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Directors and Officers in Canada: Law and Practice

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 Chapter 9 (Fiduciary Duty and Duty of Care) including updates to Chapter 9.2(c)(i) - Where the Courts Found a Breach of Fiduciary Duty and updates to Chapter 9.2(c)(ii) - Where the Courts Did Not Find a Breach of Fiduciary Duty. This release also includes updates to Chapter 9 (Fiduciary Duty and Duty of Care) of Part D - Remedies Table - Breach of Fiduciary Duty by Directors and Officers. This release also includes updates to Appendix G National Instrument 51-102 (on or after January 1, 2011) - Continuous Disclosure Obligations with updated version amended on June 12, 2018.

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Release Highlights

- **Fiduciary Duty and Duty of Care – Codification of the Fiduciary Relationship – Judicial Consideration of the Statutory Provisions – Where the Courts Found a Breach of Fiduciary Duty –** The applicant portrayed the acquisition of the Markham property by Greystar as a corporate opportunity that was appropriated by the individual respondents for Greystar's benefit in breach of the fiduciary duties they owed DBG as directors and officers of DBG. Justice Dunphy observed that there could be no question that each of the three DiBattista respondents owed fiduciary duties to DBG including a duty not to appropriate corporate opportunities of DBG. Justice Dunphy had no hesitation in concluding that the Markham property was an opportunity that belonged to DBG. The initial unsolicited sales pitch came in to DBG's offices and to Anthony's DBG email address. Greystar did not then exist. DBG was in the development business and, through Ray, has reiterated on multiple occasions that it was building up a significant cash holding to be in a position to pursue development opportunities. DBG had cash on hand sufficient to purchase the property. The negotiation and closing of the purchase and the great bulk of the financing was accomplished by DBG employees using DBG facilities and DBG cash. There was simply no reason why DBG could not pursue this acquisition and development opportunity. The submission that the "New Opportunities" provisions of the MOA justified their actions was not tenable for several reasons. The directors could not contract out of their statutory duties: OBCA s. 134(3). The MOA did not purport to contract out of new opportunities where DBG was involved by providing 75% of funding. The respondents took no steps to avoid the clear conflict of interest arising from Ray's decision to pursue this venture, showing no sign of even recognizing it as a problem. Ray's evasiveness at the 2016 shareholders meeting and failure to disclose is evidence of bad faith: *Gambin Estate v. Di Battista Gambin Developments Limited*, 2018 CarswellOnt 13727, 2018 ONSC 4905 (Ont. S.C.J.).

- **Fiduciary Duty and Duty of Care – Codification of the Fiduciary Relationship – Judicial Consideration of the Statutory Provisions – Where the Courts Did Not Find a Breach of Fiduciary Duty –** Justice Perell observed that in assessing what is a reasonable expectation of a claimant, the context is that directors owe a fiduciary duty only to the corporation. While the expectations of a stakeholder may coincidently coincide with what is in the best interest of the corporation, directors owe their duty to the corporation and not the stakeholders, and where the expectations of the stakeholders and the best interests of the corporation do not coincide, then the reasonable expectation of the stakeholders is simply that the directors will act in the best interests of the corporation. In

determining whether and the extent to which it is appropriate to make a director or officer personally liable for the corporation's oppressive conduct, the court should be guided by the principle that it may be fair to impose personal liability when the director derived a personal financial advantage, increased control of the corporation, breached a personal duty, misused corporate power, or where a remedy against the corporation would harm other stakeholders. Justice Perell concluded that there was no legally or factually viable oppression remedy claim against Pro-Financial, the McKinnons, or Pinto. In his view, it was debatable whether IAS should be granted standing as a complainant. The Pro-Financial Defendants owed no fiduciary duties to IAS. Moreover, the breach of fiduciary duty claim against the directors of Pro-Financial for orchestrating the sale of Pro-Financial's assets was properly the subject of a derivative action for which leave to commence had not been sought or obtained and the limitation period for doing so had now passed. IAS was no more than an angry and frustrated judgment creditor seeking to enforce its $1.3 million judgment. Justice Perell observed that debt actions should not be routinely turned into oppression remedies: *The Investment Administration Solutions Inc. v. Pro-Financial Asset Management Inc.*, 2018 CarswellOnt 2612, 2018 ONSC 1220 (Ont. S.C.J.).