, but you serve it in the community)
- a jail term

*judge might
throw out
some evidence*

*get legal advice
about Charter
violations*

*closing your
case*

*possible
sentences*

explain your situation before you are sentenced

get the guide

amount of fine and time to pay

automatic victim surcharge

judge may excuse you from the surcharge

Speaking to the judge before you are sentenced

You get a chance to speak to the judge before he or she decides your sentence (this is called **speaking to sentence**). The judge will give you a chance to explain why you committed the crime, whether you will 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.

Ask for a copy of the guide *Speaking to the Judge Before You Are Sentenced* from the same place where you got this guide and read it before you go to court.

Paying a fine

The maximum fine for a summary 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 cannot pay on time, get the guide *If You Can't Pay Your Court Fine on Time* from the same place where you got this guide. Do this as soon as possible.

If you are convicted of possession of an illegal drug, you also have to pay a victim **surcharge** (fee). The amount you have to pay will be either:

- 15% of your fine (if the judge gives you a fine as part of your sentence),

OR

- \$50 for a summary offence, \$100 for an indictable offence, or more if the judge orders a higher amount.

You can ask the judge to excuse you from paying the victim surcharge. The judge can decide that you do not have to pay the surcharge only if you show that paying it would cause you or your dependants undue hardship. *If you do not ask, the court registry will automatically charge you this fee.*

Checklist: What the prosecutor must prove if you are charged with possession of an illegal drug

Use this checklist when the prosecutor presents the Crown's case against you.

The prosecutor must prove all of these things:

- 1 **your identity**
- 2 **jurisdiction:**
 - the crime happened in BC
 - the date of the crime (for summary offences, the **information** must be dated within six months of the date of the crime)
 - the town, city, or municipality where the crime took place
- 3 **you possessed the drug:**
 - you had knowledge of the drug
 - you had control over the drug
 - the type of possession (personal, constructive, or joint)
- 4 **the substance was an illegal drug**

prosecutor must prove these things

Remember:

- If the prosecutor does not prove all the necessary parts of the crime, make a no-evidence motion (see page 6).
- If the prosecutor's case is weak or inconsistent in one of the above areas, mention this in your submission (see page 9).

Where can I get legal help?

Even if you cannot afford a lawyer to represent you in court, it is a good idea to talk to a lawyer before your trial. To find one:

help from duty counsel

- Speak to a duty counsel lawyer at the courthouse. When duty counsel are available, they can give you advice about the charges against you, court procedures, and your legal rights. This service is free. Duty counsel can also speak on your behalf the first time you appear in court, but they cannot act as your permanent lawyer. Call the Legal Services Society at **604-408-2172** (in Greater Vancouver) or **1-866-577-2525** (call no charge, outside Greater Vancouver) or your local courthouse to find out when duty counsel will be there.

help from a private lawyer

- 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.

how to find a lawyer

- If you do not know a lawyer who handles criminal cases, contact the Lawyer Referral Service. They will give you some suggestions. For a \$25 fee plus taxes, you can meet 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 **1-800-663-1919** (call no charge) or **604-687-3221** in Greater Vancouver.

help from free clinics

If you live in the Lower Mainland, 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 assistance from LSLAP if you are charged with a summary offence and are not likely to get a jail sentence if convicted. 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.

links to more help on the Web

For more information about the law, go to the Clicklaw website at www.clicklaw.bc.ca. Here, you will find links to legal information, education, and help. You can find out about your rights and your options to solve legal problems, access toll-free numbers for law-related help, and learn about the law and the legal system.

Also available

- How Does a Court Order Affect Me?
- If You Are Charged with a Crime
- If You Can't Get a Lawyer for Your Criminal Trial
- If You Can't Pay Your Court Fine on Time
- Representing Yourself in a Criminal Trial
- Speaking to the Judge Before You Are Sentenced
- What to Do If You Are Charged with a Breach of a Court Order
- What to Do If You Are Charged with a Drinking and Driving Offence
- What to Do If You Are Charged with Assault
- What to Do If You Are Charged with Mischief
- What to Do If You Are Charged with Possession of Property Under \$5,000 Obtained by Crime
- What to Do If You Are Charged with Theft Under \$5,000

How to get these publications

All of these publications can be read online at www.legalaid.bc.ca/publications

Many are available in both English and French.

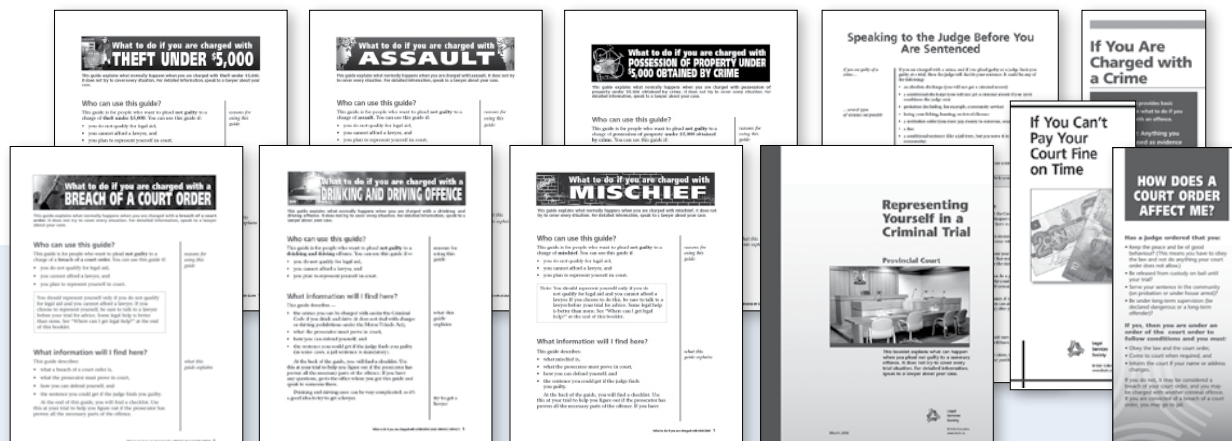
Get free copies of these guides from your local legal aid office or order:

Online: www.crownpub.bc.ca
(click the Legal Services Society image)

Phone: 1-800-663-6105 (call no charge)
250-387-6409 (Victoria)

Fax: 250-387-1120

Mail: Crown Publications
PO Box 9452 Stn Prov Govt
Victoria, BC V8W 9V7



**Legal
Services
Society**

British Columbia
www.legalaid.bc.ca