



Directors Duties – The BCE Case

In December 2008 the Supreme Court of Canada (SCC) released its written reasons in the landmark case of *BCE Inc. v. 1976 Debenture Holders* (2008 SCC 69). Earlier in 2008 the SCC announced its decision in favour of BCE, paving the way for the proposed acquisition of BCE by a group led by the Ontario Teacher's Pension Plan Board. That acquisition subsequently failed to close, due to non-compliance with certain closing conditions.

The written reasons released by the SCC cover a wide range of issues, and are important reading for those involved in mergers and acquisitions, especially those projects involving plans of arrangement. In addition, the SCC makes a number of general observations in the area of directors fiduciary duties, which will have a broader impact beyond the field of mergers and acquisitions.

To Whom (Exactly) is the Fiduciary Duty Owed?

The SCC reasons confirm that a director's fiduciary duty is owed to the corporation. It is not owed exclusively to any one particular

stakeholder group (including shareholders). The board must give consideration to a range of stakeholders (including employees, shareholders, customers, and creditors) and interests (including the environment and good corporate citizenship) in exercising their business judgment. Balancing competing interests must be done in light of the surrounding circumstances. This decision reaffirms the SCC's position in prior cases (Peoples Department Stores) and distinguishes that law in Canada from the evolving position in the U.S.A., which continues to emphasize shareholders and share value as an overriding consideration in directors duties (Revlon). However, the Canadian directors duty, while permitting more flexibility, imposes a significant obligation on directors to diligently identify, assess and weigh a variety of competing interests in any particular circumstance, using their best business judgment.

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