



What to do if you are charged with **POSSESSION OF AN ILLEGAL DRUG**

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.

Note: You should represent yourself only if you do not qualify for legal aid and you cannot afford a lawyer. If you choose to do this, 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 back of the 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. If you have any questions, go to the office where you got this guide and speak to someone there.

*reasons for
using this
guide*

*what this
guide explains*

other helpful guides

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

type of possession

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

or

- you had **constructive possession** of the drug (in some way, you had some control over it)

or

- you and another person had **joint possession** of the drug (you both had control over it)

and

knew drug was illegal

- you knew the drug was illegal.

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.

What 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. But sometimes the prosecutor will treat it as an **indictable offence**, which is a more serious crime that typically involves a stricter sentence.

The first time you are in court, ask how the prosecutor is proceeding.

Usually, the prosecutor will say that he or she is proceeding “summarily” (which means that you are being charged with a summary offence). But if you hear that the prosecutor is proceeding “by indictment” (which means that you are being charged with an indictable offence), 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 will usually have a better chance of getting legal aid — so be sure you know what type of offence you are being charged with.

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

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 give **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 called *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:

*summary or
indictable
offence*

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

*prosecutor
must prove you
are guilty*

*you can
question
witnesses*

*you are the
one who
committed the
crime*

*place and date
of crime*

*physical
possession*

*constructive
possession*

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 (like 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, time, place, and type of offence) that the prosecutor gave 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 physical possession of the drug. For example, suppose the police officer found marijuana in your jacket pocket. The prosecutor would argue that you had physical possession because you had control over the drug.

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.

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 are stopped and searched by the police, who find the drugs on you. If you say to them, “yes, that’s my dope,” the prosecutor can mention this at the trial to show proof of possession.

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).

*substance
must be tested*

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*).

*certificate of
analysis*

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.

*you get copy of
certificate*

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

*danger of
pleading guilty*

Be careful about pleading guilty too soon to a charge of possession of an illegal drug. If the analysis hasn't been completed by the time you enter your plea, 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 the Crown's case. Tell the judge what 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 — 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.

*your own
evidence can
hurt you*

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 this *against* you to help fill in weak spots in the Crown's case.

get the guide

For more information about how to use witnesses, prepare questions, and decide whether to give evidence yourself, see the guide called *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.

*did not know
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.

*did not have
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.

*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, and the police find rolling papers and hashish pipes in your house, this defence will probably fail because the circumstances do not support your argument.

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

You can use this argument 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.

only a trace

5. "My Charter rights were violated."

The Charter of Rights and Freedoms can sometimes stop the prosecutor from using certain evidence against

Charter rights

police must respect your rights

evidence may not be used

get legal advice

you. If the police got evidence by violating your rights under the Charter, the prosecutor may be prohibited from using that information as evidence. And if the prosecutor cannot use certain evidence, you can argue that the judge should 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 suspicion, you can challenge that as an unreasonable search because your rights under the Charter were violated.

The Charter also ensures your basic rights if you are arrested. If this happens, the police must:

- tell you immediately that you can remain silent,
- 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 free of charge. (The Legal Services Society has lawyers available 24 hours a day to talk to you by telephone if you are in police custody.)

If the police do not do this, 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.

Even if you show that the police violated your Charter rights, the judge will not automatically exclude the evidence in question. You must also show that using such evidence would reflect poorly on the integrity of the justice system.

If you plan to use a defence that involves your Charter rights, talk to a legal adviser before your trial. Judges expect you to tell the prosecutor in advance if you plan to use this type of an 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 called *Representing Yourself in a Criminal Trial* for more details on preparing submissions.

closing your case

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 (you will not get a criminal record)
- a conditional discharge (you will not get a criminal record if you meet conditions 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

possible sentences

Speaking to the judge before you are sentenced

You get a chance to speak before the judge 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.

speak to judge before you are sentenced

Speaking to sentence is important because it gives you a chance to explain your situation to the judge.

explain your situation

Get the guide called *Speaking to the Judge Before You Are Sentenced* where you got this guide and read it before you go to court.

get the guide

*amount of fine
and time to
pay*

*automatic
victim
surcharge*

*judge may
excuse you
from surcharge*

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 called *If You Can't Pay Your Court Fine on Time* where you got this guide. Do this as soon as possible.

If you are convicted of a summary offence, you also have to pay a victim **surcharge** (fee). The amount you have to pay will be:

- 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:
 - crime happened in BC
 - the town, city, or municipality where the crime took place
 - the date of the crime (for summary offences, the **information** must be dated within six months of the date of the crime)
- 3 you had knowledge of the drug
- 4 you had control over the drug
- 5 the type of possession (physical, constructive, or joint)
- 6 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 defence (see page 6).

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 talk to a lawyer:

- Call the Lawyer Referral Service at **(604) 687-3221** (Lower Mainland) or **1-800-663-1919** (toll free, outside the Lower Mainland). For \$25 you can speak with a lawyer about your case for half an hour.
- Speak to a duty counsel lawyer at the courthouse on the day of your trial (ask at the desk for how to find the duty counsel lawyer). This service is free.

If you are in Victoria or the Lower Mainland, there are also law student clinics that may be able to help you. In Vancouver, call **(604) 822-5791**. In Victoria, call **(250) 385-1221**.

For more information about the law:

- Call LawLINE at **(604) 408-2172** (Lower Mainland) or **1-866-577-2525** (toll free, outside the Lower Mainland). In some cases, you may be able to get brief legal advice.
- Go to the LawLINK website at **www.lawlink.bc.ca**. This website offers links to information on legal topics including crime, family, immigration, and housing. Contact your local legal aid office for locations of free LawLINK public access computers you can use to find legal information on the Internet.



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