



2024 MICROLEARNING SERIES

CRIMINAL SECONDARY LIABILITY FOR DIRECTORS, OFFICERS, AND SENIOR EMPLOYEES

PRESENTED BY ASCENDION LAW &
THE CANADIAN CORPORATE COUNSEL ASSOCIATION

ASCENDION LAW



Canadian Corporate Counsel Association
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juridiques d'entreprises

VIDEO 3: ESTABLISHING A SUCCESSFUL DEFENCE STRATEGY

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In this third and final video, I want to cover two areas. First, I want to discuss the circumstances in which you will want to retain external counsel to protect the interests of your director, officer, or key employee in a criminal investigation or regulatory prosecution. And second, I want to cover the areas, documents, and information corporate counsel will want to review to assess your company's potential exposure to criminal liability and also that of your key employees.

BALANCING THE INTERESTS OF THE CORPORATION AND KEY EMPLOYEES

As counsel, your first duty is to your employer: the corporation. However, your direct supervisor is someone who may need to be referred out for external help because the interests are not necessarily aligned.

The CEO, CFO, Senior Vice President, someone of a significant authority within the company might be the person giving you instructions; but you need to remember that your first loyalty is to the corporation, not to that individual.

That will become difficult if that individual may have different interests than that of the corporation. As I discussed in our first video, directors, officers, agents, and key employees have different interests from that of the corporation. **They are separate parties.**

Under the various secondary liability provisions we explored in the first video, we know that it is possible for a person to be charged and the corporation not to be charged. And vice versa, it's possible for a corporation to be charged, but the person not to be charged.

In parallel, and distinctly, it is impossible for a director to be found guilty of an offence and the corporation to be found innocent. And it is necessary for the corporation to be guilty of an offence for that director to be found guilty. **This sets up a very distinct possibility of a conflict of interest.**

One exception is the very specific and narrow circumstance of the owner operated corporation. And by owner operated, I mean tightly owned, where it's a single shareholder who is also the director, officer, and key employee of the corporation. Unless you're dealing with that kind of circumstance, there's an inherent conflict of interest in any criminal prosecution and secondary liability provisions between the director, officer, and key employee and the corporation.

The director, employee, or officer always has an incentive to point to the corporation and say, "The structures didn't work, the reporting systems didn't work. I gave orders but my subordinate didn't follow my instructions, or the corporation didn't implement the kinds of systems that I wanted the corporation to implement."

Conversely, the corporation always has the incentive to point to an employee, director, or an officer and say, "The individual gave those instructions" or "He or she was acting outside the scope of employment, and the liability of that person shouldn't be attributed to us." Again, there is an inherent conflict of interest between those two parties.

ETHICAL DUTY TO REFER TO EXTERNAL COUNSEL

As I discussed in my second video, as soon as it becomes apparent that cooperation with the government might be turning into a criminal investigation, the interests diverge. And at that point, you might need to be thinking about referring out the director, officer or key employee involved in the incident to external counsel.

First, it may help to have two separate sets of counsel looking at the same problem, two different views, two different interests, and two different ways of looking at the same problem, meaning more defences get brought out into the open.

Second, and most importantly for many of you, you will have an **ethical duty** to refer that person to an independent counsel.

You have a primary duty to your corporation. But you have a situation where someone within that corporation has very different and potentially diverging interests. **That person needs to be referred out.**

WHEN TO CONSIDER ENGAGING DEFENCE COUNSEL

Let's cover some of the steps that you can take to set up the defences on behalf of the corporation when you think that a criminal investigation might be underway and to minimize the risk of criminal exposure.

Let me first preface all of this by saying nothing that I'm saying goes to the substance of an offence; that will depend on the type of industry that you're in. I'm not here to talk about how to defend yourself against an environmental spill or a securities fraud or an income tax evasion or a workplace incident.

What I'm looking at is the **corporate function** and **how do you protect the directors, officers, and key employees** within your corporation when those investigations come up.

So in light of that caveat, as soon as you start seeing the **warning signs** I covered in the second video, this is an important cue. Are inspectors asking for emails originating from individuals within the corporation? Are they looking at diaries and meeting logs and other forms of communication specific to individuals around a certain incident? Is a key employee being brought in for an interview?

Once you start seeing those kinds of signs that there is the **potential for criminal investigation** to have started and you need to start thinking in those terms.

If you believe an investigation has started, you should immediately retain independent counsel for the individuals involved, and potentially for the corporation as well, with criminal and regulatory defence experience.

Charter rights are very specific, especially the legal rights section between sections 7 and 11. Counsel must have experience with the information and processes to obtain, production orders, search warrants. These are all aspects of the law that many civil lawyers do not have exposure to.

Similarly, a pure criminal lawyer may not be as alive to the nuances of how directors, officers, and key employees need to work within a corporation, as well as the unique dynamics and powers of the state when using their inspectional powers. On initial examination in the purely criminal context, it can seem that the production orders that are available in administrative context may be in breach of the Charter, when in fact the courts have said many of them are Charter compliant because such orders furthered the needs of the regulatory state. Look for a lawyer who understands both the criminal side and the nuances of working within corporations in a regulated industry.

ASSESSING POTENTIAL LIABILITY OF KEY INDIVIDUALS

In this video series, I've now covered when you need to worry about a criminal investigation, what needs to be thought of, and who needs to be involved. Now I want to talk about how you want to do it.

Specifically, I want to cover what you're looking for to assess your company's criminal exposure and your key employee's criminal exposure for the purposes of assessing secondary liability exposure.

How do you assess the extent to which a key employee, director, or officer might be liable under a secondary liability provision as opposed to the corporation?

The focus is to look at the words themselves in these provisions: ***Did the person direct, permit, authorize, or acquiesce to the actions that led to the offence?***

That lends itself to looking at (A) the **chain of communications** between that person and others within the corporation and (B) **the nature of the chain of command**.

The more a person is involved with the events that led to the alleged offence, the more it could be said that the person permitted, authorized, or acquiesced to the offence.

These types of activities may not just be **explicit**, i.e. in the form of the communications, emails, memos, letters, or direct orders given verbally to an employee.

It could also be **implied** means of communication, often through formal chains of command, processes, and procedures.

Look for explicit or implicit directions from a director, officer, or key employee down to subordinates. That is what governs whether someone permitted, authorized, or acquiesced to the corporation's activities. That is also what you want to consider at in assessing the extent to which this person needs separate representation.

Understanding the weight of all these factors will require you to look at the internal records of the firm. You will want to understand very precisely the director, officers, or key employee's **role within the events** leading to the alleged offence.

As soon as possible, activate your data preservation and record preservation procedures, your anti-spoliation processes, and all the other internal processes that you would normally do to investigate events leading to an incident or offence.

CONCLUSION

In the first video in this series, we covered what secondary liability is and why it is a form of exposure for directors, officers, agents, contractors, and key employees of a corporation that is separate from the offences committed from the corporation.

Our second video talked about the danger zone, the times when you're cooperating with your regulator or the state, and how that might move into a criminal investigation that produces evidence in a criminal or regulatory prosecution.

In our final video, we covered some of the steps that you can take to better protect your company, as well as the key employees within it.

It's been a pleasure to work with the Canadian Corporate Counsel Association to produce these microlearning videos for you. At Ascendion Law, our lawyers focus on corporate commercial litigation in highly regulated industries, public law, administrative law, and regulatory defence.

We're very pleased to answer any of your questions. **Come visit our website.** I hope we've given you some useful information. Thanks for watching.

This document does not constitute legal advice. It is intended as a general discussion for training purposes.