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CANADA BUSINESS CORPORATIONS MANUAL Jack J. Quinn Release No. 4, May 2022
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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.

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This release features updates to Appendix 11A. Remedies Table — Breach of Fiduciary Duty by Directors and Officers in Chapter 11 (Directors — Officers). This release also features updates to Appendix § C:3 National Instrument 51-102 (on or after January 1, 2011) — Continuous Disclosure Obligations in Appendix C. Selected National Instruments. This release also features updates to Appendix TC. Tables of Concordance, with updates to Appendix § TC:1 Bergen, Table of Concordance of Business Corporations Acts.

Highlights

- **Chapter 11 (Directors — Officers) — Appendix 11A. Remedies Table — Breach of Fiduciary Duty by Directors and Officers — Damages/Equitable Compensation** — Shortly before the hearing of the appeal, the appellants and the respondents other than Dr. Nakhuda reached a settlement. The appeal proceeded only on the parts of the order dismissing the claims against Dr. Nakhuda. The appellants asserted that the trial judge erred by failing to find Dr. Nakhuda breached his contractual duty of loyalty and fidelity owed as an employee of Genesis. They did not challenge the judge’s conclusions that Dr. Nakhuda did not breach any fiduciary duties owed to Genesis. Justice Tysoe explained that just as the undisputed evidence supported the trial judge’s finding that the Departing Physicians had breached the component of their fiduciary duties requiring them to act in good faith, the evidence established that Dr. Nakhuda breached the component of his duty of fidelity requiring him to act in good faith by doing the same thing as had the Departing Physicians. Dr. Nakhuda signed the five letters of employment with Genesis employees without informing Genesis. This was contrary to Genesis’s business interests. While an employee of Genesis, Dr. Nakhuda acted contrary to its interests and thereby breached his duty of good faith. Justice Tysoe noted that the conclusion that Dr. Nakhuda breached the express and implied terms of his employment contract required the Court of Appeal to consider the amount of damages, if any, that should be awarded to Genesis. In Justice Tysoe’s opinion, the Court of Appeal was not in a position in the absence of substantive submissions to deal with this matter. Rather than inviting substantive submissions, it was preferable in Justice Tysoe’s view to remit them to the Supreme Court for resolution in a manner within the discretion of that Court. The appeal was allowed and the paragraphs in the order dismissing the action against Dr. Nakhuda and awarding him costs of the action against the appellants set aside: *Genesis Fertility Inc. v. Yuzpe*, 2021 CarswellBC 3506, 2021 BCCA 420 (B.C.C.A.).
- **Chapter 11 (Directors — Officers) — Appendix 11A. Remedies Table — Breach of Fiduciary Duty by Directors and Officers — Accounting of Profits** — It was evident that the disgorgement order was imposed to serve a prophylactic purpose. In the circumstances, Justice Hourigan concluded that the trial judge was obliged to fashion a remedy that would have a deterrent impact. Justice Hourigan noted that the question that remained was whether, in fashioning a prophylactic disgorgement order, the court is required to order disgorgement of all ill-gotten gains or whether it can make an order that achieves its deterrent purposes but does not require full disgorgement. Justice Hourigan explained that there may well be circumstances where it would be ineq-

uitable to order a faithless fiduciary to disgorge all profits. Equity seeks what is fair and what is fair should be determined with flexibility, not by means of hard and fast rules. For that reason, Justice Hourigan would not endorse an inflexible rule that full disgorgement of all profits must be ordered in all cases, but nor would Justice Hourigan speculate on the sorts of reasons that may justify something less than full disgorgement. Justice Hourigan noted that Australian courts have grappled with the circumstances in which full disgorgement ought to be made and whether there should be a rebuttable presumption that full disgorgement is appropriate. Justice Hourigan declined to decide those questions as counsel for the Appellants failed to address either point. Justice Hourigan noted that there was nothing to suggest that a partial disgorgement order should be made here. In the circumstances, an order of disgorgement of all profits was in Justice Hourigan's view appropriate: *Extreme Venture Partners Fund I LP v. Varma*, 2021 CarswellOnt 18074, 2021 ONCA 853 (Ont. C.A.).

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