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ANNOTATED BRITISH COLUMBIA BUSINESS CORPORATIONS ACT

Fasken Martineau DuMoulin LLP

Release 2022-2, June 2022

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What's New in this Update:

This release features the addition of case law annotations to Parts 2 (Incorporation), 5 (Management), 8 (Proceedings), 9 (Company Alterations), and 10 (Liquidation, Dissolution, Restoration and Reinstatement) of the *Business Corporations Act*. Also updated is Appendix TC – Tables of Concordance.

Highlights:

- ***Business Corporations Act – Part 5 – Management – Division 3 – Conflicts of Interest – Section 150 – Powers of Court*** – On appeal, Sonic submitted that the judge erred in failing to recognize the onus on a fiduciary who has a conflict of interest to establish that he did not breach his fiduciary duties. It drew a distinction between disclosable interests in a discrete contract or transaction, to which it conceded that the *BCA* serves as a complete code, with broader conflicts of office. Alternatively, even if the conflicts of interest provisions in the *BCA* were applicable, Sonic submitted that the judge misapplied the provisions by failing to place the onus on Savage to prove with clear evidence that the TCS Transactions were procedurally and substantively fair to SDSI. In Justice Butler's view, the issues on appeal all concerned Savage's fiduciary duty of loyalty to SDSI. Justice Butler addressed the following issues: (a) Did the judge err in addressing Sonic's claims under the provisions of the *BCA* i.e., whether the *BCA* is a complete code that was properly applied to the contracts or transactions at issue? (b) Did the judge err in failing to place the onus of proof on Savage? (c) Did the judge err in finding that the transactions were procedurally and substantively fair and reasonable to SDSI? Justice Butler explained that the fact that conflicts of interest involving such contracts or transactions are governed by Division 3 does not mean that common law principles are inapplicable. The meaning or interpretation of what is fair and reasonable under s. 150(2), both procedurally and substantively, will necessarily be informed by the common law. Further, Savage's fiduciary duty to act in the best interests of the corporation went beyond merely abiding by the conflicts provisions in Division 3. However, that did not change the applicability of Division 3 to the nature of the conflict of interest that was in issue. Justice Butler would not give effect to Sonic's submission that the conflicts at issue were those contemplated by s. 153, such that the provisions of ss. 147-152 did not apply to the transactions between SDSI and TCS. Sonic raised this argument to support its position

that Division 3 did not apply to a series of contracts or transactions. Justice Butler observed that not only was that argument not raised in the court below, it would lead to an absurd result. The effect of Sonic's argument would be that the *BCA* would only apply if Savage had a disclosable interest in a single transaction but would not apply where TCS, the company in which he had a disclosable interest, was involved in a series of contracts or transactions with SDSI. In Justice Butler's view, this would defy logic. There is no principled reason for such a distinction. It was clear that Savage was required to disclose his interests outside the company in accordance with the provisions of Division 3 and that s. 150 must apply to any contracts or transactions in which he had a disclosable interest. However, there was nothing in those provisions that limited the application of those provisions to a single contract or transaction. Further, the claim advanced at trial and on appeal was for an accounting of profits from the TCS Transactions including disgorgement of TCS' profits. That claim clearly fell within ss. 147-152 of the *BCA*. At trial, Sonic did not pursue any claim generally for breaches of trust or duty by Mr. Savage. In addition, Justice Butler noted that a plain reading of s. 153 states that a director or officer must disclose his interests outside of the company which could directly or indirectly result in a conflict "of office". Sonic did not plead any non-compliance with that section. There was no question that Savage complied with the requirements of s. 153. Roussy had full knowledge of Savage's role with TCS when SDSI was incorporated and began to do business, including the business of entering into the TCS Transactions. The conflict of interest provisions found in the *BCA* applied to the impugned TCS Transactions. Justice Butler concluded that the judge did not err in analyzing those transactions under Division 3 and in considering whether they were fair and reasonable under s. 150 of the *BCA*: *Sonic Holdings Ltd. v. Savage*, 2021 CarswellBC 3679, 2021 BCCA 441 (B.C.C.A.).

- ***Business Corporations Act – Part 8 – Proceedings – Division 1 – Court Proceedings – Section 227 – Complaints by Shareholder – Application must be timely*** – The Tolling Agreement made clear that the limitation period pertaining to any dispute commenced August 31, 2017. Justice Burke agreed that the oppression claim was based on a "continuing course of action", where multiple acts over a number of years contributed to an ongoing and cumulative oppressive state of affairs. In Justice Burke's view, it was not open for the respondents to rely on the Tolling Agreement to insulate themselves from judicial intervention for allegedly oppressive conduct which continued today. The fundamental nature of the claim related to the totality and cumulative nature of the conduct alleged to be oppressive. The claim could not,

therefore, be said to be discovered on the date of the initial breach, but instead was an ongoing concern. The petition was not statute or contractually barred, and should be considered on the merits: *Beck v. 0973415 B.C. Ltd.*, 2021 CarswellBC 3754, 2021 BCSC 2323 (B.C.S.C.).

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