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ADVISING THE FAMILY-OWNED BUSINESS

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This looseleaf service is expertly designed to assist the professional advising the family-owned business in legal matters. It explores the main stages in the life of the business from its start-up to its operation and any alterations in its structure and/or participants.

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What's New in this Update:

This release features updates to Appendix B. Wrongful Dismissal Claims. This release also features updates to Appendix C. Sentencing Table: Liability of Corporations for Offences Relating to Occupational Health and Safety. This release also features updates to Appendix D.50. Remedies Table—Breach of Fiduciary Duty. This release also features updates to Appendix PS. Procedural Summaries including updates to the following summaries concerning Ontario's Business Corporations Act including IX. Incorporation and Meetings of Directors, X. Meetings of Shareholders, IV. Part XI of the OBCA—Auditors and Financial Statements, XII. Part XIV of the OBCA—Fundamental Changes, XIV. Part XV of the OBCA—Liquidation and Dissolution—Voluntary Winding Up, and XV. Part XV of the OBCA—Liquidation and Dissolution—Winding Up by Court.

Highlights:

- **Wrongful Dismissal Claim—Technical and Skilled—Ontario—**The employee was senior draftsperson earning $75,000 plus benefits who was terminated at 61 years of age and had been with company for almost 3.5 years. The employee was entitled to six months' notice. The appeal was dismissed. The employment agreement was properly rejected as an attempt to contract out of the *Employment Standards Act*. The dismissal provisions of agreement could not stand. The Trial judge properly applied factors considering a reasonable notice period.
- **Sentencing Table: Liability of Corporations for Offences Relating to Occupational Health and Safety—Offences under Safety Codes Act (Alberta)—**The appeal was allowed, and the sentence was varied to provide for a daily fine of $75 per day from February 1, 2021 until the date of compliance with the SC Order. The trial judge imposed a daily fine for 28 days, from February 1, 2021 to March 1, 2021. The trial judge issued her decision 753 days following the ordered compliance date, in which she noted that Eau Claire was still noncompliant. The sentencing judge asserted that the Crown could issue a new information with a later date that would count as a new offence. Justice Price explained that this was not an appropriate practice due to the significant penalty increase "for a 2nd or subsequent offence." The legislation cannot intend for the Crown to issue new information repeatedly for the same underlying offence, being a failure to follow an order, resulting in a dramatic increase in penalty. As a result, Justice Price concluded that the reference in s 68(1)(a) to a "continuing offence" must mean the continuation of the activity that constituted the original of-

fence of which the party was determined guilty, under s 67. The continuing offence was Eau Claire's failure to follow the Order from February 1, 2021 onward until the date at which it complied with the *Safety Codes Act* by "carry[ing] out any action required in [the] order." The sentencing judge knew of Eau Claire's continued non-compliance at the date of conviction. In such cases the sentencing judge may choose to set an initial daily fine amount, to begin accruing. Since this review was occurring after the fact, increasing the daily fine as of the sentencing date of July 12, 2023 could not act to incentivize compliance. As a result, Justice Price maintained the $75 per day fine commencing on February 1, 2021 until the date of compliance: *R. v. Eau Claire Distillery Ltd.*, 2024 CarswellAlta 828, 2024 W.C.B. 407, 2024 ABKB 134 (Alta. K.B.).

- **Remedies Table—Breach of Fiduciary Duty—Business Relationship—**Justice Kirchner concluded that Nath and Horvath had a fiduciary duty to disclose to the plaintiffs that they had an interest in the properties and that they would earn a substantial profit from the plaintiffs' purchase of them. They breached that duty by failing to disclose that and were accountable to the plaintiffs for the profits they took. Justice Kirchner noted that Nath and Horvath's misappropriation of the plaintiffs' Project Development Funds, knowing they could only be used for the Prince George project, essentially amounted to theft. Justice Kirchner agreed that was conduct that offended the court's sense of decency and was deserving of an award of punitive damages against Nath and Horvath. Justice Kirchner was not persuaded that Guo's conduct was deserving of punitive damages. His complete abdication of his management responsibilities under the Project Management Agreements cost the plaintiffs over $2 million in losses to Nath and Horvath's misappropriations and another $812,000 in wasted expenditures on a failed development. However, he did not engage in a deliberate course of conduct to take advantage of the plaintiffs or line his own pockets with their money. Unlike Nath and Horvath, Guo received nothing of the plaintiffs' money. His conduct was a gross dereliction of his contractual and fiduciary duties but Justice Kirchner was not persuaded it reached the level of high-handedness that is required for an award of punitive damages. Justice Kirchner noted that an award of punitive damages must be proportionate to the degree of vulnerability of the innocent party; the harm or potential harm directed specifically at the plaintiff; the need for deterrence; other penalties, both civil and criminal, which have been or are likely to be inflicted on the wrongdoer for the same misconduct; and the advantage wrongfully gained by the wrongdoer from the misconduct. Nath and Horvath's conduct not only involved the misappropriation of

over $2 million to their own benefit or to other projects they were working on but also an attempt to deceive the plaintiffs, though Guo, with false and inflated invoices from subcontractors. In Justice Kirchner's view an award of $100,000 for punitive damages against those two defendants was appropriate: *Wang v. Guo*, 2024 CarswellBC 586, 2024 BCSC 380 (B.C. S.C.).

- **Procedural Summaries—Meetings of Shareholders Pursuant to Ontario's Business Corporation Act—Business at an annual meeting of shareholders—**The focus of the appeal was on the part of the order requiring the corporation to perform its outstanding audits going back for ten years as required by the *OBCA*. Justice Leiper agreed that the order should be varied because an application to enforce corporate duties by force of s. 253 of the *OBCA* fell within the definition of "claim." Justice Leiper concluded that a failure to provide audited statements involves a "loss" to the shareholder who is entitled to have this information. Justice Leiper explained that the relief provided for within s. 253 of the *OBCA* fits logically into the framework and understanding of what is meant by a "claim" under the *Limitations Act*. Section 253 is a statutory proceeding which exists to enforce omissions under the *OBCA*, including the corporation's core obligations to its shareholders. There is no statutory exemption under either the *Limitations Act* or the *OBCA* from the operation of the basic limitation period. The application judge erred in determining that a limitation period of two years pursuant to the *Limitations Act* did not apply to this demand for audited financial statements for several years prior to those two years. Accordingly, the claim for an order to require the appellants to produce audited statements for those years prior to 2020 was statute-barred. The appeal was allowed to the extent necessary to bring the period for which audited financial statements must be produced in line with the time limit for such a claim as prescribed by the *Limitations Act*: *Lagana v. 2324965 Ontario Inc.* (2024), 48 B.L.R. (6th) 80, 2024 A.C.W.S. 694, 2024 CarswellOnt 1825, 2024 ONSC 953 (Ont. Div. Ct.).