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DIRECTORS AND OFFICERS IN CANADA: LAW AND PRACTICE

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Directors and Officers in Canada: Law and Practice is a comprehensive text on the current legal framework of corporate governance in Canada. It considers and compares the Canada Business Corporations Act and the corporate statutes in each of the provinces and territories, describes relevant case law in detail, and discusses current themes in corporate governance.

This release features updates to the Remedies Table – Breach of Fiduciary Duty by Directors and Officers in Chapter 9 (Fiduciary Duty and Duty of Care). This release also includes updates to Appendix G. National Instrument 51-102 (on or after January 1, 2011) — Continuous Disclosure Obligations, amended on August 25, 2021. This release also features updates to Appendix PS7. Meetings of Shareholders Pursuant to BCBCA – Summary of Procedure. This release also includes updates to Appendix TC. Table of Concordance of Business Corporations Acts.

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Case Law Highlights

- **Remedies Table — Breach of Fiduciary Duty— Accounting of Profits—** It was evident that the disgorgement order was imposed to serve a prophylactic purpose. In the circumstances, Justice Hourigan concluded that the trial judge was obliged to fashion a remedy that would have a deterrent impact. Justice Hourigan noted that the question that remained was whether, in fashioning a prophylactic disgorgement order, the court is required to order disgorgement of all ill-gotten gains or whether it can make an order that achieves its deterrent purposes but does not require full disgorgement. Justice Hourigan explained that there may well be circumstances where it would be inequitable to order a faithless fiduciary to disgorge all profits. Equity seeks what is fair and what is fair should be determined with flexibility, not by means of hard and fast rules. For that reason, Justice Hourigan would not endorse an inflexible rule that full disgorgement of all profits must be ordered in all cases, but nor would Justice Hourigan speculate on the sorts of reasons that may justify something less than full disgorgement. Justice Hourigan noted that Australian courts have grappled with the circumstances in which full disgorgement ought to be made and whether there should be a rebuttable presumption that full disgorgement is appropriate. Justice Hourigan declined to decide those questions as counsel for the Appellants failed to address either point. Justice Hourigan noted that there was nothing to suggest that a partial disgorgement order should be made here. In the circumstances, an order of disgorgement of all profits was in Justice Hourigan's view appropriate: *Extreme Venture Partners Fund I LP v. Varma*, 2021 CarswellOnt 18074, 2021 ONCA 853 (Ont. C.A.).
- **Meetings of Shareholders Pursuant to British Columbia's Business Corporations Act — Summary of Procedure — Case Law — Consent Resolution of Shareholders —** The singular legal issue to be decided was whether the Consent Resolution was valid and effective. If the answer to that question was "yes", there was no dispute concerning the consequential relief that Edward requested to ensure RCI properly recorded the consequences in the corporate records and filed with the Registrar a notice of change of directors. The clear import of both the Articles and the *Act* was the intention that they dovetail with each other and that they be read and applied in harmonious fashion. RCI's argument that an actual meeting was necessary also required that one ignore another clearly applicable provision found in the *Act*, namely, s. 180. Justice Fitzpatrick disagreed with RCI's suggestion that the express provisions of the Articles precluded the application of s. 180. There was nothing in the *Act* to support the interpretation that "meeting" could only mean an actual meeting of the shareholders. To the contrary, s. 180 expressly provides that an "actual" meeting is not necessary provided certain prerequisites are met. Justice Fitzpatrick explained that there is no rational reason why, considering the clear statutory intention found in s. 180, a "meeting" could not include either an actual meeting *or* a "deemed" meeting. In that respect, the *Act* provides for a "legal fiction" in that the effect of the Consent Resolution

is as if an actual meeting had taken place to both remove and replace directors, just as contemplated by Article 3.4. In Justice Fitzpatrick's view, the clear import of s. 180 of the *Act* is that the process of a consent resolution can, under s. 180, be "deemed" as valid and effective as if passed at a meeting, signaling that the process is intended to obviate the need for a meeting at all: *Rogers v. Rogers Communications Inc.*, 2021 BCSC 2184 (B.C.S.C.).

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