

Publisher's Note

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Canada Business Corporations Manual 2nd Edition

The Manual provides corporate law practitioners with a comprehensive and up-to-date toolkit, including: a narrative roadmap through the relevant statutes and regulations; authoritative commentary on case law developments; clear guidance on the technical aspects of federal corporate organization, maintenance, and transactions; and a comprehensive collection of precedents, forms, and checklists.

This release features updates to the Remedies Table for Breach of Fiduciary Duty by Directors and Officers in Chapter 11.52 (Directors — Officers). This release also includes the addition to the Selected National Instruments tab of CSA Staff Notice 52-330 — Update on CSA Consultation Paper 52-404 Approach to Director and Audit Committee Member Independence, July 26, 2018; and CSA Multilateral Staff Notice 58-310, Report on Fourth Staff Review of Disclosure regarding Women on Boards and in Executive Officer Positions, September 27, 2018.

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Highlights

- **Remedies Table — Breach of Fiduciary by Directors and Officers — Damages/Equitable Compensation** — 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.).