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AUGUST 31, 2009

THE GOOD CORPORATE CITIZEN

Abstract:

This paper considers the use of various legal instruments to advance a more expansive, but focused, view of directors' duties and discretion – one which focuses on the longer term interests of the corporation. To do so, we begin with an attempt to clarify the nature of directors' statutory duties under Canadian corporate law. We then consider the recent decisions of the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v. Wise* and in *BCE v. 1976 Debentureholders*, in which the Court took a broad view of corporate purpose but failed to provide clear logic or operational guidance as to consequential directorial responsibilities. As a result, the Court may have afforded directors increased deference (assuming they comply with prescribed procedural steps) without a clearly stated legal rationale. We then outline various legal theories that courts might consider and elaborate on in order to help advance and clarify some of the concepts averted to by the Supreme Court of Canada in the Peoples and BCE decisions, as well as opportunities for complementary legislative or shareholder-initiated reform.

Key words:

Directors' duties, corporate citizenship, stakeholder remedies.

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1 Introduction

“... being too far ahead of your time is indistinguishable from being wrong.”¹

Many observers view the law and legal scholarship as remarkably self-serving disciplines. Scholars and judges² often find a way to ensure that “the law” confirms the view they would otherwise favour for economic, social or political reasons. There are strong incentives built into the political process for those who make laws to engage in (and invite) such circumlocution, by being purposefully general in the language they use to express concepts.

The broad theme of this paper is that judges (by choice or default) often eschew clarity in the law and favour ambiguity in order to achieve a desired outcome.³ This easily leads to confusion and unintended consequences. One area where this ambiguity is apparent is the law surrounding proper corporate purpose, and the duties, discretion and accountability of directors. Our goal in this paper is not to advance a normative rationale for or against “good corporate citizenship”. Rather, our focus is on how courts and legislators have attempted to devise legal norms relating to directors’ (and officers’) duties, in order to advance a modest notion of corporate social responsibility within the traditional framework of corporate governance.

At the heart of such efforts lies the continuing debate as to the obligation of directors and officers to act in “the best interests of the corporation”.⁴ As discussed later in this paper, translating this duty into clear, operational guidance for directors lies at the heart of one of the great, unresolved debates in corporate law – whether and to what extent the interests of the corporation are limited to those of its shareholders or extend to the “stakeholder” constituencies that contribute to or

¹ Harold S. Marks, “The Value of Predictions, or Where’d All This Rain Come From?” (1993) 49 *Financial Analysts Journal* 6 at 6.

² Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard U. Press, 2008).

³ See, for e.g., Cass R. Sunstein, “Incompletely Theorized Agreements” (1995) *Harv. L. Review* 1733.

⁴ *Canada Business Corporations Act*, R.S.C. 1985 C-44, s.122(1)(a).

are impacted by the corporate enterprise. Suffice to say, at this juncture, that the Committee which recommended including such express statutory language in the *Canada Business Corporations Act* (“**CBCA**”) specifically declined to offer guidance as to how the words “in the best interests of the corporation” should be interpreted. Instead, they left this task to the courts, while expressing the view that their formulation would allow the courts to escape from the constraints of what (they suggested) has somewhat charitably been described as the “anachronistic” view that has developed in the English courts.⁵ They were referring to Gower’s complaint that such courts viewed the best interests of the company as that of its shareholders.⁶

The Supreme Court of Canada’s recent decision in *BCE Inc. v. 1976 Debentureholders* (the “**BCE Decision**”)⁷ illustrates the hazards of navigating this debate. In getting to a decision that confirmed the prevailing view of the law, and seeking to clarify its own reasons in *Peoples Department Stores Inc. (Trustee of) v. Wise* (the “**Peoples Decision**”)⁸, the Supreme Court managed to express some strikingly confusing views about the duties of directors and directors’ accountability. The near term result will likely be a diminution of the latter. Likewise, the Supreme Court’s casual references to good corporate citizenship, in the absence of clear-headed analysis (or legislative norms), will likely serve primarily to add procedural costs to ensure adequate legal cover for board decisions, rather than create new norms and incentives to guide corporate conduct.

The BCE Decision may be welcomed by many. Boards will take comfort in language which suggests that, in the context of change of control transactions, their duty to act in the best interests of the corporation may be discharged by taking reasonable steps to maximize shareholder value. They will also welcome the broad discretion which the BCE Decision appears to confer on them to

⁵ Robert W.V. Dickerson et al., *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971), at para. 241.

⁶ L.C.B. Gower, *The Principles of Modern Company Law*, 3rd ed. (London: Stevens, 1969) at 522.

⁷ [2008] S.C.J. No. 37, SCC 69.

⁸ [2004] 3 S.C.R. 461.

determine what is in the best interests of the corporation, should they choose to take a course other than maximizing short term shareholder value. Because of the breadth of effect that the Supreme Court has accorded to the concept of the business judgment rule, it will be difficult for corporate stakeholders (including shareholders) to challenge their conduct so long as directors act in a reasoned and informed manner.

Non-shareholder stakeholders and advocates of corporate social responsibility will welcome the Supreme Court's discussion of directors being required to act in the best interests of the corporation viewed as a "good corporate citizen".⁹ They will also applaud the Supreme Court's statement that the fiduciary duty of directors is not confined to short-term profit or share value but, rather, where the corporation "is an ongoing concern, it looks to the long-term interests of the corporation".¹⁰

The BCE Decision provided the Supreme Court with a rare opportunity to articulate and clarify its view with respect to proper corporate purpose and the responsibilities of directors. To do so meaningfully would have required more careful elaboration on stakeholder theory, the director-centric governance model and attendant accountability mechanisms. Instead, unreasoned discourse, especially by the Supreme Court, is likely to be interpreted to provide something for everyone; which may mean too little for anyone.¹¹ Put another way, the BCE Decision can be read as saying that the best interests of the corporation are the interests of those stakeholders that a particular board deems most worthy of protection provided that due process is adhered to in selecting which stakeholder interests to favour. It is unlikely that this is what the Supreme Court had in mind, rendering its reasoning somewhat suspect.

⁹ *BCE Decision*, *supra* note 4 at para. 81.

¹⁰ *Ibid* at para. 38.

¹¹ Ronald J. Daniels & Randall Morck, *Corporate Decision-Making in Canada* (Calgary: University of Calgary Press, 1995) at p.8. See also, Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard University Press, 1991) at 38 – "A manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither. Faced with a demand from either group, the manager can appeal to the interests of the other."

The first part of this paper reviews the history of ambiguity in the assessment of directors' duties and accountability. Specifically, the extent of uncertainty and public policy debate surrounding the duty of loyalty and good faith, the duty of care, and the business judgment rule, focussing particularly on anglo-american law, are examined. The second part of the paper focuses on judicial circumlocution as to the role and accountability of directors in the BCE Decision. In the third part of the paper, various well developed legal theories that a court might invoke to meaningfully elaborate the role of directors are presented. In particular, the incorporation into corporate law of trust law principles, the team production approach to corporate law, moral stakeholder theory as a normative principle of corporate governance, the application of the common law duty to act reasonably and prescribing "enhanced" directors' duties in specified circumstances are considered. In addition, statutory reform and shareholder initiated approaches towards focusing director accountability are canvassed. We briefly canvass some relevant precedents, domestic or otherwise, to illustrate such approaches.

As we embark on a consideration of how such legal obligations might be framed, the factors motivating increasing pressure for companies to be "good citizens" are worth noting. At the simplest level, the lack of congruence between those who take a narrow view of corporate social obligations (i.e., to comply strictly with law) and the actual behaviour of corporate managers has become strained. As discussed later in the paper, it is obvious to any serious observer that corporate managers are highly attentive to the interests of various constituencies, beyond those of current shareholders and are constantly weighing competing interests. In this context, recognizing the limitations of legal norms, corporate law has been structured to provide "managerial discretion to respond to social and moral norms and sanctions".¹² This has become particularly relevant in a world characterized by connectedness and complexity. Globalization has eroded the power of states

¹² Einer Elhauge, "Sacrificing Corporate Profits in the Public Interest" (2005) 80 N.Y.U.L. Rev. 733 at 804.

to regulate large, multi-national corporations¹³ and market externalities.¹⁴ Likewise, the sheer complexity of contemporary social problems challenges their susceptibility to effective regulation through traditional, national legal instruments.¹⁵ In this environment, corporations (and other effective institutions) are being forced to look farther ahead and farther afield to achieve “sustainable” solutions.

2 Statutory Duties

2.1 Duty of Loyalty and Good Faith

Some of the confusion regarding the role and accountability of directors can be traced to the conflation of directors’ fiduciary and statutory duties. Canadian corporate law imposes two basic duties on directors and officers – a duty of care and one of loyalty and good faith, both of which are shaded by the “business judgment rule”. While both are often referred to collectively as “fiduciary duties”, it is more typical for the “fiduciary” label to be applied only to the duty of loyalty and good faith. For example, the Supreme Court of Canada in the Peoples Decision specifically referred to the duty of loyalty (in contrast to the duty of care) as a “statutory fiduciary duty”.¹⁶

Subsection 122(1)(a) of the CBCA provides that “every director and officer of a corporation in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation.”¹⁷

As Flannigan has pointed out in a series of articles, describing this “duty of loyalty” as a fiduciary obligation is a mistaken characterization. The function of fiduciary duties is to control opportunism and discipline self-interested behaviour in those arrangements in which an actor has

¹³ Martin Wolf, “Will the Nation-State Survive Globalization?” (2001) 80 Foreign Affairs 178.

¹⁴ Cass R. Sunstein, “Paradoxes of the Regulatory State” (1990) 57 U. Chicago L. Rev. 407.

¹⁵ See, for e.g., Gunther Teubner, “Global Bukowina: Legal Pluralism in the World Society” in Gunther Teubner, ed. *Global Law without a State* (Brookfield: Dartmouth 1997) 3.

¹⁶ *Peoples Decision*, *supra* note 5 at para. 32.

¹⁷ *Supra* note 4.

“access to the assets of another for a defined or limited purpose”.¹⁸ The fiduciary accountability of corporate directors and officers is established through their preferential access to the assets of the corporation. Fiduciary duties are a narrow subset of the duty of loyalty, embracing conflicts between the corporate duties of directors and their personal interests. These typically arise in respect of corporate opportunities, compensation, contracts in which a director or officer has a material interest and change of control transactions. The broader statutory duty of loyalty and good faith imposes on directors and officers the obligation not to exceed their authority and to exercise such authority “in the best interests of the corporation.” Considering the interests that directors must take into account in their decisions is a distinct exercise from defining the beneficiaries of their fiduciary duties. Conflating the two issues necessarily involves either the expansion of fiduciary duties or an erosion of the statutory duty of loyalty and good faith.

The mistaken description of the duty of loyalty and good faith as a “statutory fiduciary duty” is exemplified in the drafting proposals which led to the CBCA (the “**Dickerson Report**”).¹⁹ In characterizing the proposed duty as “a general statutory formulation of the principles underlying the fiduciary relationship between corporations and their directors”,²⁰ the Dickerson Report referred to earlier U.K.²¹ and Ontario law reform initiatives.²² In fact, a reading of the Ontario reform proposals suggests that the Select Committee on Company Law may have been focusing on the narrower “fiduciary” concern of directors foregoing their personal self-interest:

“The law is clear as to what duties of good faith are owed by a director to the company arising from the fiduciary relationship ... the Committee has determined that it is not the

¹⁸ Robert Flannigan, “Fiduciary Duties of Shareholders and Directors” (2004) *Journal of Business Law* at 281. See also “The Boundaries of Fiduciary Accountability” (2004) 83 *Canadian Bar Review*; “The Adulteration of Fiduciary Doctrine in Corporate Law” (2006) 122 *Law Quarterly Review*; “Reshaping the Duties of Directors” (2005) 84 *Canadian Bar Review*; “Book Review: A Romantic Conception of Fiduciary Obligation” (2005) 84 *Canadian Bar Review*.

¹⁹ *Supra* note 5, Vol. 1.

²⁰ *Ibid.* at 81.

²¹ *Report of the Company Law Committee*, (London: HMSO, 1962, Cmnd. 1749).

²² *Interim Report of the Select Committee on Company Law* (Toronto: Province of Ontario Legislative Assembly, 1967).

director's fiduciary relationship to the company which is unclear in law, nor does the precise scope or nature of his duties and responsibilities need clarification."²³

While this may be a charitable view of the Ontario Select Committee's analysis, there is no basis for giving the Dickerson Report a similar benefit of the doubt. Making it clear that the statutory provision was intended to embrace common law and equitable principles, the Dickerson Report identified its purpose as giving "statutory support to principles that are as difficult to apply as they are well understood".²⁴ By observing that the notion of the best interests of the corporation left "the way free for directors to take into account whatever factors they consider relevant in determining corporate policies",²⁵ they clearly had in mind a broader agency duty – one inconsistent with traditional fiduciary obligations.

The resulting lack of clarity and accountability is not unique to Canadian corporate law. Flannigan²⁶ traces how things went astray shortly after the House of Lords' decision in *Regal (Hastings) Ltd. v. Gulliver*.²⁷ That decision confirmed the focus of fiduciary regulation on controlling opportunism, indicating strict liability where a conflict exists (or a benefit is obtained), absent consent. In contrast, the following month, the U.K. Court of Appeal in *Re Smith & Fawcett Ltd.*²⁸ combined the concept of fiduciary obligation with that of "the best interests of the corporation". Describing the power to register share transfers as a "fiduciary power", Lord Greene stated that directors "must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose".²⁹

²³ *Ibid.* at 53.

²⁴ *Supra* note 13 at 81.

²⁵ *Ibid.* at 82.

²⁶ R. Flannigan, "The Adulteration of Fiduciary Doctrine in Corporate Law" (2006) 122 Law Quarterly Review.

²⁷ [1942] One All E.R. 378, HL, [1967] 2. A.C. 134n

²⁸ [1942] 1 Ch. 304.

²⁹ *Ibid.* at 306.

Likewise, in *Howard Smith Ltd. v. Ampol Petroleum Ltd.*,³⁰ in considering whether directors had properly issued shares during a control contest, the Privy Council took a view of fiduciary accountability as extending beyond the objective of controlling opportunism. In rejecting the argument advanced on behalf of the directors (that the issuance of shares was not motivated by self-interest and was within the authority of the board), Lord Wilberforce purported to expand the scope of fiduciary accountability:

*“But it does not follow from this, as the Appellants assert, that the absence of any element of self-interest is enough to make an issue valid. Self-interest is only one, though no doubt the commonest, instance of improper motive: and before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made.”*³¹

Nor is the confusion as to the distinction between fiduciary accountability and determining the best interests of the corporation limited to Anglo-Canadian jurisprudence. In *Credit Lyonnais Bank Nederland N.V. v. Pathe Communications Corp.* (“Credit Lyonnais”), in the context of deciding whether there was a breach of fiduciary duties, then Chancellor Allen stated that “where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise.”³² While the decision was initially interpreted to expand directors’ duties to include creditors when a corporation is in the so-called “zone of insolvency”, subsequent case law has clarified that, rather than extending or expanding duties to creditors, it was intended to create an additional shield for directors against shareholders claiming the company should have taken increased risks for their benefit.³³ In the more recent *Gheewalla* case, the Delaware Supreme Court made it clear that duties are not owed directly to creditors but that directors continue to owe duties only to the corporate enterprise.³⁴

³⁰ [1974] A.C. 821.

³¹ *Ibid.* at 834.

³² 1991 Del. Ch. Lexis 215 at 108 (Del. Ch. 1991).

³³ *Production Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A. 2d 772 (Del. Ch. 2004).

³⁴ *Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. Sup. Ct. 2007).

The Supreme Court of Canada addressed the above-mentioned logic in the Peoples Decision. By doing so under the rubric of fiduciary obligations (as in *Credit Lyonnais*), it may have added to the confusion in Canada. Peoples Department Store Inc. (“**Peoples**”) had been acquired by a subsidiary of Wise Stores Inc. (“**Wise**”) from Marks & Spencer Canada Inc. (“**M&S**”).³⁵ The three Wise brothers were directors of both Wise Stores and its new subsidiary. To protect amounts due to M & S on account of the purchase price, the purchase agreement restricted the amalgamation of the two corporations.³⁶ As a result, a joint procurement program was established whereby Peoples did most of the purchasing and transferred to Wise inventory purchased on its behalf.³⁷ When Peoples filed for bankruptcy, its trustee claimed that the directors had breached their statutory duties of loyalty and care to Peoples by implementing the joint procurement plan.³⁸

While the Supreme Court of Canada determined the directors do not have a fiduciary duty to corporate creditors where the corporation is approaching insolvency,³⁹ it framed its analysis in terms of what stakeholder claims are entitled to consideration by directors in determining “the best interests of the corporation”.⁴⁰ The Supreme Court rejected the notion that the best interests of the corporation means the best interests of its shareholders and stated that the positions of other stakeholders (including creditors – and not merely when a corporation approaches the zone of insolvency) are entitled to consideration by directors:

*“It is clear that the phrase the “best interests of the corporation” should be read not simply as the “best interests of the shareholders” ... in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.”*⁴¹

³⁵ *Peoples Decision*, supra note 5 at para. 8.

³⁶ *Ibid.* at para. 11.

³⁷ *Ibid.* at para. 18.

³⁸ *Ibid.* at para. 23.

³⁹ *Ibid.* at paras. 43-46.

⁴⁰ *Ibid.* at paras. 481-484.

⁴¹ *Ibid.* at para. 42.

The Supreme Court cited with approval the view of Berger J. in *Teck Corp. v. Millar*:

*“I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company’s shareholders...But if they observe a decent respect for other interests lying beyond those of the company’s shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.”*⁴²

The stakeholder debate is an important and timely one but the Supreme Court may have done a disservice by characterizing it as an issue of fiduciary obligation. Having done so, the Supreme Court found that both Peoples and Wise had consented to the existence of the conflicting duties that the directors owed to each of them and that the evidence indicated no favouritism but, rather, that the defendant directors had been solely motivated to resolve the problem of managing inventories efficiently.⁴³ As a result, the Supreme Court concluded that there was no fiduciary breach. By treating the issue as whether directors owed a fiduciary obligation to creditors (as opposed to determining whether the directors had breached their statutory duty to the corporation), the Supreme Court managed to extricate itself from the “proper purpose” analysis by arguing that creditors (and, presumably other stakeholders) had other remedies – such as oppression and negligence - available to them. Indeed, the Supreme Court suggested that the availability of a broad oppression remedy “undermines any perceived need to extend the fiduciary duty imposed on directors”.⁴⁴

Having mischaracterized the issue as one of fiduciary accountability, the Supreme Court might have resolved the issue by finding no evidence of bad faith or negligence. Instead, while observing that directors’ fiduciary liability is strict,⁴⁵ it immediately stepped back from that position to assert that “all the circumstances may be scrutinized to determine whether the directors and

⁴² *Teck Corp. v. Millar* (1972) 33 DLR (3d) 288 at 314.

⁴³ *Ibid.* at paras. 480-481.

⁴⁴ *Ibid.* at paras. 485-486.

⁴⁵ *Ibid.* at para. 480.

officers have acted honestly and in good faith with a view to the best interests of the corporation”.⁴⁶ The Supreme Court also stated that “the subjective motivation of the director ... is the central focus of the statutory fiduciary duty”.⁴⁷

It is not clear how the Supreme Court reconciled “subjective motivation” or scrutiny of “all the circumstances” with strict liability. Nor is it evident how wading into the stakeholder debate was relevant to the issue of fiduciary accountability. Doing so arguably imported the oppression analysis and further diluted the concept of fiduciary accountability – if complainants must produce evidence of improper motivation or culpability “in the circumstances”, the likelihood of a court finding directors in breach of their “fiduciary” duty is substantially diminished.⁴⁸

2.2 Duty of Care

A review of how the law has evolved with respect to the duty of care further highlights the hazards of ambiguity.

Subsection 122(1)(b) of the CBCA provides that “every director and officer of a corporation, in exercising their powers and discharging their duties, shall ... exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”

The common law standard of directorial care was subjective and (viewed in hindsight) remarkably low. Its classic articulation is found in *re City Equitable Fire Insurance Company Limited*⁴⁹ In effect, the common law standard did not require of directors (as it did of others under

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at para.491.

⁴⁸ For a more detailed discussion of the frailties of the *Peoples Decision*, see Ian Lee, “Peoples Department Stores v. Wise and the ‘Best Interests of the Corporation’” (2005) 41 Canadian Bus. L.J.; Mohamed F. Khimji, “Peoples v. Wise – Conflating Directors’ Duties, Oppression and Stakeholder Protection” (2006) 39 U.B.C. Law Review; and D’Arcy L. MacPherson, “Supreme Court Restates Directors’ Fiduciary Duty – A Comment on Peoples Department Stores v. Wise” (2005) 43 Alta. L. Rev.

⁴⁹ [1925] 1 Ch. 407.

the general law of negligence) to meet the standard of the “reasonable person”. This approach was rejected by each of the Ontario Select Committee on Company Law and the Dickerson Report.

The Ontario Select Committee recommended that the common law standard of care be elevated to an objective test, requiring that directors exhibit the degree of care, diligence and skill of a “reasonably prudent director in comparable circumstances”.⁵⁰ The language ultimately adopted in the *Ontario Business Corporations Act* (the “**OBCA**”) extended the test to officers, as well as directors, and measures their conduct against that of a “reasonably prudent person” (rather than of a “reasonably prudent director”) in comparable circumstances.⁵¹

While the use of the word “person” instead of “director” might have been viewed as a conforming change (given the extension of the duty to officers, as well as directors), it was also viewed as a diminution of the proposed standard from that of a “director” (connoting some degree of expertise or professionalism) to that of a “reasonably prudent person”. This was the conclusion of the Federal Court of Appeal in construing virtually identical language in s. 227.1(3) of the *Income Tax Act*.⁵² That Court found the reference to a reasonably prudent (vs. skilled) person suggested a subjective standard of competence, a logic buttressed by the inclusion of the phrase “in comparable circumstances”. Accordingly, it concluded that the language in s. 227.1(3) created a hybrid test:

“It is not enough for a director to say he or she did his or her best, for that is an invocation of the purely subjective standard. Equally clear is that honesty is not enough. However, the standard is not a professional one. Nor is it the negligence law standard that governs these cases. Rather, the Act contains both objective elements, embodied in the reasonable person language, and subjective elements, inherent in individual considerations like “skill” and the idea of “comparable circumstances”. Accordingly, the standard can be properly described as “objective subjective”. ”⁵³

⁵⁰ *Supra* note 14 at 56, para. 7.2.4.

⁵¹ *Business Corporations Act*, R.S.O. 1990, c. B.16 s. 134(12).

⁵² *Soper v. Canada* (1998), 1 F.C. 124 (C.A.) at para. 38.

⁵³ *Ibid.* at para. 41.

Like the Ontario Select Committee, the Dickerson Report sought to raise the common law standard of care in its proposed statutory codification.⁵⁴ As it noted, “it is ... cold comfort for a shareholder to know that there is a steady supply of marginally competent people available under present law to manage his investment”.⁵⁵ Although the Dickerson Report did not propose the phrase “in comparable circumstances”, it was included by the legislative drafters. At least until the Peoples Decision, this was viewed by many (including the Federal Court of Appeal) as preserving the common law subjectivity of the duty of care.

Arguably, such ambiguity was put to rest by the Supreme Court of Canada in the Peoples Decision. With respect to the specific issue, the Supreme Court made it clear that the standard had been raised to an objective contextual one:

*“The main difference is that the enacted version includes the words “in comparable circumstances”, which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care.”*⁵⁶

As a result, the duty of care imposed on directors would appear to be identical to that imposed on all other persons.

In reaching that result, however, the Supreme Court may have created new uncertainty. Firstly, their reference to the introduction of a “contextual element” into the statutory standard of care is not clear. According to the Supreme Court “The contextual approach dictated by s. 122(1)(b) of the CBCA not only emphasizes the primary facts, but also permits prevailing socio-economic conditions to be taken into consideration.”⁵⁷

⁵⁴ *Dickerson Report*, *supra* note 11 at para. 242.

⁵⁵ *Ibid.*

⁵⁶ *Peoples Decision*, *supra* note 5 at paras. 490-491.

⁵⁷ *Ibid.* at para. 491.

The Supreme Court did not elaborate on the relevance of such socio-economic conditions or how they might be taken into account - whether by directors or by judges, exercising their discretion in adjusting liability standards after the fact. Nor did it reflect on the justiciability of such issues.

Instead, the Supreme Court took an expansive view of the scope of directors' duty of care, observing that:

*"... unlike the statement of the fiduciary duty in s.122(1)(a) of the CBCA, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s.122(1)(b) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. ... Thus the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors."*⁵⁸

As Nicholls points out, it appears that the Supreme Court may have conflated two different concepts – the tort “duty of care”, which anticipates many beneficiaries, and the statutory duty. Nicholls argues that it is difficult to understand why a corporate statute would impose additional personal duties on directors other than to the corporation itself.⁵⁹

It has been suggested that this reasoning of the Supreme Court was based on the civil law of Québec.⁶⁰ This raises interesting issues with respect to the consistent interpretation of the CBCA – a federal statute, particularly in the context of interpretation by a civil law court.

Ontario has subsequently amended its Business Corporations Act to add the underlined words:

s. 134(i): Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,
a) act honestly and in good faith with a view to the best interests of the corporation;
and
*b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*⁶¹

⁵⁸ *Ibid.* at para. 57.

⁵⁹ Christopher C. Nicholls, *Corporate Law* (Toronto: Emond-Montgomery, 2005) at 298-299.

⁶⁰ Bruce L. Welling, *Corporate Law in Canada: The Governing Principles* 3rd ed. (London, ON: Scribblers Publishing, 2006) at 331, note 115. Both the Peoples Decision and the BCE Decision were considered by the Supreme Court on appeal from the Quebec Court of Appeal.

⁶¹ *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 134.

In analyzing the Supreme Court’s language in the Peoples Decision, it is interesting to consider whether a broader duty of care, theoretically owed to a diverse, undefined group of stakeholders, might serve to defeat the object of the duty of loyalty, thereby creating further confusion and leading to suboptimal board decision-making. For example, would well advised directors eschew risks for fear of attracting creditor liability, even when doing so sacrifices corporate opportunity? If so, the Peoples Decision would serve to encourage self-interested conduct (i.e., the mitigation of exposure to personal liability). This concern has been specifically raised in the context of court-supervised reorganization proceedings under the *Bankruptcy and Insolvency Act* and the *Companies’ Creditor Arrangement Act*.⁶² For this reason, Ben-Ishai and Nowak recommend that the oppression remedy should not be available for use by stakeholders of a corporation once it has entered into a court-supervised reorganization proceeding.

Such concerns have risen to the forefront, of late. Increasingly, directors focus on the personal consequences of board service, both in deciding to go (or remain) on a board, in their deliberations (which tend to be highly process driven) and in their aversion to taking higher risk decisions (which are often a characteristic of longer-term strategies). The consequences for firm and systemic innovation and competitiveness are alarming.

2.3 The Business Judgment Rule

One final aspect of the Peoples Decision merits comment. This was the first instance in which the Supreme Court of Canada specifically considered and validated the “business judgment rule”.

In the United States, the courts have formalized the “business judgment rule” as a standard of conduct which, if adhered to, insulates the board from judicial review of their actions. A classic

⁶² Stephanie Ben-Ishai and Catherine Nowak, “The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations” (2008) *Ann. Insolv. Rev.*..

U.S. case is *Shlensky v. Wrigley*, in which the plaintiff challenged the Wrigley board's refusal to install lights at Wrigley Field when every other major league baseball team played night games. The board defended its actions based on the preferences of Wrigley's majority owner – that baseball is a day game and that lighting the stadium would damage the surrounding community. The court granted the board's motion to dismiss, relying on the “business judgment rule” to preclude the plaintiffs from even inquiring into the basis for the board's decision.⁶³

Assuming a board acts in good faith, on an informed basis, in a manner in which it believes is in the best interest of the corporation, and is neither wasteful (in the narrow sense of amounting to “corporate waste”) nor engaged in self-interested conduct, they are afforded wide latitude by the U.S. courts under the shield of the business judgment rule.⁶⁴ The presumption of judicial deference to the judgment of directors may be rebutted if any of the above-noted conditions are not satisfied, in which case the burden shifts to the directors to show that their actions were rational and taken in good faith. Self interested conduct in the context of control transactions results in the application of a more stringent “entire fairness” test.⁶⁵

Former Chancellor Allen justifies the business judgment rule, within the overall context of liability provisions, as intended to protect shareholders by encouraging boards to take risks for their benefit.⁶⁶

Elhauge provides a more socially-focused rationale – that allowing managerial discretion may serve to subject corporate decisions to the same social and moral processes that apply to sole proprietors.⁶⁷

⁶³ 237 N.E. 2d 776 (Ill. App. 1968).

⁶⁴ *Aronson v. Lewis*, 473 A.2d 805, 1984 Del. Lexis 305 (Del. S.C. 1984); *Kaplan v. Centex Corp.*, 284 A.2d 119, 1971 Del. Ch. Lexis 143 (Del. Ch. 1971); *Robinson v. Pittsburgh Oil Refinery Corp.*, 14 Del. Ch. 193, 126 A. 46, 1924 Del. Ch. Lexis 21 (Del Ch. 1924); *Puma v. Marriott*, 283 A.2d 693, 1971 Del. Ch. Lexis 137 (Del. Ch. 1971).

⁶⁵ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 1985 Del. Lexis 482 (Del. S.C. 1985).

⁶⁶ William T. Allen, “Modern Corporate Governance and the Erosion of the Business Judgment Rule in Delaware Corporate Law” (2008) Comparative Research in Law and Political Economy Research Paper No. 06/2008, available online at ssrn.com/abstract=1105591.

In practice the business judgment rule has provided a broad shield. Well advised boards should always have a carefully prepared record to ensure that the business judgment rule protection trumps any statutory duty claim. For example, boards have been protected in taking actions that deliberately benefit creditors at the expense of shareholders, so long as the decision was based in facts, well considered, in good faith, and not conflicted by any personal interests of a majority of directors.⁶⁸

Canadian jurisprudential deference to the “business judgment rule” is less developed. In *CW Shareholdings v. WIC Western International Communications Ltd.*,⁶⁹ the Ontario Superior Court of Justice explained that the rule:

“... operates to shield from court intervention business decisions which have been made honestly, prudently, in good faith and on reasonable grounds. In such cases, the board’s decision will not be subject to microscopic examination and the court will be reluctant to interfere and usurp the board of directors’ function in managing the corporation.”

The rule was referred to by the Supreme Court of Canada in the Peoples Decision as follows:

*“Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available ex-post facto. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the “business judgment rule”, adopting the American name for the rule.”*⁷⁰

For reasons discussed below, the BCE Decision may serve to either enshrine an overly broad formulation of the business judgment rule or cast doubt as to its relevance and utility. Neither of these outcomes is desirable.

⁶⁷ *Supra* note 12 at 844.

⁶⁸ See S. Bainbridge, *Corporation Law and Economics* (New York: Foundation Press, 2002) at 414-15.

⁶⁹ (1998), 39 OR (3d) 755.

⁷⁰ *Peoples Decision*, *supra* note 5 at para. 64.

3 The BCE Decision

Those who follow Canadian corporate law eagerly awaited the Supreme Court of Canada's reasons in the BCE Decision. Given the uncertainty surrounding directors' duties and to whom they are owed, exacerbated by the Supreme Court in the Peoples Decision, there was a general expectation that the Supreme Court might use the opportunity to revisit and distinguish (or otherwise clarify) its earlier reasoning. Instead, the Supreme Court created additional uncertainty with respect to the manner in which the "fairness" test for a Plan of Arrangement ("**Arrangement**") and the oppression remedy will be applied, as well as adding to the confusion surrounding directors' duties and the indeterminate nature and scope of their agency obligations.

The facts involved a (then) traditional leveraged buyout (which, at the time, would have been the largest of its kind, had it been consummated) to have been effected by an Arrangement under the CBCA. While it did not purport to arrange the legal rights of bondholders of Bell Canada (a wholly-owned subsidiary of BCE), certain such bondholders contested the fairness of the Arrangement and brought an oppression claim. The trial judge dismissed such claims, finding the Arrangement to be in the best interests of BCE and Bell Canada.⁷¹

The Quebec Court of Appeal unanimously overturned the trial decision, finding that the Arrangement had not been shown to be fair and that it should not have been approved.⁷² The Court of Appeal found that the BCE board of directors (the "**Board**") was under a duty to consider whether the Arrangement could have been structured in a way that provided a satisfactory price for shareholders while avoiding (or at least mitigating) the adverse effect on bondholders. In the absence of such efforts (and ignoring the trial judge's specific findings that the Board had considered the interests of bondholders), the Court of Appeal determined that BCE had not discharged its onus of showing that the Arrangement was fair and reasonable. Given its lack of

⁷¹ *BCE Inc. and Bell Canada v. 1976 Debentureholders et al* (2008), 43 B.L.R. (4th) 1, 2008 QCCS 9057.

⁷² *BCE Inc. and Bell Canada v. 1976 Debentureholders et al* (2008), 43 B.L.R. (4th) 157, 2008 QCCA 935.

linkage to the factual record, the Court of Appeal's decision was troubling in that it suggested a substantive objection – i.e., it was not sufficient to consider extra-contractual interests but, rather, the Board should have done something about them (beyond ensuring that contractual obligations would be honoured). Absent a legal entitlement that could be clearly articulated, the Quebec Court of Appeal left unanswered how a board might go about striking a satisfactory and legally justifiable balance.

On a remarkably expedited basis, the Supreme Court of Canada heard the appeal and unanimously reversed the decision of the Quebec Court of Appeal. In its reasons, the Court reinstated key findings of the trial judge, rejecting the bondholder claims that the transaction was oppressive and confirming that BCE had satisfied the fairness test required for court approval of the Arrangement.

In analyzing the manner in which the “fairness” test for an Arrangement will be applied, the Supreme Court noted that the scope of judicial inquiry is generally confined to legal rights. The Supreme Court rejected the “fair and reasonable” test by which courts previously reserved to themselves the discretion to rule against an Arrangement, notwithstanding shareholder approval thereof.⁷³ Instead, and absent extraordinary circumstances (not found in this case and, therefore, presumably not simply a diminution in the market value of a complainant's securities), the Supreme Court articulated a narrower test for approval, i.e., whether (a) the Arrangement has a valid business purpose and (b) the objections of those whose legal rights are being arranged have been resolved in a fair and balanced way. The Supreme Court recognized that “there is no such thing as a perfect arrangement” and that “although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination”.⁷⁴

⁷³ BCE's common shareholders approved the Arrangement by a vote of over 97%.

⁷⁴ *BCE Decision*, *supra* note 4 at para. 164.

The valid purpose prong of the test suggests a fact specific inquiry by the Supreme Court and ties into their discussion of necessity. Presumably, the lower the degree of “necessity” the higher the degree of scrutiny an Arrangement will attract. The fair balancing prong looks at a number of factors (including requisite shareholder approval).

It remains to be seen whether this two-part test will facilitate Arrangements or be used by courts as a (different) mechanism to “second guess” shareholder votes when they are so inclined for equitable reasons. Moreover, as noted, the Supreme Court’s reasons imply a “necessity” test in order to effect a transaction by way of an Arrangement. In this case, the Supreme Court determined such necessity to have been established, without any elaboration thereon.

The Supreme Court also set out a two-pronged test with respect to their analysis of the oppression remedy. A complainant is required to establish (a) that it had a reasonable expectation which (b) was “unfairly disregarded”.⁷⁵ The Supreme Court found the concept of reasonable expectations to be objective and contextual in that “the question is whether the expectation is reasonable having regard for the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations”.⁷⁶ It went on to suggest that, where there is a conflict between the views of stakeholders, each are entitled to reasonably expect that they will be treated fairly. In resolving conflicts, the Supreme Court suggested that a board owes a duty to the corporation, not a particular group of stakeholders, and the reasonable expectations of stakeholders are that the directors will act in a disinterested and impartial manner, free from conflict of interest, and in the best interests of the corporation.

The Supreme Court elaborated various factors useful in determining whether reasonable expectations exist (and are protected), including general commercial practice, the nature of the corporation, the relationship between the parties, past practice, steps the claimant could have taken

⁷⁵ *Ibid.* at para. 56.

⁷⁶ *Ibid.* at para. 62.

to protect itself, representations and agreements, and the fair resolution of the conflicting interests of different stakeholders.⁷⁷ With respect to the last factor, while the Supreme Court noted that directors can resolve conflicts between different stakeholder groups in a way that favours one group at the expense of another, it articulated a cornerstone of fair treatment – “the corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly”.⁷⁸ The BCE Decision fails to provide guidance as to when permissible favouritism crosses over the line into the zone of unfairness.

The Supreme Court’s approach to the oppression remedy illustrates the circular logic of its reasoning. Reasonable expectations arguments are, by their nature, somewhat circular, insofar as expectations are likely to reflect extant legal norms. To compound (for confound) that the Supreme Court, in effect, suggests that reasonable expectations can be breached, so long as doing so is not unfair. This challenges the law since *Ebrahimi*,⁷⁹ under which “reasonable expectations” defined fairness. Moreover, in setting out several factors for determining the “reasonableness” of expectations, the Supreme Court may have changed their relative significance. For example, did the Supreme Court, in listing the existence of a contract alongside the other factors, intend to diminish its relative importance? More generally, by touching on various theories of what might form the basis for a judicially recognized “reasonable expectation” the Supreme Court created uncertainty as to the assessment thereof.⁸⁰

The Supreme Court’s analysis regarding how a board should weigh “the fair resolution of conflicting interests between corporate stakeholders” appears to link oppression to the duty of

⁷⁷ *Ibid.* at paras. 69-84.

⁷⁸ *Ibid.* at para. 64.

⁷⁹ In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] AC 360 (H.L.).

⁸⁰ Jeffrey G. MacIntosh, “BCE and the Peoples’ Corporate Law: Learning to Live on Quicksand” [Insert upcoming CBLJ cite].

loyalty owed by directors and that “reasonable expectations” are now relevant to such duty. The Supreme Court stated that:

*“directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation.”*⁸¹

Earlier in its reasons, the Supreme Court asserted:

*“...this case does involve the fiduciary duty of the directors to the corporation, and particularly the “fair treatment” component of that duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy.*⁸²

Merging the duty of loyalty (one owed to the corporation) with the oppression remedy (intended to redress personal harm to a security holder, creditor, director or officer of a corporation) can only serve to create uncertainty as to both.

In effect, the Supreme Court suggests that fair treatment in respect of alleged corporate or personal harms is whatever stakeholder groups are entitled to reasonably expect, without further elaboration on the nature (or reasonableness) of such expectations or the distinction between various remedies.⁸³ The Supreme Court appears to designate the board as a referee and, so long as it observes appropriate process, to afford it the protection of what appears to be an extraordinarily expansive business judgment rule.

The Supreme Court’s “fiduciary duty” analysis is the most problematic. It states that the content of the duty varies with the situation at hand⁸⁴ and, in effect, relegates it to one of the listed

⁸¹ *BCE Decision*, *supra* note 4 at para. 66.

⁸² *Ibid.*, at para. 36.

⁸³ For an interesting and somewhat prescient contextual analysis, written after the Supreme Court’s decision and in anticipation of its reasons, see Peer Zumbansen and Simon Archer, “The BCE Decision: Reflections on The Firm as a Contractual Organization” (2008) Comparative Research in Law and Political Economy Research Paper No. 17/2008, available online at ssrn.com/abstractid=1160094. See also MacIntosh (*supra* note 80) for a discussion of how the BCE Decision further confuses derivative and personal actions.

⁸⁴ *BCE Decision*, *supra* note 4 at para. 37.

factors to be considered in the context of considering oppression relief – i.e., entailing a factual “fairness” determination rather than a determination of whether a decision was made on a good faith basis. Reaffirming the Peoples Decision (i.e., that the duty is to act in the best interests of the corporation, which may include considering the impact of corporate decisions on particular groups of stakeholders), and rather than simply confirming directorial discretion to consider stakeholder interests, the Supreme Court went on to speak of an affirmative (if ill-defined) “fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen”.⁸⁵ In resolving conflicting interests, the Supreme Court suggested that there is “no principle that one set of interests – for example, the interests of shareholders – should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercise business judgment in a responsible way.”⁸⁶ Such observations are unhelpful in clarifying norms of directorial conduct. The Supreme Court also noted that the “fiduciary duty” of the directors to the corporation is not confined to short-term profit or share value. “Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation.”⁸⁷ Although the stakeholder debate is an important and timely one, the Supreme Court may have done it a disservice by characterizing its premise as an issue of fiduciary obligation. The challenge of judicial monitoring of competing stakeholder interests is even more daunting than that of monitoring shareholder value maximization. Judges are ill-suited to either task.

The BCE Decision also adds uncertainty to the nature and scope of directors’ agency obligations. Looking to the facts of the case, the Supreme Court vindicated the trial judge. The Supreme Court found that evidence both supported a reasonable expectation that the Board would consider the position of the bondholders and, in fact, did consider their interests in an appropriate

⁸⁵ *Ibid.* at para. 8.

⁸⁶ *Ibid.* at para. 84.

⁸⁷ *Ibid.* at para. 38.

manner, given the circumstances. The repeated references to the interests and fair treatment of stakeholders, and to long-term corporate citizenship, suggest a rejection of the Delaware model, which expressly recognizes and explicitly resolves the conflict directors face in a change-of-control context, establishing as a principle that once a board of directors makes a decision to sell a company, they (i) have a duty to maximize the value that shareholders receive and (ii) are subject to an “intermediate standard of review” – their decisions receive less deference than under the normal business judgment rule.⁸⁸ That said, having framed the issue in terms of stakeholder theory (in contrast to a duty to maximize value for shareholders while respecting obligations to other stakeholders), the Court provided no guidance as to the priority of any constituency claims, other than to suggest that boards focus on the “best interests of the corporation”. For example, the Supreme Court did not address (because they were not called upon to do so) the treatment of preferred shareholders. Ontario’s Divisional Court decision in *Carling O’Keefe*⁸⁹ effectively protected such shareholders by holding that the directors’ duty is to act in the best interests of shareholders as a whole, including holders of preferred shares. The BCE Decision posits preferred shareholders as just another stakeholder group whose interests (arguably more akin to debt than common equity) must be balanced.

Even the question of whether directors may, should or are obliged to consider stakeholder interests (and, if the latter, when) was not addressed clearly by the Supreme Court. Early in its reasons, the Supreme Court notes that in the Peoples Decision “...this Court found that although directors must consider the best interests of the corporation, it may also be appropriate, although not

⁸⁸ See *Revlon, Inc., v. MacAndrews & Forbes Holdings, Inc.*, 506 A. 2d 173 (Del. S.C. 1986); subsequent Delaware cases have addressed fact specific issues concerning how directors should approach value maximization when selling a company. In each of *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R., (3d) 177 and *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, the Ontario Court of Appeal held that when there is a change of control, directors should take reasonable steps to maximize shareholder value. Other Canadian courts have taken a similar view. This principle is also reflected in Canadian Securities Administrators’ National Policy 62-202, which states: (2) *The primary objective of the take-over provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company.*

⁸⁹ *Palmer v. Carling O’Keefe Breweries of Canada Ltd.* (1989), 67 O.R. (2d) 161, 56 D.L.R. (4th) 128.

mandatory, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders.”⁹⁰ Later the Supreme Court states “the duty of directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders equitably and fairly.”⁹¹ Is this duty mandatory in nature?

Having waded into stakeholder theory, the Supreme Court retreated (without so acknowledging). In searching for an accountability mechanism, the Supreme Court recognized as a practical matter that, with a change of control being imminent, the Board had a duty to maximize value for shareholders (even while stating that the Revlon duty does not displace the fundamental rule that the duty of directors cannot be confined to particular priority rules). This reasoning was buttressed by finding the buy-out would have a beneficial impact on BCE. Absent any finding of conflict of interest or bad faith, and providing that its decisions were within a range of reasonable choices they could have made in weighing conflicting interests, the Supreme Court was not prepared to exercise hindsight as to whether the Board’s decision was the perfect one.

In effect, by deferring to directors’ determinations as to how to resolve conflicts between stakeholder groups in a fair manner that reflects the best interests of the corporation, the Supreme Court appears to have broadened the jurisprudential relevance and protection afforded by the business judgment rule. What previously afforded protection from directorial negligence arguably now extends to determining directors’ statutory duties and whose interests should, may or must be considered in resolving conflicts in a “fair manner”.⁹² Taking the Supreme Court’s logic to its extreme, boards would be accorded broader deference than administrative tribunals. In the case of

⁹⁰ BCE Decision, *supra* note 4, at para. 39.

⁹¹ *Ibid.*, para. 82.

⁹² Alternately, the context may have supported a conclusion that shareholders had a reasonable expectation, in a sale of control, that the board would act to maximize value for them.

the Ontario Securities Commission, this recently was held to include “the right to be wrong”⁹³ (but, in the case of boards, presumably not the right to be “unfair”, whatever that may mean).

This may reflect a fundamental divergence of Canadian and U.S. legal norms with respect to review of directors’ conduct. For example, in contrast to the “entire fairness” test⁹⁴ which informs judicial review of directors’ conduct (at least when allegations of self-interest are made) in the U.S., Canadian courts have tended to defer to process-oriented requirements⁹⁵ imposed by securities regulators, largely in response to the historical prevalence of controlled public companies in Canada. Securities regulation, in effect, has “occupied the field”, leaving the courts less inclined to invoke the extraordinary breadth of the oppression remedy in the face of self-interested or control transactions.

However, the Supreme Court’s reasons leave it open for the opposite to be argued as well. By engaging in a detailed review of the factual circumstances, the Court may be interpreted to have been paying lip-service to the business judgment rule (or using it as a device to extricate itself from the analytical swamp it had waded into). Such a lack of deference and implied willingness to second guess director decisions, made with care and in good faith, would suggest a radical narrowing of the business judgment rule!

While many had hoped the BCE Decision would be the Supreme Court’s opportunity to clarify and narrow some of the open-ended pronouncements in the Peoples Decision, one can speculate on a range of fact situations in respect of which the law may now be highly uncertain. How does a board of directors deal with a bidder whose stated intentions may be prejudicial to non-shareholder constituencies (or whose reputation is for not honouring certain contractual

⁹³ *Sears Holdings Corporation et al. v. Ontario Securities Commission et al.* (2006), 84 O.R. (3d) 61 at para. 13.

⁹⁴ See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d. 701 (Del. S.C. 1983), requiring defendants to demonstrate that the impuned transaction was “entirely fair” to the corporation.

⁹⁵ Ontario Securities Commission Rule 61-501 – Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions.

commitments) when their offer is the best value for shareholders? All other things equal, should a board be prepared to accept a lower bid in order to ensure a better capitalized acquiror (at least at the time the acquisition is effected)? In a broader context, how would one advise a board of directors which decides to relocate operations offshore, with a view to ensuring the corporation's long-term commercial viability, given the conflicting effects on creditor, employee, shareholder and other constituencies? Traditional notions of fiduciary duties, oppression and the business judgment rule have been confused in a casual discourse on corporate citizenship and directorial accountability – remarkable both in its lack of analytical rigour and of necessity to reach the Supreme Court's ultimate decision.

Ironically, the oppression claim (in respect of which relief only extends to conduct prejudicial to the interests of security holders, creditors, directors or officers) was abandoned by the bondholders and not argued by their counsel before the Supreme Court. This renders the effect of the Supreme Court's discussion of these issues even more uncertain.

4 Alternative Paths to Corporate Citizenship

While not an excuse for casual reasoning by the Supreme Court of Canada in the Peoples and BCE Decisions, the debate about imposing corporate citizenship or social responsibility obligations through corporate law is long-standing. It is fair to say that courts and legislators have, overall, tended to follow and respond to the incremental manner in which societal expectations have increased over time. The following section of this paper considers ways in which this process might be accelerated and clarified.

No one disputes the proposition that corporations may only pursue their economic mission through lawful means.⁹⁶ That said, legal and political debates about the role of the corporation in society extend back close to a century. The political debate has intensified with the success of the corporation as a vehicle for mobilizing capital and, accordingly, its impacts on society. As noted by US President Obama in his inaugural address:

*“Nor is the question before us whether the market is a force for good or ill. Its power to generate wealth and expand freedom is unmatched, but this crisis has reminded us that without a watchful eye, the market can spin out of control and that a nation cannot prosper long when it favours only the prosperous.”*⁹⁷

Debates as to how to tweak the market’s “watchful eye” tend to run aground when (and to the extent) they are disconnected from effective legal frameworks. Robert Reich characterizes these phenomena as a kind of “faux democracy”, suggesting that the message that companies have social responsibilities tends to divert public attention from the task of establishing such laws and rules in the first place.⁹⁸ This, in turn, feeds into the legal debate over corporate social responsibility, generally characterized by competing theories as to the duties of directors and managers – to “owners” or to a wider range of “stakeholders”. While, as discussed below, there have been occasional law reform initiatives to address this issue, the debate has been highly theoretical and repetitive.

Advocates of corporate social responsibility have embraced words in the Peoples Decision that accepted “as an accurate statement of law” the legal proposition that it may be legitimate for directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment in determining whether they are acting with a view to

⁹⁶ Robert C. Clark, *Corporate Law* (Little Brown 1986) at 17-18, stating that a corporation’s purpose is to “maximize the value of the company’s shares, subject to the constraint that the corporation must meet all its legal obligations to others who are related to or affected by it”.

⁹⁷ Barack Obama, Inaugural Address, January 20, 2009, available online at: http://www.pic.org/pressroom/entry/president_obamas_inaugural_address/.

⁹⁸ Robert B. Reich, “The Case against Corporate Social Responsibility” (2008) Goldman School of Public Policy Working Paper No. GSPP08-003, available at ssrn.com/abstract=1213129.

the best interests of the corporation.⁹⁹ There was little Canadian law on this issue prior to the Peoples Decision.¹⁰⁰ Rather than providing clarification, the BCE Decision reaffirmed the Peoples Decision, stating that:

*“The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short term profit or share value.”*¹⁰¹

and that:

*“In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule.”*¹⁰²

As discussed, such statements add little to the law, other than to conflate concepts and provide cover for directorial discretion, assuming appropriate process is adhered to. The resulting uncertainty concerning proper corporate purpose could lead to a diminution in directorial accountability and potential liability. There are, however, a range of alternate legal theories that courts may choose to focus on to more meaningfully elaborate on the “social” or “stakeholder-related” duties of directors. Some are canvassed below. In addition, we briefly note several opportunities for legislative or shareholder-initiated reform.

4.1 Trust Law

The Supreme Court’s language, particularly in the BCE Decision, is somewhat suggestive of theories of corporate responsibility advanced by Berle and Dodd in the nascent stage of the corporate responsibility/accountability debates. In 1931, Berle advanced the notion that corporate

⁹⁹ BCE Decision, *Supra* note 4, para. 34.

¹⁰⁰ As noted earlier in this paper, in *Teck Corp. Ltd. v. Millar* (1973), 33 D.L.R. (3d) 288, (B.C.S.C.) at 97, Justice Berger stated: “I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company’s shareholders in order to confer a benefit on its employees ... But if they observe a decent respect for other interests lying beyond those of the company’s shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.”

¹⁰¹ BCE Decision, *supra* note 4 at para. 38.

¹⁰² *Ibid.* para. 40.

directors would become subject to the implied oversight of a court's equitable jurisdiction¹⁰³ and that, in the future, corporate law would become "in substance, a branch of the law of trust".¹⁰⁴ He argued that directors' powers are subject to equitable limitations to ensure that their grant of power is used for "the ratable benefit of all the shareholders as their interest appears".¹⁰⁵ Berle was reacting to the broad powers directors exercised "on behalf of" owners. In effect, he engaged in the same sort of aspirational logic as the Supreme Court of Canada, concluding:

*"In every case, corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply in favor of a cestui que trust to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary".*¹⁰⁶

The Supreme Court of Canada might have embraced and expanded on Berle's proposal to incorporate trust law principles into corporate law.

Berle's argument was taken to its logical (for those who advocate stakeholder responsibility) conclusion by Dodd the following year.¹⁰⁷ Dodd treated the corporation as a separate legal person and characterized directors as trustees, not for the shareholders but for the separate legal entity. He then argued that directors could "employ [corporate] funds in a manner appropriate to a person ... with a sense of social responsibility without thereby being guilty of a breach of trust".¹⁰⁸ Put otherwise, Dodd suggested that any notion of social responsibility by directors, on behalf of corporations, is voluntary but permissible.

Berle quickly responded,¹⁰⁹ arguing that Dodd's proposal effectively replaced the notion of shareholder primacy with nothing but the discretion of management, doing away with any legal

¹⁰³ A.A. Berle, Jr., "Corporate Powers as Powers in Trust" (1931) 44 Harv. L. Rev. 1049.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ E. Merrick Dodd, Jr., "For Whom Are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145.

¹⁰⁸ *Ibid.* at 1161.

¹⁰⁹ A.A. Berle, Jr., "For Whom Corporate Managers are Trustees: A Note" (1932) 45 Harv. L. Rev. 1366.

accountability mechanisms. He characterized this as simply handing power over to management “with a pious wish that something nice will come out of it”.¹¹⁰ He went on to note that:

*“[Lawyers] must meet a series of practical situations from day to day. They are not ... in a position to relinquish one position – here, the idea of corporate trusteeship for security holdings – leaving the situation in flux until a new order shall emerge. Legal technique does not contemplate intervening periods of chaos; it can only follow out new theories as they become established and accepted by the community at large.”*¹¹¹

However, as Berle became more concerned about corporate power he became more enamoured with the stakeholder theory of corporate governance, as evidenced by his directive to lawyers to “provide for the new interests as they successively appear”.¹¹² In his best known work, he suggested “that the “control” of the great corporation should develop into purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity”.¹¹³

Dodd continued to provide the counterpoint as his thinking evolved. In reviewing Berle and Means’ book, he seized on the hazard Berle had initially focused on in their exchange – that duties to “the corporation” weakened duties to shareholders without putting anything effective in their place and argued that “If corporations generally are to be conducted in such manner as to give due regard to the interests of all classes in society ... it is primarily through legislation that the change can be brought about.”¹¹⁴

The conclusions of both Berle and Dodd are not as incompatible as they may at first seem. Berle suggested that the stakeholder debate should be incorporated into corporate law through trust law principles. Dodd argued that it should only be recognized through legislation. In contrast, the Supreme Court’s analysis in the BCE Decision fails to even suggest a workable framework.

¹¹⁰ *Ibid.* at 1368.

¹¹¹ *Ibid.* at 1371.

¹¹² *Ibid.* at 1372.

¹¹³ A.A. Berle, Jr. and Gardiner Means, *The Modern Corporation and Private Property* (New York: Macmillan Company, 1932) at 312-313.

¹¹⁴ E. Merrick Dodd, “The Modern Corporation and Private Property” (1933) 81 U.Pa. L. Rev. at 785.

Before leaving the trust law characterization, it should be noted that courts have meaningfully wrestled with the extent to which non-shareholder interests should be considered by directors. For example, several years before the *Credit Lyonnais* decision in *Central Ice Cream*,¹¹⁵ a bankrupt company's only asset was a \$52 million judgment it had obtained against McDonald's. In response, McDonald's offered to settle for \$16 million - which would have satisfied all of the creditor claims and left \$4 million for the shareholders. The creditors favoured the settlement while the shareholders opposed it. Stopping short of the suggestion in *Credit Lyonnais* that, in the zone of insolvency, directors may need to make choices other than those that shareholders would make, the judge (Easterbrook) suggested that bankruptcy law requires the trustee to maximize the value of the estate. By this logic, directors duties might be analogized to the trust law principle of "impartiality" – the duty of trustees to consider the trust as a whole, with due regard for the diverse beneficial interests created by the terms of the trust.¹¹⁶

As with Berle and Dodd, Judge Easterbrook's thinking evolved. Viewing the corporation as a "nexus of contracts" between various stakeholders relegated corporate law to a set of default rules¹¹⁷ designed to reduce transaction costs (by obviating the need for individual contracts). Such a construct considerably diminishes (if not eliminates) the notion of the corporation as a distinct entity. Easterbrook and Fischel argue that if the corporation is simply a web of contracts, it becomes "a financing device and is not otherwise distinctive".¹¹⁸

The limits of this conceptualization were highlighted in the bid by Rupert Murdoch's News Corporation for Dow Jones, Inc. About 64% of Dow Jones was held in various trusts for descendants of the Bancroft family. Some family members preferred the premium cash offer, while

¹¹⁵ *In re Central Ice Cream Co.*, 836 F.2d 1068 (7th Cir. 1987).

¹¹⁶ For example, where the interests of beneficiaries conflict, the trust should try to maximize the value of the trust as a whole – to "act impartially and with due regard for the diverse beneficial interests created by the terms of the trust". See s.79(1), Restatement of the Law, Trusts, 3d ed. (St. Paul MN: American Law Institute 2003).

¹¹⁷ Frank Easterbrook and Daniel Fischel, *supra* note 7 at 75.

¹¹⁸ *Ibid.* at 10.

others were prepared to sacrifice monetary value in order to ensure continued “journalistic integrity”. According to press reports, in considering the various interests involved, the first several months of negotiations were spent arguing over principles (resulting in various “commitments” to protect and invest in the quality and integrity of the Dow Jones publications and news services), while the last several days were spent negotiating price. The final “sweetener” was News Corporation and Dow Jones agreeing to pay the family’s advisors’ fees – estimated at US\$40 million (or an additional US\$2 a share for family members on top of the US \$60 per share final bid price).¹¹⁹ Faced with a conflict between money and idiosyncratic preferences, the outcome was not surprising (and the law was not particularly relevant). To the extent that fiduciary duties serve as a proscription on self-interest, it tends to be obscured by the contractual approach to corporate law.

A contrasting contractual analogy to trustee powers in a corporate law context was illustrated in the merger of Reuters Plc and the Thomson Corporation. There, as a part of a business combination that gave the controlling shareholder of the Thomson Corporation control over the combined entity (initially a dual listed structure of Thomson Reuters Corporation and Thomson Reuters PLC), Thomson and its controlling shareholder undertook to support the Reuters Trust Principles in relation to the combined entity. These principles include the preservation of integrity, reliability of news, development of the news business and related principles and are enforced by the Reuters Founders Share Company Limited, which was to hold a special “founders share” in each of the dual listed entities, enabling it to exercise an overriding vote where a third party has obtained prescribed holdings of voting shares in excess of specified limits.

Alces has recently argued that efforts to define and enforce corporate fiduciary duties, where the relationship isn’t a fiduciary one, has led to the atrophy of such duties to the point of

¹¹⁹ Andrew Ross Sorkin, “Murdoch and Dow Jones: How the Deal Got Done” *The New York Times* (1 August 2007).

obsolescence.¹²⁰ Instead, she recommends contractually-based disciplinary regimes, including provision for an “equity trustee” which might serve a similar function for shareholders as does an indenture trustee for bondholders. Perhaps there is some basis in such mechanisms for enshrining the “long term” focus averted to by the Supreme Court in the BCE Decision, should a board and/or a corporation’s shareholders so choose. The notion of enshrining overriding principles into the corporation’s constating documents merits more careful review, and is discussed below.

4.2 Team Production Theory

Blair and Stout significantly advanced Dodd’s trustee analogy in proposing the “team production” approach to corporate law as the basis for describing the existing legal duties of directors (rather than arguing, as did Dodd and Berle at various stages in their thinking, about what the board’s responsibilities should be in the future).¹²¹ They argue that the board’s economic and legal role is to balance competing interests of various stakeholders, all of which are essential to the success of the enterprise. In describing it as a “mediating hierarch” between competing constituencies within the corporation, Blair and Stout see stakeholders as voluntarily ceding control to the board, which, in promoting a team enterprise, is then obliged to and responsible for balancing competing interests.¹²²

One can read much of this reasoning into the BCE Decision. The Supreme Court stated that the duty of directors to act in the best interests of the corporation:

“comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including – but not confined to – the need to treat affected stakeholders in a fair manner, commensurate with the corporation’s duties as a responsible corporate citizen.”¹²³

¹²⁰ Kelli A. Alces, “Debunking the Corporate Fiduciary Myth” [insert cite], available at ssrn.com/abstract=1352595

¹²¹ Margaret N. Blair and Lynn A. Stout, “A Team Production Theory of Corporate Law” (1999) 85 Va. L. Rev. 2.

¹²² *Ibid.* at 28.

¹²³ BCE Decision, *supra* note 4 at para. 82.

Until recently, such notions rarely caused legal confusion. Indeed, ambiguity in statutory duties allowed for constructive tension and responsive judicial interpretation in egregious cases. Any dissonance between the legal duties of directors to “owners” and their broader obligations has tended to be one of theory and behaviour. In practice the day-to-day conduct of effective managers generally reflects an implicit view of corporate obligations to a variety of constituents as being more immediate (if not important) to the enterprise than are its obligations to shareholders. Convergence is achieved, as the Supreme Court implied, by taking a longer-term view of value (and wealth) maximization.

The difficulty arose in the face of systemic behaviour challenging the incumbency of management and rewarding the immediate realization of shareholder value, often to the detriment of other constituents. As is generally the case, market forces (including the short-term focus of incentive structures, the opportunity for deception arising from financial innovation, the limited attention span of politicians and the overwhelming urge to manage public expectations) trumped legal theory. At that point that a legal construct, which professes to balance multiple interests, breaks down, insofar as it provides neither coherence, consistency, nor organizational focus.

Those who advocate team production (or other-than-shareholder primacy) recognize this limitation. For example, Ellsworth argues in favour of customer primacy as providing the most effective discipline on corporate management.¹²⁴ Blair and Stout do not address this challenge of keeping accountability focused. Nor did the Supreme Court of Canada. While reaffirming the “stakeholder” model of directors’ duties they had endorsed in the Peoples Decision (and, hence, largely accepting the bondholders’ argument as to directors’ duties), the Supreme Court ruled against the bondholders in the BCE Decision, concluding that they had no reasonable expectation to

¹²⁴ Richard R. Ellsworth, *Leading with Purpose: The New Corporate Realities* (Stanford: Stanford University Press, 2002). This would have been an ironic test to apply to BCE which, until relatively recently, enjoyed monopoly status in Canada.

anything more than the contractual rights provided to them in the trust indentures pursuant to which their bonds were issued.

Examples of new stakeholder-based governance models (in addition to more traditional models such as cooperatives and employee-owned firms) are rapidly emerging. A recent survey of such experiments in substituting social-benefit for profit-maximization as the dominant organizational principle around which ownership, governance, capitalization and compensation structures are designed identified three dominant models.¹²⁵ The first are stakeholder-owned companies, such as the Rabobank Group in the Netherlands, the Vanguard group of mutual funds or John Lewis Partnership PLC. The latter is the largest department store chain in the U.K., wholly-owned by its 69,000 employees. It is overseen by a traditional board as well as an employee-elected governing body (which, in turn, elects 5 of the 12 board members and has the power to dismiss the chairman). The second are mission-controlled companies, such as Thomson Reuters Plc (discussed above). Upstream 21 Corporation is a holding company established in Oregon to buy local companies focused on building social and economic capital within the region and facilitated by recent reforms to Oregon's corporate law, described below. Finally, there are public-private hybrids, which deliberately blur the lines between for-profit and non-profit modes of operation. Google.org, which manages Google's annual philanthropic budget of about U.S. \$2 billion,¹²⁶ terms itself "for-profit philanthropy" and operates as a division of Google - eschewing the traditional tax-exempt foundation organizational structure in order to embed itself within and draw fully on the resources of Google.

4.3 Moral Stakeholder Theory

¹²⁵ Marjorie Kelly, "Not Just for Profit", *strategy & business* (Booz & Co.) Issue 54, Spring 2009, p. 49.

¹²⁶ See Dana Brakman Reiser, "For-Profit Philanthropy" (2008) available online at http://works.bepress.com/dana_brakman_reiser/14. In Google's IPO, discussed later in this paper, the company announced its intention to contribute 1 percent of equity and 1 percent of profits to charity.

The team production approach to corporate law fails to address the issue of immediate accountability. Most directors are anxious to meet all prescribed legal norms and are reluctant to stray much further. The proliferation of new governance standards (and consequential liability) has exacerbated their proclivity to risk averse behaviour.

It has been argued that moral stakeholder theory (“MST”) may “hold the key to giving the board a more useful, comprehensive framework of the firm’s utility and purpose to society.”¹²⁷ MST can be summarized as upholding the beliefs that “fiduciary obligations go beyond short term profit and are in any case subject to moral criteria in their execution; and...mere compliance with the law can be unduly limited and even unjust.”¹²⁸

Like the team production approach, MST implies that a board’s role is to balance the competing interests of various stakeholders. While the team production approach fails to provide a workable framework for stakeholder identification and how their interests should be balanced, MST, through the identification of relational attributes, seeks to provide insight with respect to the relative manner in which stakeholders’ interests should be considered by directors.

For example, Mitchell, Agle and Wood¹²⁹ seek to narrow the definition of stakeholder on the basis of “power to influence the firm; legitimacy of the stakeholder relationship with the firm; and urgency of the stakeholder claims.” Mapping stakeholders using such criteria might better enable directors to recognize, prioritize and thereby manage various stakeholder interests more efficiently, thereby enabling boards to effectively move away from market induced short term incentives.

In response to Friedman’s concern that “few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility

¹²⁷ Rookman Mahavaj, “Critiquing and Contrasting “Moral” Stakeholder Theory and “Strategic” Stakeholder: Implications for the Board of Directors” (2008) 8 Corporate Governance 2 at 115.

¹²⁸ K.E. Goodpaster “Business Ethics and Stakeholder Analysis” (1991) 1 Business Ethics Quarterly 1 at 70.

¹²⁹ R.K.Mitchell, B.R. Agle, and D.J.Wood, “Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts” (1997) 22 The Academy of Management Review 4 at 853-86.

other than to make as much money for their stockholders as possible,”¹³⁰ MST mapping arguably benefits corporations financially, even though directors may not have anticipated financial gain at the time of stakeholder identification. For example, in an interview regarding an energy company that suffered financial loss and long term costs because of its inability to identify and prioritize stakeholders interests, a company executive stated “I think that the stakeholder risks that developed... were not ones that we could have seen before, perhaps because of our lack of knowledge and understanding about a bunch of church groups.”¹³¹

It is often the case that stakeholders will have unique insights to contribute to the success of an enterprise. For that reason (and a desire to promote effective stakeholder engagement) corporate reporting is increasingly viewed as a process through which to meaningfully engage stakeholders (rather than simply an outcome required by regulation). Put otherwise, the identification of stakeholder interests, according to MST, may provide more focused accountability.

A similar mapping exercise might be beneficial at a societal (i.e., country or regional) level. While the “virtues” of responsibility, accountability, fairness and transparency are widely accepted and implicit in most corporate governance frameworks,¹³² their application is highly contextual and there is (or should be) a legitimate debate as to whom and how far such “virtues” should be applied. West recently proposed such a research agenda to address the question of whether corporate governance convergence between various jurisdictions is appropriate.¹³³ He noted that, irrespective of the answer to the question he posed, such an inquiry might inform governance frameworks (including accounting practice, managerial approaches and business education).¹³⁴

¹³⁰ Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 133.

¹³¹ *Supra* note 113 at 119.

¹³² See, for e.g., Ira M. Millstein, *Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets* (OECD, 1998).

¹³³ Andrew West, “Corporate Governance Convergence and Moral Relativism” (2009) 17 *Corporate Governance: An International Review* 1 at 107.

¹³⁴ *Ibid.* at 117.

4.4 Obligation to Act Reasonably

We have previously noted how, in an early effort to defer to the business judgment of directors, courts have exempted directors from general tort law principles, reducing the threshold for liability (as regards to their statutory duties of care and loyalty) to one of gross negligence. Canadian jurisprudence was further muddled following the Federal Court of Canada's decision in *Mentmore Manufacturing Co. Ltd. v. National Merchandise Manufacturing Co.*,¹³⁵ where Justice LeDain asserted a conflict between the principles of tort law and corporate law.¹³⁶ Leaving aside confusion regarding the argument that directors should be subject to the same application of tort law as are others¹³⁷, there is a broader argument that, in all basic areas of law governing market conduct (including tort, contract and property law), there is a fundamental duty to act reasonably.

Singer characterizes this as an “obligation of attentiveness”,¹³⁸ arguing that directors, in their oversight of corporate conduct, are subject to the same equitable obligations as others to attend to the effects of their (in this case the corporation's) actions on others. These obligations apply to those with whom the corporation has continuing relationships (i.e., stakeholders) as well as to the interests of strangers. Beyond specific laws that create clear limits on corporate conduct, Singer suggests that this obligation to attend to the interests of others is based in the common law duty to act reasonably:

“This obligation...requires us to temper our self-interest by attending to the needs of others. We are required to abide by clear statutory and regulatory limitations on our freedom. But we are also under a continuing duty not to act negligently; we are not free to act unreasonably so as to cause significant harm to others. ... we have an obligation to balance their interests against our own to determine whether we can justify the harm we may cause them. Can we

¹³⁵ (1978), 89 D.L.R. (3d) 195 (F.C.A.).

¹³⁶ Robert Flannigan, “The Personal Tort Liability of Directors” (2002) 81 *The Canadian Bar Review* 2.

¹³⁷ There are currently operating in Canada a number of arguably inconsistent judicial approaches to the question of when directors may be found liable to third parties for tortious corporate acts. See, for e.g., Nicolas Juzda, “The Tort Liability of Directors to Parties Outside the Corporation”, LL.M. Thesis, Osgoode Hall Law School, November 2007.

¹³⁸ Joseph W. Singer, “Corporate Responsibility in a Free and Democratic Society” (2008) 58 *Case Western Law Review* 1, accessible at ssrn.com/abstract=1278133.

*explain to a neutral third party why we acted as we did? Can we explain to those who suffer the consequences of our actions why they suffered a tragedy but not an injustice?''*¹³⁹

In the environmental field, the precautionary principle has now been embraced, both in international law and in domestic Canadian and U.S. statutes and jurisprudence.¹⁴⁰ By mandating precautionary measures in the face of threats of serious or irreversible environmental harm, the principle may serve to elaborate on directors' duty of care. A similar concept has been advanced by Ruggie in his efforts to operationalize a "protect, respect and remedy" framework as regards the issue of human rights and transnational corporations.¹⁴¹ He argues for a "corporate responsibility to respect all human rights or, put simply, to not infringe on the rights of others."¹⁴²

The concept of a "duty to consult and accommodate" has been well developed by the Supreme Court of Canada in the context of the Crown's obligations to Aboriginal peoples. It has held that such a duty arises when the Crown (federal or provincial) contemplates conduct that might adversely affect Aboriginal rights or title.¹⁴³ Likewise, trust scholars have suggested that financial fiduciaries might be subjected to a statutory duty to consult with their beneficiaries when formulating investment policies.¹⁴⁴

Given this judicial history, it would not have been a significant leap for the Supreme Court in the BCE Decision to explicitly develop a directorial "duty to consider", as has been suggested by

¹³⁹ *Ibid.* at 6.

¹⁴⁰ For a full discussion of the development and extended relevance of the precautionary principles, see Michael Kerr, Richard Janda and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis*, LexisNexis Canada, 2009 at Chapter 9.

¹⁴¹ John Ruggie, Special Representative of the U.N. Secretary-General, "Business and Human Rights: Towards Operationalizing the Protect, Respect and Remedy Framework" U.N. Document A/HRC/11/13 (April 22, 2009).

¹⁴² *Ibid.*, at paras. 45-55.

¹⁴³ See Kent McNeil, *The Crown's Fiduciary Obligations in the Era of Aboriginal Self-Government* [upcoming] Canadian Bar Review; Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252.

¹⁴⁴ Gary Watt, *Trusts and Equity* 2nd ed. (Oxford: Oxford U. Press, 2006) at 437. This proposal raises interesting issues as to how the views of future or contingent beneficiaries are to be taken into account.

Sneirson.¹⁴⁵ Under such a theory, fulfilling the statutory duty of care would require directors to consider all reasonably available material information. A broad view of materiality would include the consideration of potential impacts on various stakeholders. Failure to do so could lead to decisions being invalidated by the courts.¹⁴⁶ Such a notion comports with the Supreme Court's reasoning that, once stakeholder interests have been considered, directors can reach whatever decision they believe is in the best interests of the corporation. It would also be consistent with management literature which suggests that a broader stakeholder assessment framework will lead to better corporate decision-making.¹⁴⁷

Here, again, the challenge is one of accountability. While the duty of loyalty can be utilized to limit the pursuit of self-interest by individual directors/managers, there is no equivalent construct for the corporation itself. It is unrealistic to hold directors accountable to the level of moral reasoning implicit in a "duty of attentiveness" for the "reasonableness" of corporate actions and their effects on others without the elaboration of clear standards by the courts or legislators.

4.5 Enhanced Duties

Another approach would be to articulate "enhanced duties" analogous to, but broader than, the "Revlon" duty in U.S. jurisprudence, which the Supreme Court purported to reject in the BCE Decision (but then, as a practical matter, appeared to embrace). For example, Shanfman recently proposed a standard of conduct for public company boards when dealing with excessively risky decisions. In such circumstances, he would require that boards specifically consider the company's

¹⁴⁵ Judd F. Sneirson, "Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decision-Making" (2007) 3 Corp. Gov. Law Rev. 438.

¹⁴⁶ Although, absent gross negligence, directors would generally remain affectively immune from personal liability as a result of indemnification provisions.

¹⁴⁷ Michael C. Jensen, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function", (2001) 14 J. Applied Corp. Fin. 8.

liquidity, capital adequacy, funding risk and the like before getting to a determination of whether it is in the best interests of the corporation to proceed with such a decision.¹⁴⁸

Creating such a standard of review would be consistent with the approach to board oversight taken by then Chancellor Allen in the *Caremark Decision*,¹⁴⁹ in which he identified a new affirmative duty to monitor corporate compliance with “applicable legal standards” whether or not the board had been given any notice of the wrongdoing on the part of the company’s employees. It should be noted that Allen has recently expressed reservations about the effect on risk taking of directorial liability, absent a conflict of interest.¹⁵⁰ He describes how shareholders seek to shift risk to directors whenever things go wrong, thereby discouraging subsequent risk-taking. Providing guidance might serve to clarify the manner in which directors fulfill their duties of care and loyalty in the context of specified decisions. The Delaware Supreme Court noted in *Stone v. Ritter* that “Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.”¹⁵¹ While this judicial observation was made in the context of a board accused of not having a system in place to monitor violations of law, it might be applied to an articulation of other fact situations.

If anything has been learned from the most current financial crisis, it relates to the interconnectedness that characterizes global policy-making and enterprise.¹⁵² Leaders (private and public) now realize (although they may still resist) the need to extend their horizons – temporally, sectorally and geographically. With the growing recognition that social issues have profound

¹⁴⁸ Bernard S. Sharfman, “Enhanced Duties for Excessively Risky Decisions” (Draft of February 26, 2009), available at ssrn.com/abstract=1337124.

¹⁴⁹ *Re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

¹⁵⁰ *Supra* note 63.

¹⁵¹ 911 A. 2d.362 (Del. S.C. 2006) at 370.

¹⁵² See, for e.g., John M. Broder “Climate Change Seen as Threat to U.S. Security”, N.Y. Times, August 8, 2009. In commenting on the geo-political impacts of climate change General Anthony Zinni, former head of the U.S. Central Command, is quoted, “We will pay to reduce greenhouse emissions today, and we’ll have to take an economic hit of some kind. Or we will pay the price later in military terms and that will involve human lives.”

effects on long-term business prospects, notions of corporate citizenship become more consonant with traditional fiduciary norms.¹⁵³

4.6 Statutory Reform

Prescribing standards for corporate citizenship may not lend itself to the narrowness (and shallowness) which characterizes the evolution of common law in small, incremental steps. It behooves us to also canvass legislative initiatives to develop and clarify such norms. Recent efforts in this regard tend to focus on more expansive conceptions of directors' duties and on reporting standards aimed at encouraging more responsible corporate conduct.

4.6.1 Director's Duties Redefined

As noted above, the ambiguity inherent in statutory directorial duties began to break down in the 1980s, as hostile, leveraged control transactions challenged the incumbency of managers and rewarded the immediate realization of shareholder value, often to the detriment of other constituents. The ensuing "corporate constituency statutes" adopted by many U.S. states from the 1980s onwards, empower (but, generally, do not require) directors to consider a wide range of interests in their decision-making, including those of employees, customers, creditors and local communities.¹⁵⁴ While such statutes have proven challenging for practitioners advising boards (because, like the BCE Decision, they are so open-ended), most are permissive and do not expose directors to liability if they choose to disregard non-shareholder interests.¹⁵⁵ So, too, with the

¹⁵³ Benjamin J. Richardson, "Putting Ethics Into Environmental Law: Fiduciary Duties for Ethical Investment" (2008) 46 *Osgoode Hall Law Journal* 243 at p. 271. For analogous arguments concerning the fiduciary obligations of institutional investors see United Nations Environment Programme & Financial Initiative (UNEP FI) Asset Management Working Group, "Fiduciary Responsibility: Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues Into Institutional Investment" (2009) UNEP FI: Geneva.

¹⁵⁴ See, for example, E. Orts, "Beyond Shareholders: Interpreting Corporate Constituency Statutes" (1992) 61 *George Washington Law Review* 4.

¹⁵⁵ An exception is the constituency statute of Connecticut, 117 Conn. Gen. Stat. 33-S.131(e) (2003). It only applies in respect of control transactions and requires (rather than permits) directors to consider stakeholder interests in

Delaware case law permitting directors to consider the interests of non-shareholder constituents in the context of hostile takeovers.¹⁵⁶ In this respect, they differ from the arguments of Blair and Stout (and, possibly, the theory of the BCE Decision), which suggest that a board must (or at least should) take such non-shareholder interests into account.

The impetus for such legislative reform was anti-takeover protection, based on the popular sentiment of ensuring that local (i.e., state) interests would not be adversely affected as a consequence of such transactions (and the cost-cutting and asset-disposals which often follow). The conflict between these objectives and shareholder wealth maximization (as well as the obvious conflict of interest in incumbent directors/management using such statutory provisions to secure their own position) may be the reason that the “corporate citizenship” goals suggested in these statutes have not been realized upon.¹⁵⁷ It should be noted that most such statutes are not limited in their application to control transactions.¹⁵⁸

This conflict was belied in the 1990s, as compensation schemes responded to and exacerbated the increasingly short-term focus of market participants. The transformation was profound and overwhelming. For example, the U.S. Business Roundtable - which, with the advent of hostile take-overs, had stressed the social role that corporations play in their communities - revised its position in 1997 to re-focus on the paramount duty of management to shareholders.¹⁵⁹ Corporate executives who had portrayed raiders as vandals now embraced the very same values – a process of reinvention which characterizes (and is often both a strength and Achilles’ heel of) our

determining the best interests of the corporation. The Indiana and Pennsylvania statutes require that directors not focus solely on the interest of shareholders as determinative.

¹⁵⁶ See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A. 2d 946 (Del. 1985) and *Paramount Communications, Inc. v. Time Inc.*, 571 A. 2d 1140 (Del. 1990).

¹⁵⁷ Alternatively, it is widely viewed that these laws simply confirm, in change of control situations, the broad discretion conferred upon directors under the business judgment rule.

¹⁵⁸ *Supra* note 155.

¹⁵⁹ Business Roundtable, Statement on Corporate Governance (September 1997).

enterprise system. Yet, even without constituency statutes, broad managerial discretion has been recognized in U.S. corporate law.¹⁶⁰

Law reform initiatives in each of Canada and Australia have, in recent years, considered and rejected as unnecessary proposals to amend corporate law to permit (or require) directors to take into account the interests of constituencies, other than shareholders, in their actions. In the process leading to the most recent (2001) amendments to the CBCA, Industry Canada published a discussion paper on directors' liability.¹⁶¹ While noting that the term "best interests of the corporation" is far from clear, and citing a previous survey of case law suggesting that "where [the] relationship between the short-term and longer-term or broader-based interests is incapable of precise definition...Canadian directors have few guidelines",¹⁶² the paper suggested that "the circumstances are not prevalent, and thus, the absence of guidelines in these cases is not a major issue."¹⁶³ While considering various options (particularly in response to control transactions) the report recommended that no legislative changes be made in this area and that the courts be left to develop the concept of the "best interest of the corporation".¹⁶⁴

In Australia, each of a Parliamentary Joint Committee on Corporations and Financial Services¹⁶⁵ and a federal governmental committee on corporations and markets¹⁶⁶ concluded that

¹⁶⁰ See, e.g., 1 Am. Law Inst., Principles of Corporate Governance: Analysis and Recommendations, (1994)s.2.01(b)(2)-(3) & cmt.d. which states that:

Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: (1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law; (2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and (3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

¹⁶¹ Industry Canada, CBCA Reform: Background Papers, Directors' Liability (November 1995) Available at www.ic.gc.ca/bic/site/cilp-pdci.nsf/eng/h_cl00388.html

¹⁶² Mindy Paskell-Mede and John Nicholl, "Directors' Liability from Private Rights of Action" Final Report, May 25, 1994 at 60, note 3.

¹⁶³ *Supra* note 142 at 16.

¹⁶⁴ *Ibid.* at 18.

¹⁶⁵ Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) "Corporate Responsibility: Managing Risk and Creating Value" (2006) available on-line at www.aph.gov.au/Senate/committee/corporations_ctte/corporate._responsibility/report/report.pdf.

Australian corporate law already affords sufficient basis for directors to consider the interests of stakeholders, including shareholders. Both rejected the desirability of legislative reform. The latter group noted that including a non-exhaustive list of interests to be taken into account, in the absence of guidance as to how such interests are to be prioritized and reconciled, could “make directors less accountable to shareholders without significantly enhancing the rights of other parties.”¹⁶⁷

In contrast, the United Kingdom’s 2006 Companies Act introduced a new statutory duty of loyalty which requires that directors look to “promote the success of the company for the benefit of its members as a whole” and, in doing so, take account of a range of statutorily prescribed considerations, including “the likely consequences of any decision in the long term”, “the interests of the company’s employees”, “the need to foster the company’s business relationships with suppliers, customers and others”, “the impact of the company’s operations on the community and the environment”, “the desirability of the company maintaining a reputation for high standards of business conduct” and “the need to act fairly as between members of the company”.¹⁶⁸

In fact, there has been little judicial consideration of state constituency statutes in the last several decades. We are only aware of one instance in which such a statute has been referred to in finding in favour of a decision by an incumbent board.¹⁶⁹ It is not surprising that courts have shied away from the juridification of stakeholder interests – the BCE Decision illustrates the challenge. Insofar as the U.K. statutory standard, while requiring (rather than permitting) directors to consider stakeholder interests, ultimately adjudges their deliberations based on whether their decisions “promote the success of the company for the benefit of its members [i.e., shareholders] as a whole”, the most one can reasonably expect is to see judicial validation for long-term wealth creation, rather

¹⁶⁶ Corporations and Markets Advisory Committee (CAMAC), “The Social Responsibility of Corporations” (2006) available on-line at www.camac.gov.au.

¹⁶⁷ *Ibid.* at 111-112.

¹⁶⁸ *Companies Act 2006* (U.K.), 2006, c. 46, s.172.

¹⁶⁹ *Georgia-Pacific Corp. v. Great Northern Nekoosa Corp.*, 727 F. Supp. 31; 1989 U.S. Dist. Lexis 15725 (U.S. Dist. 1989) referred to in Richard Marens and Andrew Wicks, “Getting Real: Stakeholder Theory, Managerial Practice, and the General Irrelevance of Fiduciary Duties Owed to Shareholders” (1999) 9 *Business Ethics Quarterly* 2 at 284.

than finding a new locus for directorial accountability. Even those firmly wedded to shareholder value would concede this point.¹⁷⁰

In 2007 Oregon amended its *Business Corporations Act* (effective January 1, 2008) to expressly permit an Oregon corporation's Articles of Incorporation to include a provision "authorizing or directing the corporation to conduct the business of the corporation in a manner which is environmentally and socially responsible."¹⁷¹ While apparently intended to address "sustainability" concerns, the amending legislation does not purport to define "environmentally and socially responsible" conduct. Presumably, those utilizing this provision will take care in doing so, so as to avoid uncertainty or conflict with other corporate objectives.

4.6.2 Reporting Requirements

An expected corollary of the new statutory duty in the U.K. Companies Act was to have been substantially enhanced social transparency through a requirement for "major companies"¹⁷² to provide an annual "operating and financial review" (OFR) and would have required directors to consider including in such review material relevant to the interests of stakeholders - such as the company's policies relating to employment, environmental issues and social and community issues relevant to the company's business.¹⁷³ However, as the Companies Bill went through parliamentary debates, the OFR requirement was deleted, leaving only the requirement to include in a company's Annual Business Review (for public companies) "information about environmental matters, the

¹⁷⁰ For example, Henry Hansmann and Reinier Kraakman in "The End of History For Corporate Law" state that there is "no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value" (2001) 89 *Georgetown Law Journal* at 440-441. See also Michael Jensen, "Value Maximization, Stakeholder Theory and Corporate Objective Function" (2001) 7 *European Financial Management* 3 at 309.

¹⁷¹ ORS 60.047 (2)(e), reported on by Perkins Coie, available online at www.perkinscoie.com/news/pubs_detail.aspx?publication=1553&op=updates.

¹⁷² Department of Trade and Industry, Government White Paper, "Modernizing Corporate Law", (2002) Command Paper CM 5553-1 at clauses 77 and 78 (which set out the criteria for "major companies"). Available on-line at www.dti.gov.uk/companiesbill/whitepaper.htm.

¹⁷³ *Ibid.* at 149.

employees of the company and social and community matters”.¹⁷⁴ According to the statute, the purpose of the business review is “to inform members of the company and help them assess how the directors have performed their duty under s. 172”.¹⁷⁵ Information about environmental, employee and community matters is not required if, in the view of the directors, it does not assist in understanding the business of the company. Nor is there a requirement to state why such disclosure is not provided. The deletion of the OFR requirement in the U.K. Companies Act was a disappointment to those who view social transparency as a way to influence norms of corporate conduct.¹⁷⁶

There remains, however, ample ground for optimism, both as to the imposition of new social transparency requirements and their effect on corporate conduct. For example, the European Parliament’s recent resolution on corporate social responsibility anticipates more expansive social transparency, “so that social and environmental reporting is included along side financial reporting requirements”.¹⁷⁷ This observation was made having regard for the shortcomings of voluntary social reporting in which “only a minority of the reports use internationally accepted standards and principles, cover the company’s full supply chain or involve independent monitoring and verification”.¹⁷⁸

In South Africa, the King Report (a voluntary governance code first published in 1994, revised in 2002 and with proposed revisions outstanding) advocates an integrated approach taking

¹⁷⁴ *Companies Act 2006* (U.K.), 2006, c.46, s. 417(5).

¹⁷⁵ *Ibid.* at s. 417(2).

¹⁷⁶ See, for example, Cynthia A. Williams, “The Securities and Exchange Commission and Corporate Social Transparency” (1999) 112 *Harv. L. Rev.* and Cynthia A. Williams & John Conley, “An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct” (2005) 38 *Cornell Int’l L.J.*, available on-line at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632347.

¹⁷⁷ European Parliament Resolution of March 13, 2007 on “Corporate Social Responsibility: A New Partnership”, available at eruparl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0062&language=EN.

¹⁷⁸ *Ibid.*

into account the “triple bottom line”- people, profits and planet.¹⁷⁹ The King Report recommends that companies move away from profit maximization and, in developing business strategies, focus on a broad range of stakeholders.¹⁸⁰ It recommends disclosure of the nature and extent of a company’s commitment to social, ethical, safety, health and environmental practices, as well as organizational integrity. While compliance is voluntary, most South African public companies follow the King Report’s recommendations as a result of initiatives by various external sources to track and publish performance. For example, the Johannesburg Stock Exchange launched the first Socially Responsible Investment (SRI) index in May, 2004, based on proprietary criteria, in keeping with the framework promoted by the UN Principles for Responsible Investment.¹⁸¹ Major South African companies, including SAB Miller, AngloGold Ashanti and Mondi actively report social responsibility initiatives on their websites. The King Report was also referred to by a South African court in finding that directors had breached environmental orders. The court specifically noted that the corporate community within South Africa has widely accepted the recommendations of the King Report, stressing that one of the characteristics of good corporate governance is social responsibility.¹⁸²

The French Commercial Code was amended in 2001 to require all French corporations listed on its primary stock exchange to report annually on social and environmental impacts.¹⁸³ This requirement was elaborated upon the following year by a Decree which specifies categories of social, community-related and environmental information that must be disclosed.¹⁸⁴

¹⁷⁹ Institute of Directors in South Africa, King Report on Corporate Governance for South Africa (first published in 1994, revised in 2002). Its most recent draft Report on Governance for South Africa (King III) was released for public comment on February 26, 2009 and can be found at www.iodsa.co.za.

¹⁸⁰ *Ibid.*

¹⁸¹ For further information about the JSE SRI index, see www.jse.co.za/sri.

¹⁸² *Minister of Water Affairs & Forestry v. Stilfontein Gold Mining Co.*, 2006 (5) SA 333 (W).

¹⁸³ Loi no. 2001-420 (15 May 2001), J.O., May 16, 2001, 7776, art. 116.

¹⁸⁴ See L.J. Dhooge, “Beyond Voluntarism: Social Disclosure and France’s Nouvelles Regulations Economiques” (2004) 21 *Ariz. J. Int’l & Comp. L.* 441.

Under the new “Social Responsibility for Large Businesses” law, which amended the Danish Financial Statements Act as of January 1, 2009, an estimated 11,000 of the largest Danish companies (both listed and state-owned) are now required to include information on their corporate responsibility policies and practices in their annual financial reports. An absence of such corporate responsibility policies must also be reported. A stated objective of the legislation is to encourage large businesses “to work actively on ways they can contribute to solving social challenges”. This links to a longer term governmental strategy, outlined in the May 2008 government “Action Plan on Corporate Social Responsibility”.¹⁸⁵ The Action Plan stated the government’s intention “to promote social responsibility and help Danish businesses reap more benefits from being at the global vanguard of corporate social responsibility”.

In 2008 the Australian Stock Exchange (“ASX”) adopted a new set of corporate governance principles which frame corporate citizenship issues within the notion of “material business risks”. Such risks are defined as follows:

*“Material business risks have the potential to create value and protect established value. The following examples of material business risk categories are identified in Principle 7: operational, environmental, sustainability, compliance, strategic, ethical conduct, reputation or brand, technological, product or service quality, human capital, financial reporting, market-related risks.”*¹⁸⁶

Listed companies need to establish policies concerning “material business risk management” and disclose a summary thereof. According to the Corporate Governance Council, “where a company has risks relating to sustainability or corporate social responsibility that are material to its business, they should be considered in the context of [the revised reporting requirement]”.¹⁸⁷

¹⁸⁵ Available online at www.eogs.dk/graphics/Samfundsvaer/dk/documenter/action_plan_GSR.pdf.

¹⁸⁶ ASX Corporate Governance Council, Review of the Principles of Good Corporate Governance and Best Practice Recommendations (2007, Principle 4.).

¹⁸⁷ Ibid, Australian Stock Exchange Corporate Governance Council, Supplementary Guidance on Principle 7: Recognize and Manage Risk (2007).

Australia recently announced support for the establishment of the Responsible Investment Academy, designed to mount education and training programs to enable the investment community to better assess ESG considerations.¹⁸⁸ It also appointed a senior Australian Treasury official to the Global Reporting Initiative Governmental Advisory Group, with the Minister for Superannuation and Corporate Law noting: “it’s clear to me that the true value of corporate responsibility crystallizes around effective reporting”.¹⁸⁹

Another recent example of a similar approach was that proposed by the Canadian Securities Administrators (CSA) in their request for comments on proposals to replace their existing corporate governance regulatory regime.¹⁹⁰ The proposed new CSA National Policy 58-201, Corporate Governance Principles, articulates nine core “high-level corporate governance principles and provides guidance to issuers on their corporate governance structures and practices”. In connection with the draft commentary to “Principle 5 – Promote Integrity”, the CSA provides examples of generally recommended practices, including adoption of a code of conduct.¹⁹¹ It then goes on to suggest that, in connection with the adoption of such a code of conduct, issues to be addressed should include “the issuer’s responsibilities to security holders, employees, those with whom it has a contractual relationship and the broader community”.¹⁹²

Increasingly public companies and their counsel are facing difficult judgment calls as to whether non-financial information concerning a company’s environmental policies or social practices might be viewed as “material” under relevant securities laws.¹⁹³ For example, over the last

¹⁸⁸ Australian Minister for Superannuation & Corporate Law, Media Release No. 009 of 05/02/2009.

¹⁸⁹ Australian Minister for Superannuation & Corporate Law, Media Release No. 008 of 05/02/2009.

¹⁹⁰ CSA press release, December 19, 2008; and request for comment – proposed repeal and replacement of NP 58-201 Corporate Governance Guidelines, NI 58-101 Disclosure of Corporate Governance Practices, and NI 52-110 Audit Committees and Companion Policy 52-110CP Audit Committees (2008) 31 OSCB 12158 (December 19, 2008).

¹⁹¹ *Ibid.* at 12176.

¹⁹² *Ibid.* at 12177. Curiously, CSA National Policy 62-202 “Take-Over Bids – Defensive Tactics” purports to remove many of the tools that a self-entrenching board might seek to invoke to favour non-shareholder constituencies.

¹⁹³ See, for example, David Monsma and Timothy Olson, “Muddling Through Counterfactual Materiality and Divergent Disclosure; the Necessary Search for a Duty to Disclose Material Non-financial Information” (2007) 26 *Stan. Envtl L.J.*

several years, a number of investor groups, lead by CERES,¹⁹⁴ have sought to pressure the U.S. Securities and Exchange Commission (“SEC”) to mandate climate change disclosure in public filings. CERES, along with the New York Attorney General, a number of state treasurers, pension fund managers and others petitioned the SEC on September 18, 2007 to provide interpretive guidance on climate risk disclosure.¹⁹⁵ A supplemental filing on June 12, 2008 described subsequent developments from the date of the original petition.¹⁹⁶ The request was reiterated in an October 28, 2008 submission to the SEC in connection with its “21st Century Disclosure Initiative”.

¹⁹⁷

To date, the SEC has not officially responded to these submissions, however the New York Attorney General (who was a signatory to the original CERES petition) issued subpoenas to five energy companies on September 14, 2007 questioning the adequacy of their climate change disclosure under the New York securities law.¹⁹⁸ The subpoenas (and subsequent investigations) resulted in settlements with two of the companies, Xcel and Dynegy, in August and October, 2008, respectively. Each company agreed to provide more detailed climate disclosure in their future SEC annual reports, including descriptions on financial risks present and probable regulation relating to greenhouse gas emissions, litigation, physical impact associated with climate change and strategies to reduce climate change risks.¹⁹⁹

¹⁹⁴ CERES is a coalition of investors and public interest groups focused on improving corporate, environmental and social performance. See www.ceres.org.

¹⁹⁵ Petition for Interpretive Guidance on Climate Risk Disclosure (September 18, 2007), available at www.incr.com//Document.Doc?id=187.

¹⁹⁶ Letter from California Public Employees’ Retirement System et al., to Nancy M. Morris, SEC Secretary (June 12, 2008), available at www.ceres.org//Document.doc?id=358.

¹⁹⁷ See “Investors call on SEC to require better disclosure on climate change and other risks” *Ceres* (23, October, 2008), available at www.ceres.org/Page.aspx?pid=951. This letter also calls on the SEC to consider how material, environmental, social and corporate governance data can be integrated into public filings.

¹⁹⁸ N.Y. General Business law No. 352, commonly referred to as the *Martin Act*, which allows investigation of any “fraudulent practice” related to investments.

¹⁹⁹ See in re Xcel Energy Inc, Assurance of Discontinuance Pursuant to Executive Law No. 63(15), aod#08-012 (August 26, 2008), available at www.oag.state.ny.us/media_center/2008/aug/xcel_aod.pdf; in re Dynegy Inc, Assurance of Discontinuance Pursuant to Executive Law No. 63(15), aod# 08-132 (October 23, 2008), available at www.oag.state.ny.us/media_centre/2008/oct/dynegy_aod.pdf.

Pressure on the SEC continues.²⁰⁰ Most recently, the SEC's Investor Advisory Committee has indicated its intention to establish a subcommittee to focus on disclosure of environmental, social and governance (“ESG”) factors.²⁰¹

While the SEC has yet to issue guidance, the Canadian Institute of Chartered Accountants recently did so.²⁰² This was followed by an Ontario Securities Commission (“OSC”) Staff Notice on environmental reporting which, based on a review of the continuous disclosure documents of 35 issuers, found a number of common deficiencies and issued guidance in respect thereof. The Staff Notice explicitly considers the materiality of environmental matters both from a financial statement and continuous disclosure perspective.²⁰³ This approach may signal a convergence of legal and aspirational requirements, focusing on the “materiality” of non-financial information.

On April 9, 2009 the Ontario Legislature voted unanimously to support a private member's resolution calling for the OSC to consult and report back to the Minister of Finance on best practices on corporate social responsibility and environmental, social and governance reporting standards.²⁰⁴

At the federal level, a private member's bill currently before the Standing Committee on Foreign Affairs and International Development would require companies in the resource sector and receiving federal government support to “act in a manner consistent with international

²⁰⁰ See, for e.g., Social Investment Forum July 21, 2009 letter to SEC requesting increased ESG disclosure (available online at www.socialinvest.org/documents/ESG_letter_to_SEC.pdf) and similar June 12, 2009 letter from CERES' Investor Network on Climate Risk (available online at www.incr.com/Page.aspx?pid=1107). For a useful survey of ESG policies recently compiled by the U.S. Environmental Protection Agency, see www.asria.org/news/press/lib/Global%20ESB%20Survey.pdf.

²⁰¹ Reported on in Global Proxy Watch (July 31, 2009).

²⁰² Canadian Institute of Chartered Accountants, “Building a Better MD&A – Climate Change Disclosures” (2008), available online at http://www.cica.ca/download.cfm?ci_id=48027&la_id=1&re_id=0.

²⁰³ OSC Staff Notice 51-716, Environmental Reporting February 21, 2008, (2009) 31 OSCB2228.

²⁰⁴ Laurel Broten, M.P.P. motion on April 2, 2009, 1st Session, 39th Parliament, Legislative Assembly of Ontario (available online at www.ontla.on.ca).

environmental best practices and with Canada’s commitments to international human rights standards.”²⁰⁵

The *Public Accountability Statements Regulations*,²⁰⁶ which apply to Canadian banks, insurance companies and trust and loan companies, with equity of \$1 billion or more, pursuant to subsections 459.3(4) of the *Bank Act*,²⁰⁷ 489.1(4) of the *Insurance Companies Act*²⁰⁸ and 444.2(4) of the *Trust and Loan Companies Act* respectively,²⁰⁹ require the annual filing of a public accountability statement, which must describe the entity’s contribution to Canada’s economy and society, including “detailed examples ... of their participation ... in activities for the purpose of community development ... of activities undertaken on their behalf during the period by their employees on a voluntary basis for the purpose of community development ... of their philanthropic activities and an overview of initiatives undertaken ... to improve access to financial services for low-income individuals, senior citizens and disabled persons.”²¹⁰

In each of the above-noted instances, demands for disclosure reflect broader efforts to influence corporate conduct and governance. This approach is exemplified in a recent PricewaterhouseCoopers report, “Recasting the Reporting Model – How to Simplify and Enhance Communications”.²¹¹ In advancing the case for “making sustainability mainstream”, the report suggests that: “the interdependent relationship between existing financial data and other data (including social, customer, supplier and environmental indicators)” must be made clear and, that doing so “could have a transformational impact on reporting by ensuring companies’ decision-

²⁰⁵ House of Commons of Canada, Bill C-300, An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas Companies in Developing Countries, John McKay, M.P., Second Reading, May 25, 2009.

²⁰⁶ SOR/2002-133 [*Regulations*].

²⁰⁷ S.C. 1991, c.46.

²⁰⁸ S.C. 1991, c.47.

²⁰⁹ S.C. 1991, c.45.

²¹⁰ *Supra* note 206 - (remembered).

²¹¹ PricewaterhouseCoopers, “Recasting the Reporting Model – How to Simplify and Enhance Communications: Opportunities for Discussion” (2008), available from info@corporatereporting.com.

making and strategy and investors' valuations are based firmly on a more complete picture of performance."²¹²

4.6.3 Reforming Regulatory Paradigms

While beyond the scope of this paper, it is worth noting the shifting role of what traditionally have been viewed as “economic” or “market” regulators to one that includes proactively advancing social goals. For example, Ontario’s *Green Energy Act*²¹³ adds to the mandate of the Ontario Energy Board the objectives of promoting conservation and renewable energy. The Act fundamentally shifts the focus of regulation from ensuring cost and environmentally efficient supply to regulating the energy sector as a contributor to the “green economy”, focusing on advancing environmental and social values and outcomes.

4.7 Shareholder Initiated Approaches

As public norms (and expectations) shift, corporations may chose to pro-actively clarify directors' duties, thereby conditioning the “reasonable expectations” of stakeholders. One Canadian example of such an exercise is Magna International Corporation. In 1984, its shareholders ratified a “corporate constitution” which set out certain principles, including guidelines for the allocation of profits as between employees, shareholders and management, the allocation of at least 7% of pre-tax profit for research and development “to ensure [Magna’s] long-term viability”, and the allocation of not more than 2% of pre-tax profit for “charitable, cultural, educational and political purposes to support the basic fabric of society”.²¹⁴ The constitution also provides that any amendments thereto require shareholder approval with each class of shares (Magna is controlled

²¹² *Ibid.* at 5.

²¹³ Bill 150, An Act to enact the *Green Energy Act*, 2009 and to build a green economy, to repeal the *Energy Conservation Leadership Act*, 2006 and the *Energy Efficiency Act* and to amend other statutes S.O. 2009, C.12. (Royal Assent received May 14, 2009).

²¹⁴ Available online at www.magna.com/magna/en/responsibility/constitution/pdf/Corporate_constitution.pdf.

through 300 vote shares) voting separately. Magna (arguably in an effort to mitigate attempts to unionize plants) also adopted an “Employee’s Charter”, which focuses on job security, workplace safety, competitive compensation and equity/profit participation.²¹⁵

Such initiatives are not unique to Magna. For example, Casio has established a “charter of creativity for Casio and Casio common commitment”,²¹⁶ as described in Casio’s 2008 Corporate Report.²¹⁷ This Charter embraces a number of norms, including corporate social responsibility, which is “said to be a matter of a company fulfilling its responsibility to all stakeholders in all economic, environmental and social respects”.²¹⁸

A more recent (and widely publicized) example was the initial public offering of Google. The prospectus included a letter from the founding shareholders which articulated a number of principles on which Google was based and which would continue to be maintained after the public offering (by the use of a dual class share structure through which the board and executive management team would control 61.4% of the voting power). Commitments to serving end users, a long-term focus (“a management team distracted by a series of short-term targets is as pointless as a dieter stepping on the scale every half hour”) and “making the world a better place” were set out in some detail in an effort to ensure that prospective investors would understand that “Google is not a conventional company...[and they] do not intend to become one.”²¹⁹

The Google vision was expressed succinctly as: “We believe strongly that in the long term, we will be better served – as shareholders and in all other ways – by a company that does good things for the world even if we forego some short term gains.”²²⁰

²¹⁵ Available online at www.magna.com/magna/en/employees/charter/default.aspx.

²¹⁶ Available online at <http://world.casio.com/corporate/principle/charter.html>.

²¹⁷ Larry Page and Sergey Brin, “An Owner’s Manual for Google Shareholders”, available online at http://investor.google.com/ipo_letter.html.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

Such disclosure (arguably reinforced by shareholder approval or other validation) has proven to be consequential in determining director liability. In *Greenlight Capital Inc. v. Stronach*,²²¹ a case involving the conduct of Magna's controlling shareholder in respect of a Magna spin-off company under identical control, the trial judge found such disclosure to be directly relevant to a determination of the subjective expectations of the shareholder plaintiff in the context of an oppression claim.²²² Given the BCE Decision, boards are likely to be advised to deliberately condition stakeholder expectations in order to insulate themselves in respect of oppression (and other) claims.

In recent years, shareholder activists have tested the limits of corporate law with by-law proposals that attempt to constrain the authority of boards of directors. It has been argued that, to the extent such proposals attempt to usurp authority for shareholders (who do not owe duties to advance the interests of the corporation) they should not be allowed.²²³ Conversely, one law firm recently proposed that corporations amend advance notice by-laws governing shareholder proposals to include new, continuous disclosure obligations (beyond those contained under U.S. securities laws) relating to beneficial ownership interests (intended to prevent activist shareholders from secretly accumulating a significant interest without disclosure).²²⁴ The Dutch Parliament is currently considering legislation which would codify recommendations of a Corporate Governance Code Monitoring Committee appointed by the Minister of Finance. The bill would impose substantive responsibilities on institutional shareholders, such as a requirement on holders of at least

²²¹ 2008 CarswellOnt 4093, 91 O.R. (3d) 241, 47 B.L.R. (4th) 215, 240 O.A.C. 86.

²²² *Greenlight Capital Inc. v. Stronach* (2006), 22 B.L.R. (4th) 11 at para. 23.

²²³ Frederick H. Alexander and James D. Honiker, "Power to the Franchise of Fiduciaries" (2008) 33 Delaware J. of Corporate Law 749.

²²⁴ Phillip A. Gelston and James C. Woolery, "Beneficial Ownership – By-law Disclosure Proposal" (2008) Cravath, Swaine & Moore LLP; Michael J. de la Merced, "Shedding Light on Hidden Activists" *New York Times* (9 September 2008).

3% public company's voting shares to notify the regulatory authority as to whether they agree with the firm's strategy.²²⁵

Lord Myners, the U.K. Finance Secretary, recently argued that voting rights might vary in proportion to the length of time shares are held.²²⁶ Such a proposal would follow the French model, under which ordinary shares double their voting rights if they are held by the same owner for a period of time specified in the company's charter (typically several years).²²⁷ While the focus (attacking "short-termism") is laudable, we are not aware of evidence that such measures have been effective. The risk, again, is a diminution in board accountability.

Another approach to extending authority to shareholders would be through the use of unanimous shareholder agreements ("USAs"). Though, at common law, the discretion of directors in respect of their duties cannot be fettered,²²⁸ a USA is a statutory exception to the common law principle. Arguments have been raised as to whether USAs can be used in public companies. This issue was analyzed in a 1996 discussion paper,²²⁹ which concluded that there is nothing in the statute that says USAs cannot be used in the context of a public corporation. Section 146(1) of the *CBCA* states:

*An otherwise **lawful written** agreement among **all the shareholders** of a corporation, or among all the shareholders and one or more persons who are not shareholders, that restricts, in whole or in part, the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation is valid.*

²²⁵ See Global Proxy Watch (July 31, 2009).

²²⁶ The Economist, "Short of Ideas – The Rights of Shareholders and the Wrong Done to Clients". August 6, 2009, available online at www.economist.com/businessfinance/displaystory.cfm?story_id=14174485.

²²⁷ Tatiana Nenova, "How to Dominate a Firm with Valuable Control? Dual Class Firms Around the World: Regulation, Security-Voting Structure and Ownership Patterns", World Bank (April 2001) available online at papers.ssrn.com/sol3/papers.cfm?abstract_id=1017603 at p.3.

²²⁸ *Kennerson v. Burbank Amusement Co.*, 260 P. 2d 823 (Calif. C.A. 1953); *Sherman & Ellis v. Indiana Mutual Casualty*, 41 F.2d 588 (7th Cir. 1930).

²²⁹ Canada Business Corporations Act Discussion Paper: Unanimous Shareholder Agreements (1996).

As noted, there is no restriction with respect to the number of shareholders or type of corporation; if shareholders can reach a sufficient agreement, why should legislation interfere? Further, Section 146(5) of the *CBCA* states:

To the extent that a unanimous shareholder agreement restricts the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, parties to the unanimous shareholder agreement who are given that power to manage or supervise the management of the business and affairs of the corporation have all the rights, powers, duties and liabilities of a director of the corporation, whether they arise under this Act or otherwise, including any defences available to the directors, and the directors are relieved of their rights, powers, duties and liabilities, including their liabilities under section 119, to the same extent.

The USA would likely have to be created a company is first set up and would have to be in place at the time of the initial public offering. The prospectus would provide full disclosure and state that the shares are subject to the USA which prescribes a different governance framework than the statute. Share certificates would have to be legended according. Section 146 (4) of the *CBCA* provides that transferees of shares subject to a USA are deemed to parties to the USA if they have notice of the agreement or a “reference to it is noted conspicuously on the security certificate”.²³⁰ Thus, as a matter of corporate law, if the agreement is written, otherwise lawful and unanimous, the aforementioned sections should be effective in creating a limited access arrangement between the corporation, directors and shareholders. It is interesting to consider whether shareholders exercising some or all of the powers of directors through such an agreement would be then subject to statutory duties as traditionally understood.²³¹

Shareholders might also impose their will *ab initio* or, arguably at least, at any time by including in the articles of incorporation provisions intended to provide guidance to directors in the exercise of their duties. While under the *CBCA* this would not serve to relieve directors of their statutory obligations (and potential liability), it might, at least, colour “reasonable expectations”. In

²³⁰ *CBCA*, *supra* note 10, s. 49(8).

²³¹ It is difficult to reconcile a duty of directors to consider stakeholders’ interests with the ability of shareholders to restrict the powers of directors.

contrast, Delaware law generally allows corporate charters to contain “any provision ... for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders ... if such provisions are not contrary to the laws of this State.”²³² Moreover, Delaware allows charter provisions that eliminate managerial duty of care liability in damages.²³³

Each of the Australia and New Zealand corporation statutes contain a provision providing for a corporate constitution of a wholly-owned subsidiary to permit its directors to act in the best interests of the parent company.²³⁴ Quere whether this represents a sanctioned departure from shareholder primacy or simply clarifies the identity of interests?

There is also growing evidence of the potency of shareholder advisory votes, particularly in respect of executive compensation practices. This is but one manifestation of the seminal and growing role of institutional investors in campaigning for improvements in corporate governance and conduct.²³⁵ Various voluntary codes of conduct and business self-regulation have emanated from (and are directed to) such investors.²³⁶ John Bogle recently referred to the challenge of establishing a “fiduciary society” based on statutory duties to focus on long-term investment, appropriate due diligence and “ensuring that managers/agents act in a way that reflects their ethical

²³² See DEL. CODE. ANN. tit. 8, s. 102(b)(1) (1974).

²³³ *Ibid.* s. 102(b)(7).

²³⁴ *New Zealand Companies Act* 2006, s. 131(2), *Australia Corporations Act* 2001, s. 187.

²³⁵ See, for example, Gordon Clark and Tessa Hebb, “Why Should They Care? The Role of Institutional Investors in the Market for Corporate Global Responsibility” (2005) *Environment and Planning A* 2015; Gordon Clark and Darius Wojcik, *The Geography of Finance: Corporate Governance in the Global Marketplace* (New York: Oxford University Press 2007); Stephen Davis, Jon Lukomnik and David Pitt-Watson, *The New Capitalists: How Citizen Investors are Reshaping the Corporate Agenda* (Boston: Harvard Business School Press 2006).

²³⁶ See, for example, International Corporate Governance Network, “Statement on Global Corporate Governance Principles” (2005) available online at www.icgn.org; United Nations Environment Program Finance Initiative, “Fiduciary Responsibility – Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues into Institutional Investment” (July 2009) available online at www.unepfi.org/fileadmin/documents/fiduciaryII.pdf.

obligations to society”.²³⁷ Indeed, such manifestations of shareholder (and other popular) sentiment are now informing legislative processes.²³⁸

5 Conclusion

Allen suggested long ago that “anyone trying to understand how our law deals with corporations must have in mind that they are the locus of many conflicting claims, and not all of those claims are wholly economic.”²³⁹ He noted how the long-term/short-term distinction preserved the norm of shareholder oriented property theory, while affording directors considerable latitude to deal with other groups or institutions having an interest in, or who are affected by, the corporation.

As he concluded:

*“... in defining what we suppose a public corporation to be, we implicitly express our view of the nature and purpose of our social life. Since we do disagree on that, our law of corporate entities is bound itself to be contentious and controversial. It will be worked out, not deduced. In this process, efficiency concerns, ideology, and interest group politics will commingle with history (including our semi-autonomous corporation law) to produce an answer that will hold for here and now, only to be torn by some future stress and to be reformulated once more. And so on, and so on, evermore.”*²⁴⁰

In other words, the legal and economic frameworks of corporate governance are embedded in more basic values, attitudes and beliefs. As former U.S. Supreme Court Justice Earl Warren noted, “the law floats on a sea of ethics”.²⁴¹

Likewise, Elhauge has forcefully argued that corporate law does and should confer managerial discretion to consider and, within reason, respond to social and moral sanctions because

²³⁷ John C. Bogle, “A Crisis of Ethic Proportions”, *Wall Street Journal* (20 April 2009) also part of a longer article by him entitled “Building a Fiduciary Society” in the July/August 2009 issue of *The Corporate Board*.

²³⁸ For example, the Australian Treasurer recently announced his government’s intention to amend the Australian Corporations Act to require shareholder approval for termination payments that exceed average annual base salary. See Rachel Pannett, “Australia to Rein in Executive Pay”, *Wall Street Journal*, March 19, 2009, p. C2.

²³⁹ William T. Allen, “Our Schizophrenic Conception of the Business Corporation” (1992) 14 *Cardozo Law Review* at 280.

²⁴⁰ *Ibid.* at 281.

²⁴¹ Quoted in Noel Preston, *Understanding Ethics* 3rd edition (Annandale: The Federation Press, 2007) at 21.

of the fact that “there are residual areas beyond the reach of even optimally framed legal duties”.²⁴² Once framed in this manner, the challenge shifts to one of determining when, absent self-interested conduct, courts should constrain the exercise of such discretion.²⁴³

It has been argued that, in each of the *Peoples* and *BCE* Decisions, the Supreme Court of Canada may have reached to achieve a desired outcome – one arguably consonant with societal norms - without carefully articulating the underlying legal reasoning, arguably leading to a diminution in both judicial clarity²⁴⁴ and directorial accountability. Some of the existing legal theories that the Supreme Court might have focused on to elaborate the responsibilities of directors have been presented, along with a consideration of potential legislative and shareholder initiated reforms, any of which might add clarity to the law.

A reader reviewing the recommendations presented in this paper may reasonably assume that clarification with respect to the role and accountability of directors necessarily involves a shift towards greater scrutiny in terms of the interests that directors should consider and directors’ commitment to long term value maximization. While this reflects the authors’ bias, it need not be the case. For example, clarity with respect to the role and accountability of directors could involve establishing that the role of directors should be a singular focus on maximizing wealth creation for the benefit of the current shareholders, with the safeguarding of other interests to be left to political and social forces and agencies.²⁴⁵

²⁴² *Supra* note 12 at 743.

²⁴³ For example, the American Law Institute suggests that courts should sustain decisions to sacrifice profits for ethical principles when such principles are reasonable because they “have significant support although less-than-universal acceptance”. *Supra* note 160 at s. 2.01 cmt.h. See also David L. Engel, “An Approach to Corporate Social Responsibility” (1979) 32 *Stan. L. Rev.* at 27-34 (he suggests a more stringent standard – one based on a clear broad social consensus).

²⁴⁴ Ian Lee, *supra* note 41 points out that the court’s approach in the *Peoples Decision* “obscures the choice actually faced by the court and the normative considerations relevant to that choice. In this way, it is an example of the kind of reasoning that realist scholars persuasively criticized in the last century”. See, e.g., F. Cohen “Transcendental Nonsense and the Functional Approach” (1935), 35 *Col. L. Rev.*

²⁴⁵ See for e.g., Reich, *Supra* note 88.

Ultimately, the determination of proper corporate purpose, duties of directors and directors' discretion accountability depends on an understanding of the role of the corporation in our society. Is a legal construct that has and continues to hold the potential to transform our world really one that we want to hinder? If not, how best can we focus the role of directors (or others assigned with legal duties and accountability) on ensuring that corporations generate wealth within the context of broader societal values? Equally, how do we focus the "watchful eye", referred to by President Obama, to ensure an effective oversight role and ultimate responsibility for wealth distribution?

Never before have the duties owed by directors attracted such political currency. Sadly, the Supreme Court of Canada has now missed two opportunities to address these issues in the context of corporate law. Perhaps, in venturing into the realm of social responsibility, it was "being too far ahead" of its time. If so, only by not "going deep". Others, hopefully, will soon provide greater clarity.

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