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The Annotated British Columbia Business Corporations Act

This looseleaf service provides complete coverage of British Columbia corporations law including: the full text of the *Business Corporations Act* and Regulations, clear and concise summaries of key reported and unreported decisions interpreting the Act, and a detailed legislative table of concordance.

This release features the addition of summaries to the Business Corporations Act tab.

Highlights

- **Section 128(2)** — By virtue of s. 5 of the *Electronic Transactions Act*, a text message sent by a director advising of her resignation, which resignation the director later attempted to retract, was found to be a "written resignation" for purposes of this section. Although the text was sent to the cell phone of the company's CEO, and not to the

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company's business address, corporate lawyer or registered office, the resignation was nonetheless effective given that it was "meaningfully communicated" to the company and was capable of objective verification: *Kasumu v. Musah*, 2018 ABQB 242, 2018 CarswellAlta 688 (Alta. Q.B.) (decided with reference to s. 248 of the Ontario *Business Corporations Act*).

- **Section 142** — A director's fiduciary duty and duty of care are tempered by the business judgment rule. The rule accords deference to a director's business decision so long as the decision is within a range of reasonableness. If the decision lies within that spectrum, a court ought not to substitute its opinion even though subsequent events may cast doubt on the wisdom of the director's decision. The standard of care does not require a director to be perfect; rather the standard is one of prudence on a reasonably informed basis. In this case, TU was a director of a group of companies, the "TBM group". When TBM's lease on its business premises was coming to an end, TU brought to the attention of TBM's board the possibility of TBM constructing and renting a facility on property owned by the plaintiff, a longtime supplier to the TBM group. TU was charged with the task of negotiating the terms of the lease with the owner of the proposed facility, seeking financing for relocation, and preparing business plans. TBM issued a press release indicating that its distribution centre was relocating to a state-of-the-art facility to be constructed on the plaintiffs' lands. The plaintiffs believed the parties had reached a binding agreement. TMB had subsequent concerns about the cost-effectiveness of the proposed move and eventually advised the plaintiffs that it did not intend to occupy space at the facility. This led to a lawsuit by the plaintiffs against TMB. TMB settled the litigation and then third partied TU seeking compensation for the settlement amount, claiming TU breached his fiduciary duty and duty of care by entering into the lease agreement. In dismissing the claim, the court found TU acted reasonably in performing his mandate and that TMB's losses did not result from any breach of duty by TU but rather from TMB's decision not to proceed with the lease: *0932053 B.C. Ltd. v. TBM Holdco Ltd.*, 2018 BCSC 368, 2018 CarswellBC 545 (B.C. S.C.), additional reasons 2018 CarswellBC 1518 (B.C. S.C.) (decided with reference to s. 122(1)(a) of the *Canada Business Corporations Act*).

- **Section 227** — The petitioner and the respondents were siblings who held non-voting shares in a company founded by their father. Over

the years, the respondents became increasingly involved in the running of the family business, establishing various "sibling" companies. The petitioner commenced an oppression action, claiming the respondents excluded her from any meaningful role in the family business, breached a shareholders agreement and acted in a conflict of interest through acquiring commercial properties and approving management agreements for themselves. The court referred the petition to the trial list, finding there were significant conflicts in the affidavit evidence. However, given the irreconcilable differences between the parties, the court made the unusual finding that dissolution of the companies would nonetheless be just and inequitable under s. 324. In lieu of dissolution, however, the court directed the respondents to purchase the petitioner's shares at FMV. In the case of one company, the share purchase was subject to a 40% minority discount to reflect the petitioner's minimal contribution to the company's success: *Dais v. Virvilis*, 2018 BCSC 459 , 2018 CarswellBC 647 (B.C. S.C.).

- **Section 227** — The requirement to prove a shareholder's expectations does not necessarily preclude a class action for oppression on behalf of shareholders in a publicly traded company. In this case, the corporate and limited partnership defendants ("the offerors") initiated a successful joint take-over bid for B. Ltd., a publicly traded iron mining company. The plaintiffs, shareholders of B Ltd., asserted a statutory action for circular misrepresentation and for insider trading damages. The plaintiffs also sought, as against the directors of B Ltd., relief from oppression. They claimed the offerors enjoyed preferred access to important and material internal information about B. Ltd.'s business and affairs that was not disclosed to the shareholders, with the result that shareholders were unable to make an informed decision about whether to tender their securities to the joint bid. The court held that the oppression claim was suitable for certification as a class action and that it was not necessary to prove the expectations of each stakeholder. The theory of the plaintiffs' case was that the market was essentially controlled by the joint bid after a particular date, thereby depriving shareholders of the opportunity to sell their shares for more than $1.50, regardless of when their shares were acquired. Regardless of subjective expectations, the objective component concerned the integrity of the market and the information disseminated in it. The objective component was something every shareholder would reasonably expect. The issues in the present case arose in the latter context.

Additionally, in a case like the present, where it would be difficult to adduce cogent direct evidence of the shareholders' expectations, it would be open to the trial judge to infer reasonable expectations from the company's public statements and the shared expectations about the way in which a public company should be run.: *Rooney v. ArcelorMittal et al*, 2018 ONSC 1878, 2018 CarswellOnt 9019 (Ont. S.C.J.) (decided with reference to s. 348 of the Ontario *Business Corporations Act*).

- **Section 245(2)(a)** — A recurring theme in the case law concerning the valuation of a dissenting shareholder's shares is that any potential gains have to be an "operative reality" prior to the valuation date, and not contingent on the closing of the transaction dissented from. In this case, facing default under a loan, V Inc. entered into a transaction with BP Co. under which BP Co. paid $500 million for a 75% interest in V Inc.'s non-operating oil sands leases. BP also covenanted to pay a further amount over a defined period for capital costs, and if this were not paid by a specified date, BP Co. would be obligated to pay a further $400 million to V Inc. The plaintiffs, shareholders of V Inc., exercised their dissent rights and brought an action for determination of the fair value of their shares. The trial judge found that the BP Co. transaction was properly considered in valuing the leases asset, but that the developmental capital expenditures had to be excluded from the valuation. The trial judge's approach was endorsed on appeal. The court found that the cash payment by BP Co. had been implemented and was an operative reality and that further contribution by BP Co. was properly excluded from fair value determination because such contribution had not been implemented and was not operative at the valuation date: *RFG Private Equity Limited Partnership No. 1B v. Value Creation Inc.*, 2018 ABCA 85, 2018 CarswellAlta 388 (Alta. C.A.), affirming 2016 ABQB 391, 2016 CarswellAlta 1360 (Alta. Q.B.) (decided with reference to s. 191 of the Alberta *Business Corporations Act*).
- **Section 360(7)** — The petitioner commenced a cost recovery action {"CRA") under the B.C. Environmental Management Act in relation to a contaminated site previously owned from 1987 by T. Inc., a company dissolved in 2000. The petitioner claimed that T. Inc. and its director, MC, as previous owners of the property, were "responsible persons" under the EMA and applied for retroactive and prospective restoration of T. Inc. and MC's directorship so as to add them as defendants in the CRA. MC conceded that the contamination occurred during the period of T. Inc.'s ownership but refuted

liability for remediation costs on basis of T. Inc.'s long-time dissolution. The court allowed the petitioner's application, finding that restoration would not prejudice T. Inc. or MC and would be both appropriate and consonant with the remedial goals and purposes of the EMA, including the "polluter pays" principle. The court also ruled that the stipulation in this section did not allow a company or its directors to use dissolution as a means to avoid liability to which they would have been otherwise exposed but for the company's dissolution: *Foster v. Tundra Turbos Inc.*, 2018 BCSC 563, 2018 CarswellBC 805 (B.C. S.C.).