2024 MICROLEARNING SERIES

CRIMINAL SECONDARY LIABILITY FOR DIRECTORS, OFFICERS, AND SENIOR EMPLOYEES

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VIDEO 2: SEE THE SIGNS - SHIELDING YOUR COMPANY IF AN INSPECTION BECOMES AN INVESTIGATION

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In the second video in our Criminal Secondary Liability in Canada series for corporate counsel, I discuss the tricky problem of how to handle yourself when dealing with government regulators – and when you know there may be an investigation or a prosecution around the corner.

As corporate counsel, you are on the front lines when government agencies come to your company's door looking for information.

This may happen frequently if you are in a heavily regulated industry like natural resources or financial services. Government agencies have significant powers to ask for information, whether it is an inspection, like going to a restaurant and looking at the kitchen, or asking for documents, like Revenue Canada employees asking for audit information.

In some cases, your company must comply with these government inspections or audits. Many statutes require your company to comply with ongoing monitoring, auditing, or other inspection requirements. In some cases, it may be a criminal offence not to cooperate or comply with the demands made of inspectors or auditors.

Further, many companies have codes of conduct consistent with their social obligations to respect the demands of government agencies and regulators when they ask for information.

BALANCING COOPERATION WITH POTENTIAL CRIMINAL LIABILITY

Under these circumstances, the first instinct of most companies, and especially corporate counsel, is to comply with these requests for information and cooperation from government agencies.

No reputable business wants to be seen as a bad actor. Everyone wants to do the right thing and to be seen to do the right thing. But this tendency can be abused by government.

The case law is replete with examples of instances of government overstep; where a government power for inspection, or to compel an audit, or a demand for documents is misused. The company then suffers a consequence in a criminal or regulatory prosecution, as a result of a good faith desire to cooperate with government inspections.

UNDERSTANDING YOUR COMPANY'S RIGHTS IN AN INVESTIGATION

The starting point of any criminal lawyer's approach to this problem are certain legal rights under the Charter of Rights and Freedoms, namely section 7, 8, 9, and 10. Those are, of course, the rights against incrimination, rights from unreasonable search and seizure, and rights to counsel on detention or arrest. Some of these may sound dramatic, especially in the corporate setting, but they have implications for your business.

Most particularly, your client has a right **not to be compelled to give information against themselves in a criminal investigation**, and to have that information adduced in a trial, in a prosecution against themselves. It is simply seen to be unfair in the Canadian context.

The courts recognize that regulated industries cannot function effectively or efficiently without the cooperation of those participating in the industry. For example, in the fisheries context, a quota system cannot function without requiring everyone to report the results of their catch daily or weekly.

On the other hand, the courts are very reluctant to allow someone who provides information for the system's benefit to then have that information used against them in a criminal prosecution. It goes against the principle against self-incrimination.

CROSSING FROM INSPECTION TO INVESTIGATION: THE FITZPATRICK TEST

The courts have developed clear tests about when an inspection or audit or other compliance related activities moves into a criminal investigation.

At high level, the Supreme Court of Canada has developed a test in R. v. Fitzpatrick, a fishing case, that lays out four different factors the courts will look at to determine whether or not a permissible regulatory exercise has moved into an investigation, and therefore the principles of self-incrimination should be respected.

These four factors include:

1. the presence or absence of **coercion** at the time that the information is being sought;
2. the nature of the relationship between the state and the person at the time the information is sought, and specifically, whether that relationship is **adversarial** in nature;
3. the risk of an **unreliable confession** that comes from the exercise of that power; and
4. an overarching concern from the courts to ensure that the moment at which the information is being sought is not subject to **abuse** by the state.

WHEN THE RELATIONSHIP BECOME ADVERSARIAL: THE JARVIS TEST

As a litigator, in my experience, the battleground is often the nature of the relationship: **was it adversarial at the time?**

The courts will often look to a multi-part test that was developed in R. v. Jarvis, a tax case, to determine whether the relationship of the state had turned from a cooperative, inspectional role, into one of a criminal investigation that might result in a criminal prosecution. The traditional formulation involves eight factors. To simplify the analysis, I like to group those eight factors into three broad themes, though not exhaustive, including:

- were there reasonable and probable grounds at the time of the incident to warrant the inspector starting a criminal investigation;
- whether the inspector or auditor's actions proceeded as if it was an investigation; and
- was there a referral to an investigative body.

For example, the CRA has both civil and criminal investigative units. Thus, in this example, the courts may consider if there was a **formal referral** from the civil side to the criminal side. They may consider if there was a **de facto investigation**, where the administrative side was using tools that were more akin to a criminal investigation. They may also consider if there was **communication** between the criminal side and the civil side, such that the criminal investigators are giving directions or advice, almost using the administrative or civil side as **agents** of the criminal side.

WHEN QUESTIONS IMPLY CRIMINAL INTENT OR MOTIVATION

The **types of questions** are also an important indicator in the Jarvis test. In other words, were the civil auditors or inspectors asking questions that would only be relevant to a criminal investigation?

As a defence counsel, I look for questions such as: What were you thinking? What were you intending? What were your motivations for engaging in the behaviour that you did?

In administrative matters, intention or the reasons why someone would have done something that was contrary to the law is usually irrelevant. It is only relevant if the Crown intends to prosecute them as a crime, alleging that the individual intended to violate the statute.

So these three warning signs – the Fitzpatrick test, the Jarvis test, and specifically questions of motivation – are clear signs to defence counsel that government agents may have crossed the line into a criminal investigation.

WHAT TO DO WHEN YOU SEE THE WARNING SIGNS OF A CRIMINAL INVESTIGATION

As corporate counsel, it often falls to you to advise your company when cooperation with the government or your company's regulators may need to stop and you need to take a more cautious, defensive position. As defence counsel, I have some general, practical recommendations when you see indicators that your company may be the subject of a criminal investigation.

First, ask outright if there has been a **referral** to the criminal investigation unit, the RCMP, or to any other department more responsible for criminal type investigations. If so, you will want to start asserting Charter Rights. For instance, you can provide a statement from your company, but state you are reserving your client's rights under section 7, 8 and 9 of the Charter.

Second, carefully review any **production orders.** If your company is being served with production orders requiring you to produce documents, or to provide witness statements or chronologies, make sure you are documenting those production orders, the responses, and asserting your client's Charter Rights when you are making those answers.

Third: **document, document, document**. I'm sure as corporate counsel, you document everything and tell everyone else at the company to document everything, especially when you know or suspect that something has crossed over into an investigative realm. Start documenting anything that could be used by defence counsel to establish that the contact that was inspectional has now turned into an investigation.

Fourth, if the documentary or the evidentiary claims or demands are becoming quite onerous, consider the possibility of seeking **judicial review** to quash government action before it becomes an investigation. Judicial reviews are costly -- but if the stakes are high enough, it might be worth the investment.

And finally, **consult** with outside criminal defence or regulatory defence counsel as soon as you see the signs of a criminal investigation, or immediately after a serious incident. As discussed in our first video in this series, the case law in this area is constantly evolving. Consulting with experienced defence counsel early in the process can provide you with guidance, develop a successful strategy to balance your client's rights and obligations, and identify potential pitfalls where the interests of the company and individuals in the company may diverge.

Visit our website for the other videos in this series.

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