

The Law of Consent and Sexual Assault in Canada: Frequently Asked Questions

Q. What is consent?

A. Consent means voluntary agreement to participate in sexual activity. Consent is legally required for all sexual touching. Sexually touching a person without their consent is sexual assault, a criminal offense.

Q. What counts as sexual touching?

A. Sexual touching can include touching any body part of the body in a sexual way, not just the genitals. For example, it can include touching someone's breasts, butt, or pubic bone. It can also include indirect touch (for example, with an object). Sexual touching can be underneath or over top of someone's clothing.

Q. According to the law in Canada, does consent always have to be communicated through words? Or can it be communicated through actions?

There is legal consent only if you are saying or doing something to show clearly that you agree to the sexual activity. The Supreme Court of Canada has ruled that silence does not mean consent.

Refusing to give consent can also be communicated by both actions and words. People show their refusal to give consent in many ways other than by saying "no." For example, pushing someone's hands away is an action showing that there is no consent.

Q. Are there situations where a person cannot legally give consent?

A. Yes. For example, there's **no legal consent** in these situations:

- If you're too young to give consent in that situation. See the next question for details.
- If you're asleep or unconscious.
- If a person has abused their position of authority or power to convince you to say yes, and you're afraid something bad might happen if you say no.
- If someone uses force on you or another person.
- If someone threatens you or another person.
- If someone misleads you on purpose about the sexual activity or the harm that may result. For example, if a doctor gets your consent for a medical procedure but actually does something sexual to you; or if someone lies to you that they are using protection to prevent pregnancy or sexually transmitted infections (STIs).

Q. How old do you have to be to give consent for sexual activity in Canada?

A. The age of consent in Canada is 16 years old. But there are three exceptions:

- A youth who is 12 or 13 years old can give consent with someone who is less than two years older (measured precisely, from birthday to birthday).
- A youth who is 14 or 15 years old can give consent with someone who is less than five years older (measured precisely, from birthday to birthday).
- Youth under the age of 18 cannot give consent with anyone who is in a position of authority or power over them, like a doctor, sports coach, teacher, or family member.

Q. Legally, can a person give consent if they are drunk or high?

A. Before we give a legal answer to this question, let's be clear:

Doing anything sexual with someone whose judgment is affected by drugs or alcohol can cause serious harm. If you want to do something sexual with someone who's been drinking alcohol or using drugs, you must be very careful that their thinking is clear. They must be able to decide freely if they want to be sexual with you and be able to communicate their consent clearly. If you are not sure whether they are thinking and communicating normally, wait until they are sober to check for consent.

Now for the legal answer:

Legally, agreeing to sexual contact while drunk is still consent. And under the law, you cannot take away your consent after the sexual activity has already happened (for example, when you become sober later on).

The law looks at intoxication and consent on a case-by-case basis. There are situations where a person is too high or drunk to give legal consent. Courts have found that no consent is possible when a person's intoxication causes a loss of consciousness or an inability to control the body. This is a very high level of intoxication.

If someone is intoxicated because of someone else's actions (like drugging or drink spiking), the courts are more likely to find that no legal consent is possible.

It is important to know that a sexual assault conviction can happen even if the person was drunk or high at the time that they assaulted someone.

Q. Is there a legal requirement to tell sexual partners about any sexually transmitted infections (STIs), including HIV?

A. There is no general legal duty to tell people that you have an STI before you get their consent to sex. However, people who have HIV may face criminal charges if they do not tell partners that they have HIV before having sex with them. They can be charged with aggravated sexual assault if the court thinks there is "a realistic possibility of HIV

transmission.” They can be charged even if the other person does not get HIV from having sex with them.

This is an area of the law that is evolving. In 2012, the Supreme Court of Canada ruled that there is no requirement to disclose HIV status if a condom is used for vaginal sex, or if the HIV-positive person has a low viral load.

The law may also require you to tell someone that you have an STI other than HIV before sex if there is a significant risk you would transmit the STI to the other person and the STI would cause serious physical harm.

Q. Can you give legal consent ahead of time? For example, can you give consent for someone to have sex with you when you are unconscious?

A. No. In order to consent legally, you must be conscious at the time you are participating in a sexual activity. You must be able to give or refuse consent to each sexual activity as it is happening.

Also, under the law, you must be free to change your mind at any time. Consent must be ongoing.

Finally, the law says clearly that only *you* can give consent for your own participation in a sexual activity. No other person can give consent on your behalf.

Q. What if a person mistakenly believes that there was consent?

A. If you want to do something sexual with another person, **you are legally required to take reasonable steps to make sure that they are giving consent.**

Mistakenly believing that someone gave consent *is not* a defence under the law when the mistaken belief is a result of any of these factors:

- Choosing to take drugs or alcohol that affected your thinking,
- A reckless attitude about whether or not the other person is consenting
- Intentionally ignoring signs that the other person might not be consenting

Guessing about whether another person is consenting can lead to serious harm. Communicate directly with the other person to be totally sure that they are consenting.

Q. Legally, can you take away your consent after the sexual activity has already happened?

A. No. If you gave your consent at the time of the sexual activity, the law would say you consented, even if you change your mind after the sexual activity is over. But if you feel bad about a sexual experience afterwards, those feelings are valid and important. You can still get

support to deal with what happened, like phoning a support service, talking to someone you trust, or using counselling services at your school. Check out the resource list for some ideas.

Q. Does sexual assault always involve touching the genitals or penetrating the vagina or anus?

A. No. Sexual assault involves touching any part of a person's body in a sexual way without consent.

In cases where the parts of the body that are touched are not usually thought of as sexual, it can be more difficult for a court to find that a sexual assault occurred. For example, a back rub may or may not be sexual assault. The court will look at the context, including factors like:

- The relationship between the people
- The ages of the people
- Any conversation happening at the time (including the tone of voice)
- The way the person is using their hands
- Where exactly on a person's back the hands are touching

An important factor for the police and courts is how the touching made the person feel: Did it feel uncomfortable and wrong?

Q. Are there different types of sexual assault under the law?

A. Yes. The *Criminal Code* outlines three levels of sexual assault:

- **Sexual assault level 1 (section 271 of the Code):** This level of sexual assault harms the sexual integrity of the victim but does not necessarily involve a physical injury.
- **Sexual assault level 2 (s. 272):** This level of sexual assault involves a weapon, threats of physical harm, or actual physical harm.
- **Aggravated sexual assault (s. 273 (1)):** This level of sexual assault results in serious injury or is life-threatening.