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# **A GUIDE TO THE LAW IN ALBERTA REGARDING**

## **THEFT, FRAUD & POSSESSION OF STOLEN PROPERTY**

version: 2006

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## THEFT, FRAUD & POSSESSION OF STOLEN PROPERTY

|   |    |
|---|----|
| THEFT .....   | 2  |
| What is Theft? .....  | 2  |
| The Criminal Code definition of Theft .....                                       | 2  |
| What happens upon arrest? .....   | 3  |
| What is restitution? .....  | 4  |
| Civil Liability to Complainant .....  | 4  |
| What are the defences to a charge of theft? .....                                 | 5  |
| What is “colour of right”? .....  | 5  |
| What is the “I forgot” defence? .....   | 5  |
| What are the options once a person has been charged?<br>.....                     | 5  |
| If an accused pleads not guilty... ..   | 5  |
| If an accused pleads guilty... ..   | 6  |
| What is Alternative Measures and Victim Offender Mediation<br>programs? .....     | 7  |
| FRAUD AND POSSESSION OF STOLEN PROPERTY<br>.....                                  | 8  |
| What is Fraud? .....  | 8  |
| The Criminal Code definition of Fraud .....                                       | 8  |
| Switched price tags and mistakes in deposits<br>.....                             | 9  |
| What is the offence of possession of property obtained by<br>crime? .....         | 9  |
| The Criminal Code definition of Possession of Property<br>obtained by Crime ..... | 10 |
| REFERRAL NUMBERS .....  | 11 |

## THEFT

### 1. What is Theft?

A theft occurs when a person takes or uses something which does not belong to him or her without the owner’s permission. It is also considered theft if a person moves something which he plans to steal or take. There are two parts to a charge of theft. First, there must be an act of taking, moving, or using something without the permission or knowledge of the true owner. Second, the person taking or moving the item must have known that the property belonged to someone else. This means that if the person who took or moved the item honestly believed that he or she had the right to take or use the object, or made a mistake as to who owned the object, then he or she should not be found guilty of theft. For a person to be found guilty of theft both parts of the offence must be proven by the Crown Prosecutor in Court.

#### a. The Criminal Code definition of Theft

Section 322 is the Criminal Code section which defines theft. This section creates two possible charges: Theft over \$5000 and Theft under \$5000. The difference between a charge of Theft under \$5000 and a charge of Theft over \$5000 is in the value of the property taken and the punishment the person charged will receive if he or she is found guilty.

When a person is charged with Theft under \$5000, he or she is charged under s.334(b) of the Criminal Code of Canada. This section says that if a person is found guilty of taking something worth less than \$5000, he or she can be found guilty of either an indictable offence or a summary offence. The Crown Prosecutor will decide whether the charge of Theft under \$5000 will be an indictable charge or a summary charge. Indictable offenses are more serious. If a person is found guilty under s.334(b) of an indictable offence, then he or she could be sentenced to a prison term of up to two years. If a person charged under s.334(b) is

found guilty of a summary offence, then he or she could be fined up to \$2000 **and** could be sent to prison for 6 months or less.

When a person is charged with Theft over \$5000, then he or she is charged under s.334(a). This is an indictable offence and if the person who is charged is found guilty, then he or she could be sentenced to jail for up to ten years. A person who is charged with s. 334(a) should seek the advice of a lawyer because of the seriousness of the charge.

**b. What happens upon arrest?**

When a person is arrested, he or she must be told of the right to counsel, and should be given an opportunity to call a lawyer. Once a person has been arrested, he or she can also be searched. Generally, if a person was stopped by a security guard, the police will be called to the store and the security guard will tell the police what happened. Once the police have heard the security guard's story they will decide if they are going to arrest the person. If the police decide to charge the person then they will give the person an Appearance Notice. This notice requires the person who has been charged with a criminal offence to go for fingerprints and to appear in Court. Also, the person who has been charged may be told they are no longer allowed to come into the store.

The arrest procedure described above must be followed. If it is not followed then the person who was arrested may have a defence because his or her rights were violated during the arrest. It is best for a person who thinks his or her rights may have been violated to talk to a lawyer. Some rights that could be violated during an arrest are the right to talk to a lawyer, the right to be free from **unreasonable** search and seizure or the right to be free from **arbitrary** (arrested for no reason) arrest and detention.

If a person has a long criminal record, or has taken something worth a considerable amount of money, he or she may be taken

into custody. While in custody, a person may want to contact a lawyer to discuss bail and whether or not he or she should answer questions or should exercise the right to remain silent.

A person may also wish to seek professional advice regarding his or her court appearance. When a person attends Court on the date in the Appearance Notice, he or she will enter a plea of not guilty or guilty. If a person pleads guilty, he or she will probably be sentenced that day. If a person pleads not guilty he or she should see the Crown Prosecutor before going to the Trial Co-ordinator's counter and scheduling a trial for the amount of time recommended by the Crown Prosecutor. The trial date will probably be about six to ten weeks later.

**c. What is restitution?**

Restitution means to restore, or to put things back to the way they once were. If a person is accused of theft, or found guilty of theft, he or she may be asked to make restitution. In this situation, restitution means that the person must give back the items taken or moved. He or she must try to put the true owner of the goods back into the position he or she was in before the theft occurred. If the goods can no longer be returned, it may be that there is something else the true owner will take to replace what was stolen. If a person is planning on pleading guilty, he or she can make restitution to the true owner before pleading guilty. If a person is pleading guilty and has made restitution it is important for that person to tell the judge. Sometimes when a person has made restitution the judge will consider this and give the person a lighter sentence.

**d. Civil Liability to Complainant**

In some cases involving theft from retail stores, you may receive a letter after the fact from the store regarding possible civil legal action against you. This is separate from your criminal charge and has specific unique issues. Before you take any action you

should consult a lawyer or Student Legal Services to discuss your potential liability.

## **2. What are the defences to a charge of theft?**

### **a. What is “colour of right”?**

For the taking of something to be a theft, the taking must be “without colour of right”. This means that if the person accused of theft honestly believed that he or she had a legal right to take the property, then he or she cannot be found guilty of theft. This defence does not apply where the accused honestly believed he or she deserved to have the property or where the accused thinks that it is fair that he or she get the property.

### **b. What is the “I forgot” defence?**

To be guilty of the offence of theft the person who has been accused must have known that he or she did not own something and have intended to take that thing or move it away from the true owner. This means that if a person honestly forgot to pay for an item, but didn’t intend to leave the store without paying for it, he or she **may** not have had the specific intent to steal and may not be guilty of theft. This may be defence to a charge of theft. However, people are generally assumed to intend their actions and if a person leaves a store without paying, it may be difficult for a judge to believe the person intended to pay for the item.

## **3. What are the options once a person has been charged?**

### **a. If an accused pleads not guilty...**

If a person decides to plead not guilty he or she will have to set a trial date. If he or she wants to set a trial date without a lawyer or the help of Student Legal Services, he or she should talk to the Crown Prosecutor and ask how much time the Crown Prosecutor needs for a trial on the file. Once the person has spoken to the Crown Prosecutor, he or she should go to the Trial Coordinator’s office to find out which dates are available for a trial of the length

requested by the Crown Prosecutor. The trial date must be accepted by the judge. Duty counsel can help people set the trial date in front of the judge or the accused can set the date by stating, when his or her name is called, that he or she is pleading not guilty and have set a trial date subject to the judge’s approval. The judge will then, probably, accept the date.

Running a trial can be complicated and an accused person may require some help. It is important for the accused person to get disclosure from the Crown’s office. Disclosure is the Crown’s case against the accused. It includes the police description of the events leading to the charges against the accused, the accused’s previous criminal record and any witness statements.

An accused may want to get some help from a lawyer or from Student Legal Services. Legal Aid may also be able to assist an accused. No matter who the accused person goes to for help, he or she should get help as soon as possible after being charged in order to give the lawyer time to prepare the case for trial.

### **b. If an accused pleads guilty...**

If a person decides to plead guilty, he or she will probably be sentenced immediately. Depending on the circumstances of the offence the sentence will vary. For example, the judge may consider whether the accused has made restitution, whether he or she has previous convictions, and the personal circumstances of the accused. An accused person can be given a fine, a term of probation, or a term of imprisonment. If an accused pleads guilty he or she should say whether or not restitution has been made and should say whether or not he or she is receiving counselling so that he or she does not steal again. If the person is employed he or she should tell the judge. Also, the judge should know what sort of fine the person can afford and how much time the person will need to pay a fine or to work it off through the Fines Option Program.

If a person has no criminal record and the value of the goods stolen is small, the Court may grant an absolute or conditional discharge. A discharge means that the person was not convicted of the offence and therefore, he or she does not receive a criminal record. However, the entry will remain on a printout of the record for one year if the person received an absolute discharge. If the person received a conditional discharge, the entry will remain on the record for 3 years from the date that the conditions expire.

Discharges can be conditional or absolute. An absolute discharge means that the accused will not be punished. A conditional discharge means that a person must perform certain tasks in order to get the discharge. Usual tasks include reporting to a probation officer and paying back the store or person who had their stuff taken. If the person who receives the conditional discharge does not do what the judge tells him or her to do, then he or she can be brought back to Court and sentenced again. When a person who received a conditional sentence is sentenced again, he or she may receive a harsher sentence.

#### **4. What is Alternative Measures and Victim Offender Mediation programs?**

If an accused is being charged with an offence for the first time, the accused may wish to avoid having a criminal charge by going through the Alternative Measures Program. The Alternative Measures Program requires that the accused take responsibility for his or her actions and make up for the theft by completing the tasks assigned by a probation officer. Once these tasks are finished, the Crown's office withdraws the charge. Student Legal Services can assist a person who wants to apply to the Alternative Measures Program. The decision of whether a person is accepted into the program is made by the Crown's office.

Another way of dealing with a charge and avoiding a criminal record is by going through Victim Offender Mediation (VOM) program (a program of the Mediation and Restorative Justice

Centre). This program, generally, is for charges that arise out of situations between two people who know each other. To participate in this program, the accused person's file must be approved by the Crown Prosecutor. Once the file has been approved, the people who were involved in the incident which lead to the criminal charges will meet in an office at a mediation centre. The mediators will help the accused, and the people who were affected by the accused's actions, to come to an agreement about what the accused should do to make up for his or her actions. Once the accused person has done the things that he or she has agreed to do, the accused will appear in Court and the Crown will withdraw the charges. Student Legal Services can help fill out applications for the VOM program for people who have been charged with theft but think that the case could be settled through mediation.

### **FRAUD AND POSSESSION OF STOLEN PROPERTY**

#### **1. What is Fraud?**

What happens when the owner of property gives it to someone else, by mistake, because the other person has fooled them? An example of this occurs when a person has switched the price tags on two items. Although in this situation people are often charged with theft, a person could also be charged with fraud. The offence of fraud can be described as the act of dishonestly affecting the price or value of something with the goal of depriving any person. This means that a person, in order to pay a lower price for something, has planned to pay for a less expensive item but leave the store with the more expensive item.

##### **a. The Criminal Code definition of Fraud**

Section 380 is the Criminal Code section which defines fraud. This section creates two possible charges: Fraud over \$5000 **or** involving a testamentary instrument, **and** Fraud under \$5000. A testamentary instrument is either a will or a legal trust which a

## A GUIDE TO THE LAW IN ALBERTA REGARDING THEFT, FRAUD & POSSESSION

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person has set up so that his possessions will be given to family and friends once he or she has died.

If the value of the fraud was over \$5000, or involved a testamentary instrument, it is an indictable offence. If a person is found guilty of this offence he or she could be sent to jail for up to ten years.

If the value of the fraud was under \$5000, and did not involve a testamentary instrument, then the Crown prosecutor will look at the facts of the case and decide whether to charge the person with an indictable or summary offence. If the person is charged with an indictable offence then he or she could be sentenced to a jail term of two years or less. If the person is charged with the summary offence of fraud under \$5000, he or she can be fined up to \$2000 and sentenced to a jail term of six months or less.

### **b. Switched price tags and mistakes in deposits**

Sometimes the person who has been charged with theft does not realize that he or she has committed a theft. For example, if a person switches the price tags on two items and then leaves the store, knowing that he or she is paying less for the item being bought than the original price tag, then that person may be charged with Theft. Also, if a bank deposits money in a person's account and the person **knows** the bank made a mistake, but spends the money anyway, then that person may be charged with theft. In the bank example the person can only be found guilty if he or she intentionally spent the money knowing that it was not his or her own.

## **2. What is the offence of possession of property obtained by crime?**

The offence of property obtained by crime is made up of two parts. First, a person charged with this offence must have property that was (or was partly) gained by Theft, Fraud, or any other crime. Second, the person must have known that the

## A GUIDE TO THE LAW IN ALBERTA REGARDING THEFT, FRAUD & POSSESSION

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property was stolen or gained by fraud. Also, if the Crown can show that it was obvious that a reasonable person would have thought the property was stolen and the accused failed to investigate whether it was stolen or not, he or she can be found guilty of possession of stolen property.

If a person is found in possession of something that has recently been stolen, they may have to provide an explanation for why they had the object to avoid guilt.

### **a. The Criminal Code definition of Possession of Property obtained by Crime**

The Criminal Code section that describes the offence of possession property obtained by crime is section 354. Section 354 states a person is in possession of property obtained by crime if that person has the property in their room, their home (if the person does not share their home), in their car, or on themselves. Even if the original owner cannot be found or no owner can be identified, a person can still be charged. Also, where the act of theft and the possession of stolen goods are done at the same time, the person cannot be convicted of illegal possession of the same things. The punishment for being found guilty of this offence is the same as for fraud.

**A GUIDE TO THE LAW IN ALBERTA REGARDING THEFT,  
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**REFERRAL NUMBERS**

Lawyer Referral Service . . . . . 1-800-661-1095

Legal Aid Society of Alberta has offices located at the  
Courthouses in Drumheller, Hanna, Medicine Hat, Fort McLeod,  
Wetaskiwin, Grande Prairie, Peace River, Red Deer, Vegreville,  
and Lethbridge.

Edmonton . . . . . [780] 427-7575

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