NEWFOUNDLAND AND LABRADOR CONTINUING LEGAL EDUCATION
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The Renewed Relevance of Principles of Corporate Liability

Date: Wednesday, September 25, 2019

Time: 9:30 am – 12:00 pm (Registration begins at 9:00 am)

Place: 3rd Floor, Law Society Building, 196-198 Water Street, St. John's, NL

Seminar Overview:

The principles of corporate liability have renewed relevance in both criminal and civil law in Canada in 2019. This seminar will consider the criminal route in the context of the recent SNC-Lavalin affair, and the civil route in the context of a very recent Supreme Court of Canada decision in the area of civil fraud.

Criminal Corporate Liability

Robert Frost wrote that "Two roads diverged in a yellow wood, And sorry I could not travel both." The legislation for deferred prosecution agreements (DPAs /remediation agreements) clearly sets out a permissible route, but also a prohibited route to seek such agreements.

A permissible route flows from the purpose section, section 715.31(f) of the *Criminal Code*: "to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing." This road in effect has a sign that says "only those who did not engage in wrongdoing" may benefit from travel on this road.

The identification of those who did not engage in the wrongdoing requires a detailed analysis of the principles of corporate criminal liability applied to each applicant for a remediation agreement. In the context of the highly publicized case of SNC-Lavalin, this requires an analysis of the level of responsibility of those persons alleged to have committed acts of bribery and how widespread the allegations of wrongdoing are. A sound understanding of corporate criminal responsibility, as set out in section 22.2 of the *Criminal Code*, is essential to undertake this analysis.

It is possible for senior officers or certain middle managers acting with intent, at least in part, to benefit a corporation and acting within the scope of their authority to have committed bribery offences on behalf of the corporation. At the same time, there may be many employees who are not involved or even aware of the misconduct. Customers and pensioners are a further step removed from knowledge about corrupt practices. This dividing line is critical for the purposes of assessing the route that remediation agreements can follow.

Civil Fraud and the Total Fraud Test

The Supreme Court's recent decision in *Christine DeJong Medicine Professional Corporation v. DBDC Spadina Ltd.* (*DBDC Spadina* 2019 SCC 30) clarified the law regarding whether corporations are civilly liable for the fraudulent actions of their Directors or Officers. Ultimately, a corporation will be liable for the fraud of a Director or Officer if the actions 1) were designed or completed to the benefit or partial benefit of the corporation; and 2) the actions were done in the scope of the Director or Officer's authority.

In this case, the Christine DeJong Medicine Professional Corporation and DBDC Spadina Ltd. had both been defrauded as victims of real estate fraud at the hands of Norma and Ronauld Walton. The Waltons convinced the victims to invest with them equally in corporations for the purpose of buying, renovating, and maintaining commercial real estate properties in Toronto. The Waltons did not invest funds of their own, instead moving the investors' contributions through their own clearing house to further their own interests.

The rules for corporate liability in civil cases were laid out in *Canadian Dredge and Dock Co. v. The Queen*. The corporation may be liable if the action taken by the directing mind:

1. Was within the field of operation assigned to him
2. Was not totally in fraud of the corporation
3. Was by design or result partly for the benefit of the company.

The second requirement of *Canadian Dredge* is commonly referred to as the "total fraud doctrine." The total fraud doctrine specifies that the actions of the directing mind will not be attributed to the corporation if the corporation was a total victim of the scheme. In other words, if the directing mind of a corporation was acting within their capacity and attempted to secure any benefit – partial or full – for the corporation through fraudulent means, then corporate attribution can occur.

In *DBDC Spadina*, the majority at the Court of Appeal was prepared to lower the burden to meet the *Canadian Dredge* test in civil cases. The Supreme Court of Canada overturned the majority decision of the Ontario Court of Appeal, instead adopting the dissent of Justice van Rensburg in its entirety. Unlike the Court of Appeal, the Supreme Court did not find the DeJong project corporations liable because the lost DBDC funds could not be directly traced back to the DeJong project corporations' accounts.

The Supreme Court's judgement in *DBDC Spadina Ltd.* confirms that the total fraud test is still alive, and the *Canadian Dredge* requirements should not be loosened to find corporate liability in civil cases. Rather, the *Canadian Dredge* test enumerates a minimum threshold of requirements which must be met to attribute corporate liability.

The Supreme Court's decision follows the *Canadian Dredge* reasoning that if there is total fraud of the corporation, the actions of a senior official or directing mind cannot be attributed to the corporation. If the corporation is entirely a victim of the fraudulent scheme, the corporation of course gained no benefit from the actions of the directing mind. Thus, the directing mind was acting alone and for their own benefit – meaning that the corporation attribution should not occur.

Corporations should protect themselves against being implicated in fraudulent schemes because a directing mind or senior official took action to partially or fully benefit the corporation. Corporations should develop or enhance internal compliance programs and mechanisms to counter against fraudulent activity within organizations.

Seminar Presenter:

Kenneth Jull

Graduate of University of Toronto (Victoria College) 1978, Osgoode Hall Law School, (LL.B., 1981) (LL.M., 1985). Mr. Jull is Counsel at Gardiner Roberts LLP and recently completed a two-year interchange with the Competition Bureau in Ottawa in the position of General Counsel. Mr. Jull is the co-author with Justice Todd Archibald of . *Profiting from Risk Management and Compliance*. (Thomson Reuters) A 2019 Student Edition of this text is used in a course taught by Mr. Jull at the University of Toronto, Faculty of Law, entitled "Financial Crimes and Corporate Compliance".

Mr. Jull conducts internal investigations and litigates disputes which have a compliance component. This risk and compliance practice spans a spectrum of diverse subject areas ranging from serious criminal offences such as bribery and price fixing to regulatory standards in areas such as the environment, telecommunications, occupational health and safety, advertising law and mergers and acquisitions review. As part of risk management, Mr. Jull provides advice to organizations with respect to a due diligence matrix for compliance. The matrix is based on a mathematical model which incorporates new behavioral research.

Mr. Jull has litigated cases at all levels of Courts including the Supreme Court of Canada and Courts of Appeals in areas including constitutional and tax law, telecommunications, securities oppression, environmental offences, misleading/deceptive advertising and civil/ criminal fraud. Mr. Jull teaches at the Schulich Executive Education Centre, Schulich School of Business, York University in both the open enrollment and custom programs. Mr. Jull is listed in the Who's Who Legal Investigations 2016.

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