

Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. <i>Distribution List</i>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

DIRECTORS AND OFFICERS IN CANADA: LAW AND PRACTICE

Carol Hansell, B.A., M.A., LL.B., M.B.A.

Release No. 1, January 2024

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 the Case Summaries — The Oppression Remedy in Chapter 16 (Shareholder Remedies Against Corporate Directors).

THOMSON REUTERS®

Customer Support

1-416-609-3800 (Toronto & International)

1-800-387-5164 (Toll Free Canada & U.S.)

E-mail CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

Case Law Highlights

- **REMEDIES TABLE — BREACH OF FIDUCIARY DUTY BY DIRECTORS AND OFFICERS — CONSTRUCTIVE TRUST** — In acquiring the property, Joe breached his fiduciary duty to SRL by taking advantage of an opportunity either belonging to SRL or for which SRL was negotiating. Joe put his personal interest in conflict with his duty to SRL. The receiver sought an order that the Grazing Lands vest in SRL so that they could be sold by the receiver and the net proceeds realized for the benefit of the stakeholders in the company. Justice Elwood noted that the remedy sought was a form of constructive trust. In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), Justice McLachlin identified four conditions which generally should be satisfied to justify a constructive trust based on wrongful conduct: (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, about the activities giving rise to the assets in his hands; (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff; (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and; (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. Justice Elwood concluded that conditions (1) and (2) were made out and conditions (3) and (4) were not fully addressed by the parties. Justice Elwood noted that it was important to recognize that SRL ceased operating as an active ranch for financial reasons shortly after Joe acquired the Grazing Lands. A sale by the receiver now that the ranch had ceased operations might result in a financial windfall for some of the stakeholders and financial deprivation for Joe and his family. Justice Elwood explained that a remedy of constructive trust does not necessarily require the plaintiff to establish a loss as a result of the breach of fiduciary duty. The courts recognize that a constructive trust may in some circumstances result in a windfall. However, “there must be no factors which would render imposition of a constructive trust unjust in all the circumstances”. Justice Elwood concluded that further submissions were required from the parties to determine an appropriate remedy that was just and equitable in all the circumstances: *Sather Ranch Ltd. v. Sather*, 2023 CarswellBC 1566, 2023 BCSC 926 (B.C. S.C.).
- **SHAREHOLDER REMEDIES AGAINST CORPORATE DIRECTORS — CASE SUMMARIES — THE OPPRESSION REMEDY — STALEMATE** — The Court of Appeal was not persuaded that the trial judge erred by (i) failing to apply the principles of partnership law in analyzing the Shanontown transaction and (ii) misapprehending the evidence related to Shanontown. The argument, essentially, was that Sheldon, Jay, and Corey, as Mark’s partners in the Group, owed Mark a fiduciary duty and both breached this duty and engaged in oppression. The Court of Appeal noted that the key factual findings were that the

Shanontown transaction was undertaken outside of the Group, and its relationship to the Group was governed by the Interim Arrangement. Mark was not entitled to any further information about the project after making the fully informed election not to participate. The terms of the Interim Arrangement were a factual matter to be determined by the trial judge. His conclusions as to whether there was an agreement, what its terms were, and whether the brothers abided by those terms were entitled to deference. The Court of Appeal noted that the fact that the quantification of the cash distribution changed three times throughout the project was irrelevant. Although Mark objected to the reduction of the initial distribution, he did not seek admission to the project. The facts that he was treated as a stranger to the project and not a partner, not informed of the negative equity in the project, not offered a right of participation on terms he found acceptable, and not consulted about the payout of the VTB mortgage were irrelevant. The Court of Appeal did not agree that the trial judge erred in not ordering a winding up of Shanontown. The choice of remedy was a matter for the trial judge's discretion, which was exercised reasonably. The finding of extreme dysfunction among the brothers did not necessitate treating Shanontown in the same manner as the Group assets, particularly given that Mark was not a part of Shanontown. If Corey and Mark believed the trial judge overlooked Shanontown in granting the wind-up remedy, the correct procedure would have been to return to the trial judge to seek clarification of the order. That was not done: *Libfeld v. Libfeld*, 2023 CarswellOnt 2387, 2023 ONCA 128 (Ont. C.A.).

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable
- Footnote text only appears in ProView-generated PDFs of entire sections and pages