

A stylized, high-contrast graphic design featuring bold black outlines and vibrant red and white areas. The design consists of thick, sweeping lines that form abstract, organic shapes reminiscent of leaves or petals. The overall aesthetic is reminiscent of mid-century modern or pop art style. The top and bottom portions of the image are dominated by these graphic elements, framing the central text.

KNOW YOUR RIGHTS

on drug laws for
Indigenous
people
who use drugs

LAND ACKNOWLEDGEMENT

The HIV Legal Network and CAAN Communities, Alliances & Networks are located across this land now called Canada on treaty lands, stolen lands, and unceded territories of many different Indigenous groups and communities who have respected and cared for this land since time immemorial. Taking the lead from Indigenous communities, we work to address the ongoing injustices and resulting health inequities faced by Indigenous Peoples, which contribute to the disproportionate impact of the HIV epidemic and drug poisoning crisis on Indigenous communities.

We also acknowledge the legacy of anti-Black racism, its relationship to the criminalization of people who use drugs, and how this fuels the mass incarceration of African, Caribbean, and Black (ACB) communities and Indigenous Peoples. We are committed to further learning to work in solidarity with Indigenous and Black peoples to undo the harms of repressive drug policy.

INTRODUCTION

Drug policy in Canada is rooted in racism and colonialism, and Indigenous communities have experienced long histories of drug policy harms. Among Indigenous people living with HIV, transmissions are attributable to injection drug use at a much higher rate than for non-Indigenous populations, while Indigenous peoples have also suffered a disproportionate proportion of fatal overdoses against the backdrop of a toxic unregulated drug supply. This is due to many factors, including racism and consequent barriers to health care, ongoing and intergenerational trauma, limited access to mental health and drug treatment, and the over-policing and mass incarceration of Indigenous peoples for drug offences.

“STRENGTH WITHIN”



ARTIST: LORETTA GOULD

3. Does the amount of drug I possess make a difference?

It is a serious criminal offence to possess drugs for the purpose of giving them to someone else, whether you sell them or share them freely (i.e. "drug trafficking").² In Canadian law, there is no specific "threshold quantity" that distinguishes between possession for personal use and possession for "trafficking." However, police and courts will consider the quantity when deciding if someone possessed drugs for personal use or for trafficking (e.g. the larger the quantity, the more likely they consider the possession for trafficking). They also consider factors such as the amount of cash on the person, and the presence of items such as scales and baggies.³



The punishment for simple possession depends on factors such as the type of drug:

- "Schedule I" drugs include heroin, fentanyl, other opioids, cocaine, ecstasy, amphetamines, and methamphetamines. If convicted of simple possession of Schedule I drugs, the maximum jail time is seven years.
- "Schedule II" drugs are synthetic cannabinoids. If convicted of simple possession of Schedule II drugs, the maximum jail time is five years.
- "Schedule III" drugs include LSD and magic mushrooms. If convicted of simple possession of Schedule III drugs, the maximum jail time is three years.

If it is the first time you are charged with simple possession, the maximum punishment is a fine of \$1000, six months' jail time, or both.

Recent legal and policy developments meant to limit charges for simple drug possession

Section 10 of the CDSA sets out principles that police and prosecutors (i.e. government lawyers) must consider before charging someone for simple possession, including that "problematic substance use should be addressed primarily as a health and social issue." Based on these principles, the law says that when considering charges for simple possession, **police and prosecutors should determine whether it would be preferable to:**

1. **take no further action;**
2. **warn the individual; or**
3. **with their consent, refer an individual to a program, agency, or other service provider in the community to assist them.**⁴

Additionally, the [Public Prosecution Service of Canada](#) has provided guidance to drug prosecutors in all provinces except Quebec and New Brunswick on factors to consider in relation to simple possession charges.⁵ The guidelines state that criminal prosecution should be reserved for the "most serious manifestations of the offence" (e.g. where there is a risk to the safety or well-being of others, and particularly children or young people; where it is associated with another drug offence or criminal offence; if it occurs in a jail or prison) and that **alternatives to prosecution should always be considered**, including when the possession relates to "a substance use disorder."

While police and prosecutors are not required to follow them, and simple possession remains a crime, these principles and guidance are meant to encourage police and prosecutors to limit charges for simple drug possession.

There is also a separate law for cannabis called the *Cannabis Act*.⁶ While recreational cannabis use was legalized in 2018, there are still restrictions on possessing the drug. People aged 18 and over are only permitted to possess cannabis that they have obtained from government-authorized sellers or to grow up to four cannabis plants per household, and only up to 30 grams of dried cannabis in a public space. Some provinces have also established rules about the maximum quantity of cannabis you can possess at home.

Each province has also established minimum ages for recreational cannabis possession.

People can face criminal prosecution for possessing any cannabis obtained *illegally* (i.e. not through a government-authorized source).

Breaking any of these laws could lead to imprisonment of up to five years for those aged 18 and over and a youth sentence for those under 18. Individual provinces may have additional laws that govern where consumption can and cannot occur.

Other exceptions to charges of simple drug possession under the CDSA:

If you are at the scene of an overdose:

- The **Good Samaritan Drug Overdose Act** can prevent police from charging you and others at the scene of an overdose, if you have sought medical help for yourself or for someone else who has overdosed. In this case, police cannot charge you for simple possession, or for violating any condition of your parole, bail, probation, or conditional sentence ("house arrest") related to a previous simple possession charge.⁷
- The **Good Samaritan Drug Overdose Act** does *not* prevent police from charging you and others for other offences outside of simple possession; outstanding arrest warrants; or violating any condition of your parole, bail, probation, or conditional sentence relating to an offence that is not simple possession.

If you live in B.C.:

- Beginning on January 31, 2023, until January 31, 2026, **adults over 18 can possess up to 2.5 grams combined of opioids (such as heroin, morphine, and fentanyl), crack and powder cocaine, methamphetamine, and MDMA (ecstasy) for personal use in specific locations.**⁸ Adults will not be arrested, charged, or have their drugs seized if they possess up to 2.5 grams of the above substances for their own use in the following locations:
 - private residences
 - if you are unhoused, wherever you are *legally* sheltering (this may depend on your city's bylaws)
 - overdose prevention, drug checking, and supervised consumption sites, and places that provide out-patient addiction services like rapid access addiction clinics.
- It continues to be illegal to possess more than 2.5 grams of any illegal drug without a prescription; any amount of other illegal drug not included in the policy; or any illegal drug in a place not listed above, including most public places (e.g. hospitals, businesses, or on transit). Youth under 18 cannot possess any amount of illegal drugs.



“OOKPIK”



ARTIST: BRIAN KOWIKCHUK

4. Can I be arrested for using the services of a needle and syringe program, a supervised consumption site, or overdose prevention service?

You cannot be arrested for merely being present at a needle and syringe program, a supervised consumption site, or overdose prevention service.

While it is against the law to possess certain drugs in Canada (with the exceptions noted in Q1 above), the government can exempt clients and operators of a supervised consumption site or overdose prevention service from criminal prosecution for the possession of illegal drugs while they are on the premises.⁹ In practice, this means that you can possess and use drugs without the threat of criminal prosecution, **if you do it inside the exempted site or service.** You are not exempt while in transit to the site.

Other harm reduction settings, like a needle and syringe program, are not exempted from Canada's drug laws, so you may still risk criminal charges if you use drugs inside those locations (with the exceptions noted in Q1 above).

5. Can I be charged for possessing drug use equipment?

Outside a harm reduction setting, you cannot be criminally charged for simply *having* drug use equipment. We are not aware of anyone ever being charged for merely possessing unused drug use equipment.

However, it is important to note that some cities have specific laws that prohibit the use or "display" of drug use equipment or "drug paraphernalia" in public spaces.¹⁰

6. What about having *used* drug equipment?

Possessing equipment that has been used and contains traces of illegal drugs is technically against the law, just like possessing the drugs themselves is illegal.¹¹

Police have confiscated or destroyed drug use equipment they have found on people and threatened to arrest people because of drug residue in their equipment or otherwise used the possession of used equipment as the basis to search and lay other charges.¹² While such incidents may be less common, it is important to know you *may* be at risk of prosecution for the crime of possessing illegal drugs (or other offences, depending on the results of a search) just by possessing the equipment after it has been used.



“FOUR DIRECTIONS”



ARTIST: JASMINE CAFFYN

7. What are your rights when police stop you because they suspect you have committed a drug-related offence?

Anti-Indigenous racism has fueled a long history of Indigenous people being racially profiled, including for drug offences. **A detention is a situation where police stop you and you do not think that you are free to leave.** Some reasons the police might stop and detain you are if:

- They claim they have a legitimate reason to suspect that you are involved in an *ongoing or recent* criminal offence (such as possessing illegal drugs) and are investigating you;
- You are driving and the police suspect you of committing a driving offence or are performing an organized traffic stop (e.g. to check if you are driving impaired); or
- They arrest you for a criminal offence (e.g. "causing a disturbance" in a public place).¹³

If it is unclear as to whether you have been detained, and it is safe in the moment for you to ask, you can ask the officer: "Am I detained?" or "Am I free to go?" If you are *not* being detained or arrested, you do not have a legal obligation to identify yourself and it is legal for you to walk away. You have the right to remain silent and not answer any questions.

If you *have* been detained, you are legally required to remain in place. You still have the right to remain silent, though you may agree to identify yourself. You have no obligation to say anything else to police. You can ask the officer "Am I under arrest?" and if they say yes, you can ask why. **If you have been detained or arrested, police are required to tell you why.**

If you are not under arrest but are being detained because they have a legitimate reason to suspect you of being involved in a drug offence, police are not legally allowed to search your person, *unless* they believe you have a "dangerous" item on you and pose a serious and immediate threat to their own or others' safety.

If you have been arrested, the police must inform you that you can speak to a lawyer and give you the opportunity to do so. You have the right to speak to a lawyer in private before police interrogate you. You never have to answer any questions from the police, other than giving your name, address, and birthdate. Anything you say to the police can be used as evidence against you, including anything you say during the detention stage. It is also against the law to lie to police.

While the police are allowed to ask you additional questions and will try to make you talk, you do not have to answer them. What you say may be used as evidence against you or others and could lead to a criminal charge. Only discuss your situation with your lawyer. (See page 14 for more information about legal aid and finding a lawyer.)

If you have been arrested, the police can only search your person and belongings if they have reason to believe you pose a serious and immediate threat to their own or others' safety or if they are preserving or discovering evidence related to the crime for which you have been arrested. For example, if they arrest you for drug charges, they may search you for drugs.

Note: The "threat to safety" exception is often misused as an excuse to search people. It may be in your best interest to stay physically calm with police, so that they can't use your actions or words as an excuse to claim that they "feared that you were armed and dangerous." The police may argue that a needle or syringe is a dangerous weapon, and that they searched someone that they suspected to be using drugs because they were "searching for needles." It might be best to warn them if you have anything sharp on you before they find it.¹⁴



“SEVEN BLESSINGS”



ARTIST: CLAYTON GAUTHIER

Drug laws and driving

The rules are different if you are driving a vehicle. Police have more power to stop and detain you if you are driving.¹⁵ If police stop you while you are driving and ask you for your ID and driver's licence (and in some provinces, vehicle registration and insurance), you must give it to them.¹⁶

If the police suspect that you are driving impaired after having used drugs, they can require you to perform a physical coordination test, give a saliva sample to screen for illegal drugs, or be evaluated by an officer to determine whether you are impaired.¹⁷ In this scenario, you do not have the right to speak to a lawyer beforehand.¹⁸ However, other than requiring you to provide your ID and driver's license, the law does not require you to answer any additional questions.

If the police pull you over while you're driving, they can also conduct a "plain view" search of the vehicle (looking around) without entering it. If the police see evidence of drugs, this gives them reason to search inside the car.¹⁹

Actions after arrest:

An arrest is not the same as a conviction. You can be arrested but not convicted. Whether you are convicted will depend on the charge, the evidence, and the findings of the court.

If you are arrested, police can either release you with conditions or keep you in jail for up to 24 hours before you will be taken to court where you can apply for bail. Bail is when you are released from jail with conditions until your case has been decided.²⁰ (Bail does not necessarily mean paying a deposit; many other factors come into play, including the nature of the offence, your work circumstances, social ties, etc. Questions about this are best answered by a lawyer familiar with your case.) If the court refuses to release you, you remain in jail while your case is determined, or until you apply for a "bail review" and a new judge agrees to let you out.

Everyone is entitled to a lawyer to defend them in court. Depending on your income, legal aid may help you pay for the lawyer. It is important to get a lawyer who is knowledgeable about drug offences.

If you plead guilty or are convicted, there will be a sentencing hearing. A sentence will be suggested by your lawyer and the prosecutor. Sometimes your lawyer and the prosecutor will agree on a sentence, but often they will disagree. It is always up to the judge to decide, and the judge can give you a different sentence from the one suggested.

Once you have been convicted, you will have a criminal record.



“BEARS”



ARTIST: BRIAN DWAYNE SARAZIN

SENTENCING AND GLADUE FACTORS

Anti-Indigenous racism is well documented in the criminal legal system in Canada, which has resulted in the mass incarceration of Indigenous people. To respond to this, the law requires judges to consider the unique history that played a part in bringing Indigenous people to court. The judges are required to consider this history, known as “Gladue factors,” in deciding whether you should get bail while waiting for trial. If your case went to trial and you were convicted, they must also consider this when deciding your sentence, as well as at other stages of the criminal proceedings. This is true for all Indigenous Peoples, including status and non-status First Nation, Inuit, and Métis people, and whether someone is living on or off reserve.

Judges should always automatically consider Gladue factors but sometimes they don't. It is important that you inform your lawyer that you are Indigenous and that you work with them to get a strong Gladue report, which gives the court information about your unique background, at your bail or pre-sentencing hearing. If you are charged and brought to court and you do not have a lawyer, you should ask to speak to an Indigenous court worker or organizations in the courthouse you are brought to.

ADDITIONAL RESOURCES:

Aboriginal Legal Services:

www.aboriginallegal.ca

T. Santini, *Read Between the Lines*, Stella, l'amie de Maimie, September 2021. Online: https://chezstella.org/wp-content/uploads/2021/11/Read-Between-the-Lines_digital-file.pdf.

Canadian Civil Liberties Association, *Know Your Rights: Racial Profiling and Police Stops*, December 2021. Online: <https://policestops-yourrights.ccla.org/how-can-this-guide-help-me/>.

Canadian Civil Liberties Association, *Know Your Rights: A Citizen's Guide to Rights when Dealing with Police*, 2021. Online: <https://ccla.org/wp-content/uploads/2021/07/Know-Your-Rights-Booklet.pdf>.

Pivot Legal Society, *KNOW YOUR RIGHTS: A guide for people who rely on public space*, June 2019. Online: www.pivotlegal.org/know-your-rights-handbook.



References

- ¹ *Controlled Drugs and Substances Act* (S.C. 1996, c. 19), s. 4(1): “Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III”
- ² CDSA, s. 5. For more legal information about how the drug trafficking law is enforced, see Stella, *Drug “Trafficking”: Criminal Offences*, September 2023, online: https://chezstella.org/wp-content/uploads/2024/01/Stella_Traffick_EN_digital.pdf.
- ³ See, for example, *R v Kaup*, 2022 ONCA.
- ⁴ CDSA, ss. 10.1-10.3.
- ⁵ Public Prosecution Service of Canada Deskbook, Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act, *5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the Controlled Drugs and Substances Act*, August 17, 2020. Online: www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch13.html.
- ⁶ *Cannabis Act* (S.C. 2018, c. 16).
- ⁷ *Good Samaritan Drug Overdose Act* (S.C. 2017, c. 4).
- ⁸ Government of B.C., “Decriminalizing people who use drugs in B.C.,” last updated: July 25, 2024. Online: www2.gov.bc.ca/gov/content/overdose/decriminalization.
- ⁹ CDSA, ss. 56(1) and 56.1.
- ¹⁰ See, for example, Kingston, Ontario, which passed a bylaw prohibiting the use or display of drug paraphernalia in a park or within 15 meters of a park (City of Kingston By-Law Number 2023-214, “Community Standards By-Law” Passed: December 5, 2023, online: www.cityofkingston.ca/media/3vsnzo5g/bylaw_communitystandards.pdf) and Penticton, B.C., which banned the “display or use” of drug paraphernalia in any public place (City of Penticton, Safe Public Spaces Bylaw No. 2023-06, online: www.penticton.ca/sites/default/files/uploads/bylaws/2023-06%20Safe%20Public%20Places%20Bylaw.pdf).
- ¹¹ S. 2(2)(b) of the CDSA prohibits people from possessing, importing, exporting or trafficking not only a controlled substance itself, but also “any thing that contains or has on it a controlled substance and that is used or intended or designed for use... in introducing the substance into the human body”
- ¹² See, for example, *Nova Scotia (Public Safety, Director) v Cochrane*, [2008] N.S.J. No. 73 and Human Rights Watch, *Abusing the User: Police Misconduct, Harm Reduction and HIV/AIDS in Vancouver, Canada*, 2003, online: www.hrw.org/report/2003/05/07/abusing-user/police-misconduct-harm-reduction-and-hiv/aids-vancouver-canada.
- ¹³ Canadian Civil Liberties Association, *Know Your Rights: A Citizen's Guide to Rights when Dealing with Police*, 2021, online: <https://ccla.org/wp-content/uploads/2021/07/Know-Your-Rights-Booklet.pdf>.
- ¹⁴ T. Santini, *Read Between the Lines*, Stella, l'amie de Maimie, September 2021. Online: https://chezstella.org/wp-content/uploads/2021/11/Read-Between-the-Lines_digital-file.pdf. See also Stella, *Frisking, Patting Down or Searching You*, September, 2023, online: https://chezstella.org/wp-content/uploads/2024/01/Stella_Searching_EN_digital.pdf and Stella, *Seizure: When police can take your things*, September 2023, online: https://chezstella.org/wp-content/uploads/2024/01/Stella_Seize_EN_digital.pdf.
- ¹⁵ For more information about the legal powers of the police in relation to passengers in a vehicle, see Stella, *Locations: Police powers depend on context*, September 2023, online: https://chezstella.org/wp-content/uploads/2024/01/Stella_Locations_EN_digital.pdf.
- ¹⁶ See, for example, *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25, s. 3.
- ¹⁷ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 320.27(1) and 320.28 (2).
- ¹⁸ *R v Orbanski* [2005] 2 SCR 3.
- ¹⁹ James A. Fontana & David Keeshan, *The Law of Search & Seizure in Canada*, 7th ed. (Markham: LexisNexis Canada Inc., 2007), at p. 603.
- ²⁰ *Criminal Code*, R.S.C. 1985, c. C-46, s. 515.

For resources on other legal issues affecting Indigenous peoples
and links to lawyer referral services, see our website at:

www.hivlegalnetwork.ca/IndigenousCommunities



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THIS PAMPHLET IS CURRENT TO AUGUST 2024, BUT THE LAW MAY CHANGE.