



2024 MICROLEARNING SERIES

# CRIMINAL SECONDARY LIABILITY FOR DIRECTORS, OFFICERS, AND SENIOR EMPLOYEES

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# VIDEO 1: CRIMINAL SECONDARY LIABILITY IN CANADA

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It is a situation corporate counsel dreads. Your corporation is under a criminal or regulatory investigation or prosecution – and your CEO, CCO, CFO, or some senior officer is also being investigated.

In the first of our three-video series, I will describe two main ways an agent associated with a corporation can be found criminally liable. When I use the word "agent", I mean an individual associated with the corporation, usually a director, an officer, an employee, a contractor, or an agent.

## PRIMARY LIABILITY

Primary liability is how a person is liable for an alleged crime because they committed the offence: they are the primary actor of the actions forming the offence. When the Crown charges a director or officer of a corporation, that corporation is usually an owner-operated one.

We often see primary liability offences in environmental statutes. For example, the definition of an environmental offence may be that the accused person possessed, controlled, or directed a substance to be released into the environment. In that way, it is not just the corporation that commits a crime. The person with direction, control, or possession of the substance also can be liable for that crime.

In those circumstances, the corporation and the individual, jointly, may be liable for releasing the substance into the environment. This situation can also include aiding, abetting, or counselling the offence. It is rare to see this in the case law, but it is theoretically possible.

## SECONDARY LIABILITY

Most regulatory statutes also allow individuals who are associated with a corporation to be found guilty of a crime committed by that corporation, when part of the events leading to an offence – this is considered Secondary Liability.

Secondary Liability requires the Crown to prove three things:

1. that the corporation committed the offence;
2. that the person charged is in the class of individuals who might be found secondarily liable for those offences, and
3. there is a connection between the person charged and the corporation.

Secondary liability implicates directors, officers, and senior employees who may not have been involved in executing the acts that led to an offence. However, they may also be found guilty of the offence because they had a decision-making role.

## SECONDARY LIABILITY VS VICARIOUS LIABILITY

Before discussing three ways one can be found liable, it is essential to distinguish secondary liability from vicarious liability.

**Vicarious liability** occurs when an agent or employee commits an offence while employed with the corporation. The liability flows from the individual to the corporation, and the corporation is automatically liable for the offence as a matter of law. Even if no one else in the corporation was involved, the corporation is responsible for the offence committed by the individual.

Secondary liability is the other way around: the corporation commits an offence, whether through other employees, other agents, or other contractors, but the director and officer who might have controlled the circumstances is found guilty of the corporation's offence.

## THREE ELEMENTS OF SECONDARY LIABILITY

### THE CORPORATION IS CULPABLE OF THE OFFENCE

There are three ways secondary liability can be proven. First, the Crown must prove the corporation is guilty of the offence. If the corporation is not guilty, the individual is also not guilty.

Keep in mind, the Crown can charge the individual without charging the corporation, even though the Crown must prove that the corporation committed the offence. Consequently, as defence counsel, when asked to defend a person charged under a Secondary Liability Provision, I will often argue that the corporation is also not guilty -- in addition to the other defences specific to the individual.

### THE DEFENDANT IS IN A CLASS OF INDIVIDUALS COVERED BY SECONDARY LIABILITY

The second part of the test is that the person charged must be within the class of individuals covered by the Secondary Liability Provision.

Wording across provinces and statutes differ, but individuals usually include directors, officers, employees, contractors, and agents. Suppose a person is in the class of those individuals within the definition of the statutes. In that case, they may be liable under a Secondary Liability Provision.

In my experience, the Crown is usually the most concerned with the person or people we often call the "**directing mind**" of a corporation. Furthermore, that is who they usually prosecute under these provisions.

## THE CONNECTION BETWEEN THE INDIVIDUAL AND THE CORPORATION

The third and final test that the Crown must prove is the connection between the individual and the corporation alleged to have committed a crime.

This varies by statute and province, but most statutes will have three out of these four definitions. The statute will include that the person charged must **direct, permit, authorize, or acquiesce**.

**Direct** speaks for itself: for example, the person charged may be an individual like a CEO who gives direct orders for the corporation to do something that results in a crime.

**Allow or permit** often considers circumstances when someone in the corporation approaches a director with a proposed course of action. Moreover, though the director might not conceive of that action, they *allow* someone else to proceed with a course of action that leads to an offence.

**Acquiescence** usually refers to knowledge or awareness of circumstances that might lead to an offence but doing nothing about it. It is the broadest set of circumstances in which one can be found to be secondarily liable.

When these microlearning videos are filmed, acquiescence is the most controversial in Canada because the country is split on addressing this problem.

In some provinces, notably British Columbia, the courts are on a path where *awareness of risks* alone might cause a person to be considered to have acquiesced to risks that might lead a corporation to commit an offence.

Other provinces are clearer in that acquiescence needs to be knowledge of circumstances where an offence is being committed; often, it is an ongoing offence, and the director, officer, or employee does nothing about it.

At Ascendion Law, we believe the latter is the better view. Because risk, as an idea, is more about **due diligence**. Suppose you are aware of the risk of an offence being committed or that could be committed. In that case, a responsible director or officer can engage in due diligence to mitigate that risk.

While acquiescence is better thought of as knowledge of an ongoing circumstance, for example, a director or officer knows that oil is being poured into a pond and does nothing about it, that can be a clear case of acquiescence.

Business always entails risk. Mitigating every possible unreasonable or reasonable risk is impossible. This is why we believe acquiescence is better seen as knowledge of ongoing circumstances constituting an offence.

My caution, however, is that this point of law is controversial. It requires appellate resolution.

## ACQUIESCENCE CASE STUDY: R. V. A & A FOOD LTD.

<https://www.canlii.org/en/bc/bcsc/doc/1997/1997canlii2163/1997canlii2163.html>

A clear illustration of acquiescence is the decision out of British Columbia called A & A Food. A cheese company was charged with handling unlabeled cheese. The director was also charged under secondary liability provisions. In that trial, the evidence was that the subordinate told the director they had unlabeled cheese in the warehouse. The director did nothing about it.

In that case, it was acquiescence because the director was told that there was a risk of unlabeled cheese in the warehouse and that there was unlabeled cheese in that warehouse thus when the inspector came and found out that the director knew about that circumstance and did nothing about it, that engendered the culpability of that director under the secondary liability provisions.

## SUMMARY

This video has reviewed the two primary ways individuals associated with the corporation can be found liable for the offence of the corporation: primary liability and secondary liability.

Secondary liability is how most directors, officers, and senior employees of a large corporation are found liable. We have also reviewed acquiescence because it is the broadest and most risky way for a director, officer, or senior employee to be found guilty of offences of a corporation.

**Visit our website for the following two videos in this series.**