

## Claim of Right: s 22(2)

---

**Under our law, a person is not criminally responsible, for an offence relating to property, if what he did [or omitted to do] with respect to the property was done [or omitted to be done] in the exercise of an honest claim of right and without intention to defraud.<sup>1</sup> [Offence charged] is an offence relating to property.**

An accused person acts in the exercise of an honest claim of right (in respect of the property the subject of the charge) if he honestly believes himself to be entitled to do what he is doing in relation to that property.<sup>2</sup> An honest claim of right may stem from a belief in a right the law does not recognize.<sup>3</sup>

**For the excuse of honest claim of right to apply, the defendant must believe that he/she has a legal entitlement to the property the subject of the charge (as for example, its owner).**

**It is not enough that the defendant believed that he/she was entitled to do what they did.**

**Also, for the excuse to apply, the defendant must act without an intention to defraud.**

**“To defraud” in this context means to do [or omit to do] something dishonestly, so the requirement that the claim of right be honest and the requirement of the absence of an intention to defraud are really two ways of saying that the defendant must have honestly believed himself to be entitled to do what he did [or omitted to do].<sup>4</sup>**

---

<sup>1</sup> See *R v Perrin* [2017] QCA 194. The offences created by sections 488 (forgery/uttering) or 408C (fraud) of the Code include elements that the defendant’s relevant act was done with an intention to defraud (s 488) or dishonesty (s 408C). For the Crown to exclude s 22(2), the Crown must prove an intention to defraud – in other words, prove dishonesty. Therefore proof of one eliminates proof of the other. There is no need to direct the jury about section 22(2) in such a case.

Intention to defraud is a subjective state of mind of the accused, but to be assessed as dishonest according to the standards of ordinary, decent people – an objective test.

<sup>2</sup> *R v Pollard* [1962] QWN 13 at 29; *R v Waine* [2006] 1 Qd R 458 at [27].

<sup>3</sup> *R v Williams* [1988] 1 Qd R 289. In *R v Mill* [2007] QCA 150 at [81] the Court noted with approval the suggested direction and its focus upon the belief of the accused person to do the act the subject of the charge.

<sup>4</sup> See *R v Perrin* [2017] QCA 194 at [72]: “The meaning of dishonesty has been accepted as explaining an intention to defraud.” The Court cited Toohey and Gaudron JJ in *Peters v The Queen* (1998) 192 CLR 493: “In a case in which ... a jury [has] to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest.”

The question whether a person holds an intention to defraud is subjective – but it is to be assessed objectively, according to the standards of ordinary, decent people.

**Dishonesty – or an intention to defraud – is a subjective state of mind, to be assessed according to the standards of ordinary decent people.**

**Remember the onus of proof. The defendant does not have to prove that he/she made an honest claim of right without intention to defraud. The prosecution must satisfy you beyond reasonable doubt that he/she did not do so.**

**So if the prosecution has failed to satisfy you beyond reasonable doubt that when [the defendant] [details of act or omission (e.g., took the suitcase owned by X)] he did not honestly believe he was entitled to [act or omission, (e.g., take it)], you must find the defendant not guilty.**