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PROFITING FROM RISK MANAGEMENT AND COMPLIANCE

Archibald • Jull

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Release Updates

This publication provides an important perspective on the liability of organizations in regulatory and criminal contexts, and deals with issues that are relevant to many areas of the law including occupational health and safety, the environment, competition and securities. Expert guidance and insightful analysis is provided on the basis for regulatory and criminal liability, how regulations apply to organizations and individuals, how the principles of sentencing will impact upon a given scenario, and navigating the regulatory and criminal liability systems in Canada.

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What's New in this Update

This release features updates to Appendix A. Leading and Seminal Cases in Sentencing. This release also features updates to Appendix B. Sentencing Tables including updates to XIII. Offences Under Provincial Securities Acts, XVIII.1. Canadian Investment Regulatory Organization (CIRO), Offences Against Environment, and XXI. Miscellaneous Regulatory Offences.

Highlights

Sentencing Tables — Offences under Provincial Securities Acts — The Commission requested that an administrative penalty of $500,000 be imposed against each of the respondents. The Panel agreed that it was appropriate to order administrative penalties against all respondents. However, the Panel did not agree that the amounts sought were warranted in view of the sanctioning principles and the breaches found, taking into account the Panel's views as to the relevant aggravating factors and also taking into the account the other sanctions ordered against the respondents. Instead, the Panel ordered that each of the respondents pay an administrative penalty of $200,000. The Panel noted that the Commission correctly submitted that determining the appropriate administrative penalty in any given case is not a precise science. Rather, the penalty in each case must be determined based on the context and circumstances of that case. Prior decisions of the Tribunal may offer guidance as to quantum and assist in assessing proportionality, but will rarely be determinative of the result. The amount ordered in any particular case depends on a variety of factors, including a consideration of all sanctions imposed on each respondent individually, the goals of specific and general deterrence, the need for the penalty to be more than just a "cost of doing business", the scope and seriousness of the misconduct and the amount of money raised from investors. As to the Commission's suggestion that the crypto asset and social media elements of this case warranted higher administrative penalties, the Panel had expressed its views on the relevance of those factors to this case without suggesting that they may not be relevant factors when assessing administrative penalties in other cases: *Nvest Canada Inc (Re)*, 2024 CarswellOnt 17040, 2024 ONCMT 25, 47 O.S.C.B. 8521 (Ont. Capital Markets Tribunal).

Sentencing Tables — Miscellaneous Regulatory Offences — Offences under the Fisheries Act and Regulations — Justice Shergill agreed that it was evident from the Reasons that the totality principle was not ignored by the Sentencing Judge. It was evident that the Sentencing Judge was alive to the application of the totality principle. The Sentencing Judge noted that the Crown submitted it had already taken the totality principle into account in the fines it had proposed on the various counts. Further it was apparent that he

undertook a "genuine consideration" of the totality principle, which was demonstrated from the following sentence:... It was my intention that the total be $250,000. Importantly, the Sentencing Judge stated the above intention when he was considering the amount for the s. 79 Order. While the Sentencing Judge acceded to all of the penalties sought by the Crown, he did not agree with the Crown on the size of the s. 79 Order. The Crown sought a disgorgement order in the range of $165,00 to $300,000. Rather than making an order in the range sought by the Crown, the Sentencing Judge imposed a substantially lower figure of $67,900 to conform to his intention to impose a total fine of $250,000. The Sentencing Judge considered the aggregate total of the fine for each of the counts and concluded that $250,000 would be a fit sentence. Consequently, he chose an amount for the s. 79 Order which he believed would keep the aggregate fine at $250,000, rather than the substantially higher figure the Crown sought. Justice Shergill explained that it was also evident from the corrigendum that the Sentencing Judge issued that he had considered and applied the principle of totality to the entire amount that was ordered to be paid. After realizing that the aggregate total was $260,000 rather than the intended $250,000, the Sentencing Judge reduced the s. 79 Order related to count 6, from $77,900 to $66,900. Consequently, Justice Shergill was satisfied that the Sentencing Judge applied the totality principle when considering a fit sentence: *R. v. Keitsch*, 2024 CarswellBC 3369, 2024 BCSC 2054 (B.C.S.C.).