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ADVISING THE FAMILY-OWNED BUSINESS

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Release No. 59, February 2019

What's New in this Update:

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.

What's New in this Update:

This release features updates to Appendix E: Procedural Summaries including the addition of case law annotations to the following summaries: Meetings of Shareholders Pursuant to *OBCA*, Financial

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disclosure pursuant to the *Canada Business Corporations Act*, and Auditors and financial statements pursuant to Ontario's *Business Corporations Act*. This release also features updates to Appendix F: Remedies Table – Breach of Fiduciary Duty.

Highlights:

Meetings of Shareholders Pursuant to CBCA — Case Law — Meeting Called by Court — Nothing in section 144 justified the court's intervention in Gokturk's exercise of his dissident shareholder rights by calling the meeting. The issue of deadlock clearly needed to be resolved. Gokturk's requisition, aimed at resolving that deadlock, had been outstanding since August 25. The petitioners had plenty of time to deal with the prospect of a special meeting being called to consider the resolution. In these circumstances, the materials did not satisfy the judge that that the petitioners had been unfairly prejudiced by the date set by Gokturk. There was, however, one area in which Gokturk had fallen short. Acting as a dissident shareholder, he had taken advantage of his management position to make use of corporate information concerning shareholders' email addresses and telephone numbers for the purpose of distributing his proxy solicitation materials and other information. The difficulty was that the petitioners did not have access to that information and were therefore at a disadvantage in their efforts to communicate their side of the dispute to the shareholders. Moreover, they wished to propose their own resolutions for consideration. In this regard, in this electronic age, and given the timing involved, the judge was satisfied that to this extent, the playing field is unfairly uneven. Accordingly, pursuant to the court's inherent jurisdiction and s. 39 of the *Law and Equity Act*, the judge pronounced an order in the nature of mandamus requiring Payfirma to deliver to the petitioners' solicitors forthwith a list of all the email addresses and telephone numbers of its shareholders in its possession: *Tracey v. Gokturk*, 2017 CarswellBC 2808, 2017 BCSC 1813.

Remedies Table — Breach of Fiduciary Duty — Professional Relationship — 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