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



## **ASSAULT**

**version: 2008**

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WHAT IS ASSAULT?

**1. Definition of Assault in the Criminal Code:**

The definition of assault can be found in s. 265 of the Canadian Criminal Code.

An assault can occur whenever someone touches another person and that person does not want to be touched. An assault can be anything from a punch in the face to touching someone on the shoulder, so long as the contact occurred without the consent of the person being touched. The important thing is not the amount of force used, but whether the touching was allowed and whether it was intended.

An assault can also occur when someone makes any gesture or action which makes another person reasonably feel that they are going to be assaulted. There does not need to be any touching for this type of assault to occur. For example, if someone is pointing their finger in another person’s face and they feel that they are going to be assaulted, an assault may have occurred.

Assault also occurs when a person who is carrying or wearing a visible weapon, stops another person, harasses them or begs something of them. Section 2 of the Criminal Code defines “weapon” as anything a person uses or means to use to cause someone fear, harm or death. This includes any guns, knives or other object which could be used as a weapon.

INTENTION

A person has to mean to touch or alarm someone else for an assault to happen. Accidentally bumping into someone, if they do not mean to bump into that other person, is not an assault. Also, if someone is waving their finger at someone else, but do not mean to alarm them, then they have not committed an assault.

**CONSENT**

**1. Introduction**

For an assault to occur, the person who has been touched must not have consented to the contact. If consent is found, then no assault has occurred. Consent is an important part in many activities which involve touching. For example, in a hockey game, the players have consented to the touching that occurs between them during a game. Therefore, if a hockey player injures someone, the player has not committed an assault because the injured player agreed to play the game which involved some danger of being hurt or injured. The injuries must be those that are expected in any hockey game; if they are more serious, then it might be assault since a hockey player does not consent to anything outside of the normal rules and risks of the game.

**2. Has there been consent?**

Whether or not there is consent depends on the facts of the situation. In a trial, the Crown (the prosecution) must prove that the person who was assaulted did not consent to being touched. Consent can be either express, which means the person who was touched actually said they could be touched, or implied, which means the person who was touched indicated by their actions that the touching was OK. However, there must be an air of reality to the consent. It may be implied that the touching was consensual if, in the facts of the situation, the reasonable person would assume that consent had been given. However, for consent to be implied the facts must give some support to the accused's belief that they had consent.

**3. Drunkenness**

If someone is drunk and intentionally assaults someone, they are not excused simply because they were drunk when it happened. As a matter of public policy people will not be allowed to use drunkenness as a defence to an intentional assault.

**4. When is consent NOT given?**

A person has not given consent to being touched if they merely went along with what someone was doing because they were threatened or otherwise scared. Just because someone has not said "no" does not mean they have consented.

A person also has not given consent in these specific examples:

- a. if the accused has hurt, or says they will hurt, someone else. This third person can be someone the person being assaulted does or does not know.
- b. if the accused lies to the person they assault about what the real activity is that the person is consenting to.
- c. if the accused lies to a person about who they really are so they can get that person's consent.
- d. if the accused uses a position of authority to coerce someone into consenting. Examples of relationships of authority are those between teachers and students, doctors and patients and lawyers and clients.

In these situations, no consent will be found in law no matter what the accused believed to be true.

**SELF-DEFENCE**

Self-defence is a defence to a charge of assault and it is defined in the Criminal Code (ss.34-37).

Self defence allows a person to use force only when it is necessary and to the extent that is reasonably necessary to prevent an assault.

If someone is threatening to punch a second person, that second person can use as much force as is reasonably necessary to prevent it. Punching or holding the person might be reasonable. Shooting the person would not be reasonable. Extra, unnecessary, punches also would not be justified.

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The defence of self defence is a shield. It does not justify unnecessary or excessive force.

### TYPES OF ASSAULT

If a person is charged with assault, there are two different levels of procedure a prosecutor can choose, summary or indictable. The penalties are found in s.266 of the Criminal Code.

#### **1. Assault Simpliciter**

Assault simpliciter is basic assault, touching without consent, where no harm is caused, no weapon is used, and it is not of a sexual nature.

If a prosecutor decides to proceed summarily and the person is found guilty of assault, the maximum penalty is \$2000 and/or 6 months in prison. A person who is found guilty can be ordered by a judge to pay a fine and spend some time in prison. A provincial court judge sitting alone will hear your case if it is a summary matter.

A preliminary inquiry is held to determine whether there is enough evidence with which to go to trial. There will only be an inquiry if the accused elects to have a trial in the Court of Queen's Bench and the Crown proceeds by indictment. The defence must request a preliminary inquiry. This can also be a chance for the defence to hear Crown Prosecutor's evidence.

Before a prosecutor decides if they will proceed by indictment, they will see if the accused person has a previous record with other assault convictions. They will also consider how serious the assault was and how seriously it ought to be punished.

#### **2. Aggravated Assault**

Aggravated assault is described as when an assault wounds, maims, disfigures or endangers the life of the complainant. Basically an assault becomes "aggravated" when the harm

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inflicted goes beyond minor and becomes more serious. Everyone who does in fact commit an aggravated assault is guilty of an indictable offence and could face up to 14 years imprisonment.

#### **3. Assault with a Weapon or Causing Bodily Harm**

If in committing an assault the defendant carries, uses or threatens to use a weapon or something that could be thought of as a weapon or if they cause harm to their victim, they are guilty of assault with a weapon or causing bodily harm. Assault with a weapon or causing bodily harm could be either an indictable or summary offence depending how the crown chooses to pursue the matter. If found guilty under a summary conviction, the accused faces a maximum imprisonment of 18 months. If found guilty by indictment, the accused faces imprisonment for a term not exceeding 10 years.

#### **4. Sexual Assault**

Sexual assault, sexual assault with a weapon and aggravated sexual assault are like other forms of assault in that they consist of unwanted touching. These types of assault are different only in that a "sexual" aspect is added on to the assault. The touching must violate the integrity of the victim.

Persons under a certain age cannot consent to sexual acts as a matter of law. The age depends on the circumstances, but, generally anyone under the age of 16 cannot consent to sexual activity except with other young people.

### LEGAL OPTIONS AVAILABLE TO THE VICTIM

#### **1. Pressing Charges**

If someone is assaulted the police will conduct an investigation to determine what happened before they lay charges. A victim will be asked to give the police a statement explaining to them what has happened. Usually, the police will lay a charge if they believe there is enough evidence. If the police do not lay a charge and the victim wishes to pursue the matter, they can contact the

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Provincial Court House and make an appointment with a Justice of the Peace to swear a private Information. If the Justice of the Peace finds there is enough evidence to lay a charge, a charge will be laid and a Court date set. An Appearance Notice will then be issued and given to the person accused of assault.

### **2. Peace Bonds**

A Peace Bond is a Court Order which requires a person who has threatened or assaulted someone else to keep the peace, be of good behaviour and comply with other conditions the Court believes are required for the complainant's safety for up to one year. The most common condition is that the accused stay away from the victim and not have any contact with them.

To get a Peace Bond, a complainant should:

- a. Report the incident to the police and explain why they feel afraid.
- b. Get the file number from the police and then make an appointment with the Justice of the Peace at the Provincial Court House.

It is up to the Justice of the Peace or the police to decide if the process for a Peace Bond will be started. If the Justice of the Peace decides to begin the process then the complainant will have to swear an Information and, eventually, appear in Court to persuade a judge that a Peace Bond should be issued. Once one is issued, if the person named in the Peace Bond breaches the conditions, then they can be arrested and charged with a criminal offence.

### **3. Restraining Order**

A Restraining Order is a Court Order that orders a person who assaulted someone else, or who may assault someone else, to stay away. The request for a Restraining Order often accompanies a civil action, such as divorce. A complainant may need a lawyer to apply for a Restraining Order. Those who

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cannot afford a lawyer can contact The Legal Aid Society of Alberta or the Protection and Restraining Order Project (PROP).

A Restraining Order lasts for 3 to 6 months but it can be renewed at the Court of Queen's Bench. It may even be made permanent. It is up to the complainant to make sure that the person they are afraid of follows the Restraining Order. If they breaks it, they will be arrested by the police once they are called.

The main differences between a Peace Bond and a Restraining Order are the amount of time it takes to get one and what happens to the person who breaches it. A Restraining Order may be obtained much more quickly, however it costs more than a Peace Bond. If a Restraining Order is breached, the person can be found in contempt which is not a criminal record but the person can be jailed. If a peace bond is breached, it is a criminal offence which results in both a penalty such as a fine or jail, and a criminal record.

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**REFERRAL NUMBERS**

The Legal Aid Society of Alberta . . . . . [780] 427-7575  
[www.legalaid.ab.ca](http://www.legalaid.ab.ca)

Lawyer Referral Services . . . . . 1-800-661-1095 (toll free)  
[www.lawsocietyalberta.com/publicservices/lawyerReferralService.cfm](http://www.lawsocietyalberta.com/publicservices/lawyerReferralService.cfm)

Student Legal Services  
Civil Law Project . . . . . [780] 492-8244  
Criminal Law Project . . . . . [780] 492-2226/425-3356  
[www.slsedmonton.com](http://www.slsedmonton.com)

Edmonton John Howard Society  
Victim Assistance Program . . . . . [780] 422-0721  
[www.johnhoward.org](http://www.johnhoward.org)

Native Counselling Services . . . . . [780] 423-2141  
[www.ncsa.ca](http://www.ncsa.ca)

Women's Emergency Accommodation . . . . . [780] 423-5302  
[www.e4calberta.org/weac.html](http://www.e4calberta.org/weac.html)

YMCA . . . . . [780] 421-9622  
[www.edmonton.ymca.ca](http://www.edmonton.ymca.ca)

YWCA . . . . . [780] 423-9922  
[www.ywcaofedmonton.org](http://www.ywcaofedmonton.org)

Distress Line . . . . . [780] 482-4357  
[www.thesupportnetwork.com](http://www.thesupportnetwork.com)

Legal Resource Centre website for battered women  
[www.violetnet.org](http://www.violetnet.org)

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Elizabeth Fry Society . . . Court Worker Program: [780] 422-4775  
Located on fourth floor of courthouse  
. . . . . Women's support number: 780-421-1175