

ASKING THE RIGHT QUESTIONS ON CRIMINAL PASTS GETS THE RIGHT ANSWERS

Bruce McMeekin
Markham
905.415.6791
bmcmeekin@millერთhompson.com



We are asked from time to time for advice on questions organizations have drafted for the purpose of screening potential directors for unsavoury criminal pasts. Unless care is taken in the precise wording of screening questions, a candidate with a criminal past can slip through the screening process and end up on a board.

In the Canadian criminal justice system, there are three potential outcomes for most *Criminal Code* prosecutions:

1. An acquittal or dismissal of the charge after a trial;
2. A finding of guilt with a conviction registered and a sentence (custodial, fine, probation, etc.) imposed; or
3. A finding of guilt but no conviction registered and the accused discharged.

The third category can be problematic for organizations. In law, a person who has been found guilty but discharged (either absolutely or conditionally, after a period of probation) does not have a criminal record. Many *Criminal Code* offences can be dealt with by way of a discharge including more serious offences like fraud, theft and sexual assault. Consequently, a potential director would be truthful in answering in the negative the question whether he/she has a criminal record if they had been discharged after having been found guilty of, for example, a fraud.

We suggest the following. If an organization wants to screen out individuals who fit into any of the three categories, the question they should be asking is whether the applicant has ever been charged with a *Criminal Code* offence. If an organization wants to screen applicants who fit into the second or third categories, the question should be whether they have ever been found guilty of a *Criminal Code* offence.

Even the foregoing questions may not serve the needs of all organizations. There are other offences involving an element of dishonesty, such as income tax evasion and insider trading in securities, that are not *Criminal Code* offences. To capture applicants who may have been found guilty of these additional types of offences, the widest possible question that one might consider would be whether the applicant has ever been found guilty of offences other than those under the *Highway Traffic Act* and/or a municipal bylaw.

We can assist you with the preparation of these types of questions to ensure you will receive the information you require.