

# Defending Yourself

## Assault



**Legal  
Services  
Society**

British Columbia  
[www.legalsaid.bc.ca](http://www.legalsaid.bc.ca)

September 2019



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

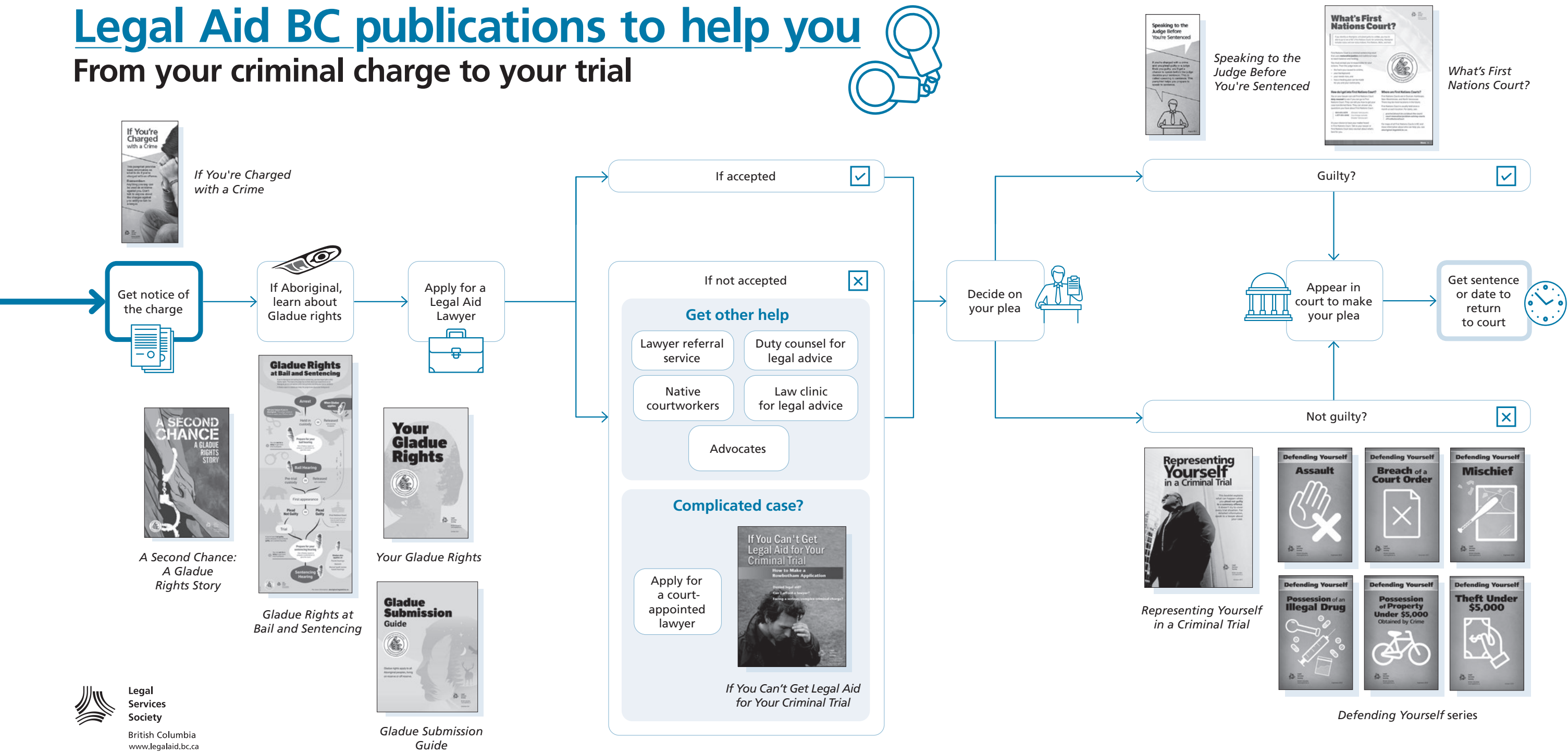
The flowchart under this flap shows how you can get help after you've been charged with a crime, including the free legal aid publications to help you at each stage.

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](https://legalaid.bc.ca/read)**.

# Legal Aid BC publications to help you

## From your criminal charge to your trial



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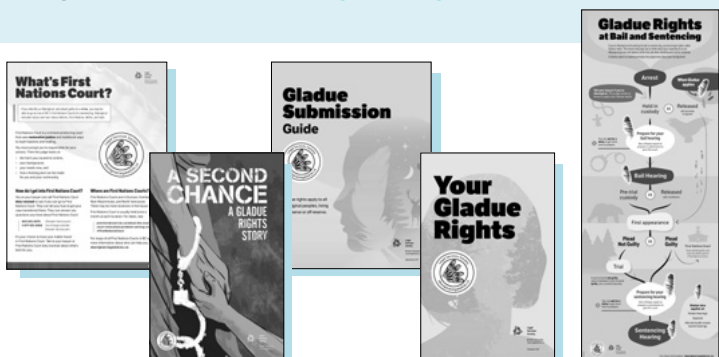
This guide is for people who want to plead **not guilty** to a charge of **assault**. Use this guide if you don't qualify for legal aid, you can't afford a lawyer, and you plan to represent yourself (be your own lawyer) in court.

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 assault. 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](http://aboriginal.legalaid.bc.ca).





# Introduction

## What is assault?

Assault (also known as “common assault”) is:

- o the intentional use, or threat of use, of force against another person directly or indirectly,
- o without that person’s consent (agreement).

Assault can range from mere touching to violent punching. Assault can include kicking someone or shoving someone out of your way.

Indirect use of force can also be an assault. An example of this is throwing a stone to hit someone. Spitting at someone is also considered assault.

Threatening or trying to use force can be an assault if you could have (or the other person reasonably believes you could have) carried out the threat. An assault can occur even if the victim isn’t hurt.

For the full definition of assault, see section 265 of the Criminal Code of Canada.

## 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 is two years less a day in jail and/or up to a \$5,000 fine or both. But 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 depending on the offence.

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:

- o proceed “by indictment,”
- o ask for a sentence that includes jail, or
- o 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:

- o you can’t afford a lawyer and were denied legal aid;
- o 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
- o 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

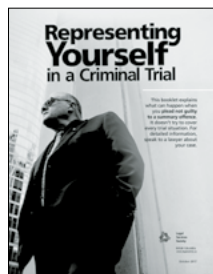
## Prepare your defence

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 has given you all the evidence that they'll use (called the **disclosure**), such as security videotapes 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 assault, you may be able to use one (or more) of the following four points if they're true:

### □ "I didn't intend to do it."

You can use this defence if you touched the other person accidentally. For example, perhaps you were in a crowd and tripped. Or you lost your balance and bumped into a stranger, but it was an accident and you didn't mean to assault the person. If you didn't intend to hit someone, you haven't committed an assault.

## □ “I was acting in self-defence.”

You can use this defence if you were assaulted (or threatened) and you used force to protect yourself. You can also use this defence if you were protecting someone else from an assault.

You can say that you acted in self-defence, if:

- it was reasonable to think that force was being used (or threatened to be used) against you or another person and you were defending or protecting yourself or that other person against that force (or threat of force) in a reasonable way.
- you only intended to defend or protect yourself or the other person. For example, if you continued to use force after the threat ended, you can't argue that you did that to protect yourself.
- your actions were reasonable in the situation. To decide if this is true, the judge will consider factors including:
  - the type of force or threat you faced and if you had any other options,
  - your history with the other person,
  - how the incident started,
  - the size and strength of the people involved,
  - if your actions were appropriate for the threat,
  - whether you knew the other person had the right to use force, and
  - if a weapon was used.

For example, it probably wouldn't be reasonable for you to pull a knife on someone who threatened to punch you. Or, it may not be reasonable to use force if you're much larger than the other person and could easily have walked away.

You also can't use this defence if you used force against a police officer (or other person such as a court sheriff acting lawfully within the course of their duties), unless you had a good reason to think the person was acting illegally.

But you can't use this defence if you pulled a knife and the other person agreed only to a fist fight. And you can't use the defence of consent if you injure the other person.

This defence also won't work if you have special training or skill in fighting, and the other person didn't know that.

If you're going to say that the other person consented, both of you must have had the same idea about what you were getting into. The agreement wasn't real if it was based on a trick or lie.

## □ "I was defending my or someone else's property."

If someone tried to illegally enter, take, damage, or destroy your (or someone else's) property and you used reasonable force to prevent it, you can argue that you were defending your (or someone else's) property. However, the force you used to do this must be reasonable and you must be right that the property is legally yours or belongs to the person you're defending and not to the person trying to take, damage, or destroy it.

For example, if you see a strange man taking your bike from your porch, you can try to stop him or get the bike away from him. But you can only use reasonable force to do so. The judge will look at the facts and decide what was reasonable in the situation.

You can't use this defence if you didn't possess the property at the time of the incident; for example, if you go to someone's house and use force to take back something they'd stolen or borrowed. You also can't use this defence if the other person legally possessed or was the legal owner of the property, even if by mistake you thought you were.

## □ "My Charter rights were violated."

If the police got evidence of the assault 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, 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 assault. To do this, the prosecutor presents evidence to the court, using witnesses, documents, videos, or recordings.



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 assault, 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 Crown prosecutor must prove:

- o that the crime happened in BC,
- o the date of the crime, and
- o 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 intentionally used force (or tried or threatened to do so)

The prosecutor must prove that you intended to use force, and that the assault wasn't an accident. An attempt to use force or a threatening act or gesture can be an assault, but only if you could have carried out the threat (or caused the victim to reasonably believe that you could have carried out the threat or attempt). Threatening someone who isn't nearby is still a crime; it just isn't considered assault.

For example, if you said to someone on the phone, "I'll hit you," that wouldn't be assault because you weren't there and couldn't have done it. (However, it could be the offence of threatening.) But if you said that to someone in the same room, it could be considered an assault if you

had the ability to (or the other person could reasonably believe that you were going to) use force.

The prosecutor will ask the victim, along with anyone else who was present, to give evidence about the force you used (or tried to use) or the threats you made.

## □ The other person didn't consent

The prosecutor must prove that you used force (or tried or threatened to do so) against the victim without their consent.

The prosecutor might argue that the victim consented out of fear, or that you tricked the victim into consenting. In either case, the prosecutor would argue that there was no real consent.

## 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** (generally up to 2 years less a day for summary offences; up to 5 years for an indictable assault; up to 10 years if a weapon or imitation weapon is used or bodily harm is caused; or up to 14 years for aggravated assault. A conviction on

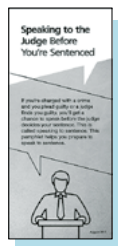
an indictable assault against an “intimate partner” (including a current or former spouse, common-law partner, or dating partner) carries even higher jail terms.

(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.

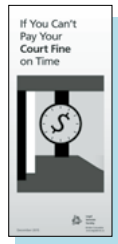
Get the brochure *Speaking to the Judge Before You’re Sentenced* and read it before you go to court.



## Paying a fine

The maximum fine for most summary offences is \$5,000.

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 committed the assault)
- ☐ **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 intentionally used force** (or tried or threatened to do so)
- ☐ **other person didn't consent**



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### Remember:

- o If the Crown prosecutor's case is weak or inconsistent in one of the above areas, mention this in your submission (see page 10) 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 [provinciacourt.bc.ca/locations-contacts](http://provinciacourt.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**.

- o 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.
- o If you live in Victoria, the Law Centre may be able to help you. Call **250-385-1221** for more information.
- o 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).
- o A legal advocate can also support you. Find a local organization on the HelpMap at [clicklaw.bc.ca/helpmap](http://clicklaw.bc.ca/helpmap).
- o For more information about the law, go to [clicklaw.bc.ca](http://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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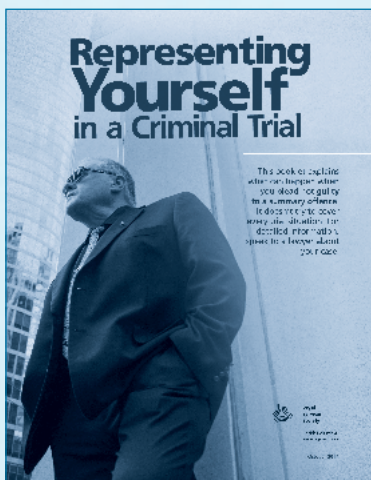
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