Research project summary: Alexis Langenfeld

Our PhD thesis project is entitled *Building Responsibility Among Corporate Groups: Challenges of Governance and CSR*. It will address the governance of corporate groups via a novel legal approach.

Background: Legislation governing corporations (federal and Québec) defines a corporate group as a hierarchical structure comprising a parent company that holds shares entitling it to appoint the majority of its subsidiaries' directors. In economic terms, however, a corporate group forms a single enterprise. That definition aside, the law does not regulate either the governance or the responsibility of these structures; it deals merely with the corporate structure and disregards the group. This has two principal implications in terms of governance. First, the group context poses a risk of legal sanction for directors and senior executives, who are under an obligation to act in the best interests of their company. But proper group governance requires that the parent company's directors consider the interests of their subsidiaries. It also presupposes that the directors of a subsidiary should sacrifice the interest of their company in favour of the group's policy, of which the parent company is the primary beneficiary. The principles of joint stock company law therefore come into conflict with the specific features of corporate governance when the company is a group. Second, the limited responsibility of joint stock companies and the principle of corporate independence allow a company's legal structure to be assembled with a view to isolating risk within certain companies of the group only. Thus, by strategically using corporate groups, companies can be unaccountable while allowing their subsidiaries to engage in high-risk activities. There is a disconnect between power and responsibility, which provides an incentive for irresponsible governance. This is especially problematic for stakeholders, particularly those of large multinational groups. Their interests are all too rarely taken into account, as they are overridden by the interests of the shareholders. This state of affairs is explained by the principle of shareholder primacy (Hansmann and Kraakman, 2001) and the emphasis on agency theory in corporate governance (Jensen and Meckling, 1976). As a result, the law (unintentionally) enables subsidiaries (notably foreign ones) of Canadian companies to engage in activities that are dangerous to the economy (corruption), to the environment (pollution) and to local communities (human rights abuses), and that have impacts on stakeholders, with no requirement for accountability from the parent company incorporated in Canada. The law also allows companies to evade their fiscal obligations through financial arrangements whereby they establish subsidiaries in countries with favourable tax regimes. Likewise, there is no provision in the law to properly address global warming caused by corporations: it can only be tackled by bringing cases against groups of companies, since emissions are linked to a company's global activities. This evasion of responsibility is all the more reprehensible in that groups can also benefit from the advantages of having a corporate presence across multiple states. In addition to the risks they create themselves, companies now face reputational risk arising from the growing concern over corporate social responsibility (CSR). Reputational risk exposes a company to market sanction by investors and consumers. The board of directors of the parent company, which must manage the risks incurred but also those generated by the group of companies, is on the front lines. The

board's action is hampered by the law, which is deficient with regard to corporate groups and the CSR issues they raise. Canadian corporate groups, however, stand to gain a great deal from development of a legal framework for organizational governance of groups that would address the societal challenges of this new century. Such a shift in the law has recently begun.

Reconfiguring governance: CSR along with recent legal changes and thinking are informing a redefinition of organizational governance of companies incorporated as groups. New perspectives on legal and market responsibility of grouped companies are appearing in response to the distinct and innovative standards of CSR (Javillier, dir., 2007). At the same time, the amendments to Section 122 of the *Canada Business Corporations Act* in the wake of the rulings in Peoples and BCE have conclusively ushered in a reorientation of business law toward the interests of stakeholders. Canada recently created the position of Ombudsperson for Responsible Enterprise. Legislative reforms to requirements for non-financial reporting by corporate groups are also being considered. With the Hudbay and Nevsun affairs, Canada now also has jurisprudence on parent corporations' duty of care. This evolving standards framework is thus paving the way for a different form of governance, one constructed around an increasingly socially responsible objective. Our thesis intends to make a meaningful contribution to the advancement of knowledge and to be a source of proposals targeting this blind spot in business law: the governance of corporate groups in the context of CSR and the societal issues it raises. One of our key objectives is to demonstrate that there is a collective interest empowering the governance bodies of parent companies and subsidiaries to reconcile the differing interests at play in fostering CSR. A further aim is to determine how the diverse sources of responsibility arising from CSR are perceived within a group.

Issues and methodology: Our study question is: How can contemporary law reconcile power and responsibility and lay the foundations for responsible governance of corporate groups? A legal and interdisciplinary methodological approach is adopted, based on economic analysis of law and comparative law. The methodological approach also encompasses ethics.

Calendar: The planned date for submission of the thesis is May 2023.