BCE Inc. v. 1976 Debentureholders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?

BY SARAH P. BRADLEY*

Directors' fiduciary duties oblige them to act in the best interests of the corporations they serve, but the interests of a corporation are not monolithic, and the question of how directors should balance the various competing interests of the constituencies that comprise a modern corporation has been the subject of considerable debate throughout the common law world. In Canada, this question is often raised in conjunction with a consideration of the oppression remedy, as it was in the *BCE* case, where the Supreme Court of Canada took the opportunity to comment on this important and relatively neglected area of Canadian corporate law. This comment is critical of a number of aspects of the Court's discussion of directors' fiduciary duties, particularly its interweaving of the oppression remedy with fiduciary obligations and its expansion of traditional conceptions of directors' fiduciary duties through the introduction of such novel and virtually unexplained elements as the "fair treatment" component, a duty to ensure that the corporation meets its statutory obligations, and a duty to ensure that the corporation is a "good corporate citizen." Concerns regarding doctrinal precision aside, such an expansion of directors' fiduciary duties, are not without consequence. This comment discusses the practical need for certainty in this area of law and presents a number of policy arguments against the expansion of directors' duties without a careful analysis of legal rationales and consequences.

De par ses obligations fiduciaires, l'administrateur est tenu d'agir au mieux des intérêts de la société qu'il sert. Les intérêts d'une société n'étant toutefois pas monolithiques, la question de savoir comment les administrateurs devraient concilier les intérêts conflictuels des diverses composantes qui forment une société moderne a fait l'objet d'un vaste débat dans les ressorts de common law. Au Canada, cette question se pose en général lorsqu'il s'agit d'examiner le recours en cas d'abus, comme ce fut le cas dans l'affaire BCE, à l'occasion de laquelle la Cour suprême du Canada a commenté ce secteur important mais relativement négligé du droit canadien des sociétés. Dans ce commentaire, on critique un certain nombre d'aspects de la discussion de la Cour à propos des obligations fiduciaires des administrateurs, en particulier l'enchevêtrement entre le recours en cas d'abus et les obligations fiduciaires et l'expansion des conceptions traditionnelles des obligations fiduciaires de l'administrateur par l'introduction des éléments aussi inédits qu'obscurs que sont l'obligation de « traitement équitable », le devoir de veiller à ce que la société s'acquitte de ses obligations légales et celui d'agir en tant « qu'entreprise socialement responsable ». Hormis les réserves relatives à la précision doctrinale, un tel développement des obligations fiduciaires de l'administrateur n'est pas sans conséquence. Dans le cadre de ce commentaire, on discute de la nécessité pratique d'établir une certitude dans ce secteur du droit et on présente un certain nombre d'arguments stratégiques contre l'accroissement des obligations des administrateurs de sociétés jusqu'à ce qu'on ait procédé à une analyse rigoureuse des justifications et conséquences juridiques d'un tel changement.

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INTRODUCTION

Few corporate law cases have been as eagerly anticipated as the Supreme Court's recent decision in *BCE Inc. v. 1976 Debentureholders*.[1] In the summer of 2008, business people, legal practitioners, academics and social commentators all anxiously awaited the Supreme Court's determination, while the fate of the largest leveraged buy-out in Canadian history hung in the balance and the economy teetered on the brink of the worldwide financial credit crisis. The outcome was uncertain. The case turned on the question of whether the proposed corporate arrangement was fair and reasonable, and whether the oppression remedy was available to creditors of a subsidiary corporation whose economic interests would be adversely affected by the transaction. The resolution of these questions required an assessment of the directors' statutory fiduciary duties in a change-of-control situation, and raised the question of the appropriate procedural interrelationship between these two key issues. The existing Canadian jurisprudence provided little guidance, with no consequential cases directly on point. Canadian law relating to corporate stakeholder protection has diverged definitively from that of other jurisdictions, and similar cases from the UK and US were of no assistance, although some commentators speculated about whether the Supreme Court would opt to align its reasons with the well-understood American standards. The trial court and the Quebec Court of Appeal reached different conclusions in the case and applied different procedures in reaching their decisions. The *BCE* appeal to the Supreme Court of Canada provided the Court with the opportunity to clarify an important and relatively neglected area of Canadian corporate law.

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1. 2008 SCC 69, [2008] 3 S.C.R. 560, 301 D.L.R. (4th) 80 [*BCE Supreme Court* cited to S.C.R.], rev'g 2008 QCCA 935, [2008] R.J.Q. 1298, 43 B.L.R. (4th) 157 [*BCE Court of Appeal* cited to R.J.Q.], aff'g 2008 QCCS 9057, [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1 [*BCE Superior Court* cited to R.J.Q.].

Due to the critical time constraints of the parties and the potential impact on the Canadian economy of the success or failure of a transaction of such magnitude, the Court heard the case on a remarkably expedited basis and delivered a summary decision without reasons just three days later, overturning the decision of the Quebec Court of Appeal and allowing the transaction to go forward. It appeared that the Court had adopted a relatively deferential position with respect to the business decisions of the board of directors. But without reasons, the legal uncertainty remained and the full decision was eagerly anticipated. The importance of the Court's reasons was highlighted by the degree of interest and speculation that continued across a broad spectrum of the Canadian business world, from newspaper editorial pages to legal periodicals, boardrooms and faculty lounges.[2] However, when the Court's reasons were delivered in December of 2008, some six months after hearing the case, they proved somewhat anticlimactic.

In its full decision, the Supreme Court provided a useful and relatively uncontroversial analysis of certain aspects of the case, clarifying and distinguishing the analytical procedure to be used by courts when considering an oppression claim in the context of a court-supervised statutory arrangement. The Supreme Court's clarification of these matters has indeed already provided useful guidance in several subsequent lower court decisions.[3] The decision also provided some comfort to boards and their advisors by reiterating the deferential standard of the business judgment rule and restating the fundamental principle of Canadian law that the fiduciary obligations of directors are owed only to the corporation itself and not to any particular stakeholder, even in a change-of-control situation. This holding has also been followed in subsequent lower court decisions.[4] But in other respects, particularly the discussion

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2. See e.g. Peer Zumbansen & Simon Archer, "SCC Must Define Directors' Duties During Takeovers" *The Lawyers Weekly* 28:22 (10 October 2008) 10; Luis Millan, "Rebuke of Quebec CA Sets Tongues Wagging" *The Lawyers Weekly* 28:32 (19 December 2008) S5; Allan Hutchinson, "Why Shareholder Primacy" *The Globe and Mail Online* (11 June 2008), online: Osgoode Alumni—In the News Archives: <http://osgoode.yorku.ca/media2.nsf/5457ed39bc56dbfd852571e900728656/4cc1efab41d041ca8525746600509ef0?OpenDocument>; Jeffrey MacIntosh, "The Peoples Corporate Law: Unsafe at Any Speed" *National Post* (10 June 2008) FP17, online: University of Toronto Faculty of Law—Faculty in the News Archives <http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/7/1/0/0&contentId=1752>; and Jeffrey MacIntosh, "Engine of Wealth" *National Post* (11 June 2008) FP19, online: University of Toronto Faculty of Law—Faculty in the News Archives <http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/7/1/0/0&contentId=1751>.

3. See e.g. *Crystallex International Corp. (Trustee of) v. Crystallex International Corp.*, [2009] O.J. No. 5435 at para. 73, 2009 CanLII 71007 (Sup. Ct.) (QL); *Tanenbaum Estate v. Tanjo Investments Ltd.*, [2009] O.J. No. 3792 at para. 46, 2009 CarswellOnt 5479 (Sup. Ct.) (QL); *Hu v. Sung* (2009), 76 C.C.E.L. (3d) 179 at para. 8, [2009] O.J. No. 3373 (Sup. Ct.) (QL); *Doucet v. Spielo Manufacturing Inc.*, 2009 NBQB 196, 62 B.L.R. (4th) 29 at para. 213, [2009] N.B.J. No. 217 (QL); *Walls v. Lewis* (2009), 97 O.R. (3d) 16 at para. 45, 61 B.L.R. (4th) 143 (Sup. Ct.); and *Le Maitre Ltd. v. Segeren* (2009), 55 B.L.R. (4th) 123 at para. 35, [2009] O.J. No. 634 (Sup. Ct.) (QL).

4. See *Peel Financial Services Ltd. v. Omers Realty Management Corp.*, [2009] O.J. No. 3375 at para. 55, 2009 CanLII 42455 (Sup. Ct.) (QL) (dismissing leave to commence a derivative action).

of the content of directors' fiduciary obligations, the decision was less satisfactory, introducing confusion rather than the clarity many had hoped for.

Most notably, the Court's discussion of the interrelationship of the fiduciary duty and the oppression remedy failed to clarify and distinguish these concepts. Instead, the Court unnecessarily expanded the scope of directors' fiduciary duty under the *Canada Business Corporations Act*,[5] incorporating novel and virtually unexplained elements, and conflated the oppression remedy with fiduciary duties in a manner that will be challenging for future interpretations and judicial decisions. An important opportunity for clarification has been lost.

The regrettable absence of doctrinal precision with respect to the Court's discussion of fiduciary duties is evident early in the decision, when the Court defines the duty of directors to act in the best interests of the corporation as required by paragraph 122(1)(a) of the CBCA[6] as their "fiduciary duty."[7] It is questionable whether the term "fiduciary duty," with its long and rich jurisprudential history and distinct meaning across a broad range of legal relationships, is appropriate to describe this statutory duty of corporate directors and officers, or whether using the term in this manner will lead to confusion. The Supreme Court itself identified this potential problem in *Peoples Department Stores Inc. (Trustee of) v. Wise*,[8] when it said that the duty to act in good faith with a view to the best interests of the corporation pursuant to paragraph 122(1)(a) "[h]as been referred to [by lower courts] in this case as the 'fiduciary duty.' It is better described as the 'duty of loyalty.' We will use the expression 'statutory fiduciary duty' for purposes of clarity when referring to the duty under the CBCA."[9]

The Court in *Peoples* went on to discuss the common law fiduciary duty, which can arise in a wide variety of contexts, distinctly from that of the statutory fiduciary duty set out in the *CBCA*.[10] It is not apparent why the Court in *BCE* chose not to make such a clarifying distinction. Robert Flannigan has commented on this shortcoming in a recent analysis of common law fiduciary duty in the wake of *BCE*.[11] However, the Court's analysis also has important implications for the interpretation of directors' and officers' statutory fiduciary duties under the *CBCA*, which will be the focus of this comment.

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5. R.S.C. 1985, c. C-44 [*CBCA*].
6. *Ibid.* Section 122 provides that: "(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation. . . ."
7. *BCE Supreme Court*, *supra* note 1 at para. 36.
8. 2004 SCC 68, [2004] 3 S.C.R. 461, 244 D.L.R. (4th) 56 [*Peoples* cited to S.C.R.].
9. *Ibid.* at para. 32.
10. *Ibid.* at paras. 36–41.
11. Robert Flannigan, "Fiduciary Accountability Transformed" (2009) 35 Advocates' Q. 334.

It has been frequently noted that Canada's stakeholder protection law is unique,[12] imposing statutory fiduciary duties on directors and also giving the stakeholders of a corporation the benefit of the oppression remedy to protect them against "unfairly prejudicial" conduct. How these protections are interpreted and how they interact with one another in the contexts of the day-to-day business operation, the circumstances leading to changes of corporate control, or dissolution of a corporation are important to all participants in Canadian businesses. The conduct of these parties is directly affected by their understanding of such protections. Clarity and predictability of these rules are vital to such market participants, perhaps more so than the rules' subjective fairness or normative correctness. To this end, American corporate law has developed relatively clear rules of conduct for boards of directors in change-of-control situations, exemplified by the "enhanced judicial scrutiny" of directors' decisions[13] and the imposition of a duty of shareholder value maximization when a change of control is "inevitable."[14] Canadian law has developed differently, maintaining a less rigid and more permissive framing of fiduciary obligations, even in change-of-control situations, but giving stakeholders the broad and equitable protection of the oppression remedy. These developments have made the vital practical requirements of clarity and predictability more difficult to realize in the Canadian context.

In *BCE*, the Supreme Court introduced a number of seemingly novel interpretations of the statutory fiduciary duty imposed by the *CBCA*. In particular, the Court discussed the "fair treatment" component of the fiduciary duty, a fiduciary duty to ensure that the corporation meets its statutory obligations, and a fiduciary duty to

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12. As observed in an often-quoted passage from the Supreme Court of Canada's decision in *Peoples*, *supra* note 8 at para. 48: "The Canadian legal landscape with respect to stakeholders is unique. Creditors are only one set of stakeholders, but their interests are protected in a number of ways. . . ."

13. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. Sup. Ct. 1985) [*Unocal*]; and *Revlon Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. Sup. Ct. 1986) [*Revlon*]. *Unocal* and *Revlon* set out the circumstances in which US courts will not defer to the decisions of a corporation's board of directors pursuant to the business judgment rule, but rather, will apply a higher standard of "enhanced scrutiny." The *Unocal* standard sets out a reasonableness review for the assessment of any defensive tactics carried out by the target company's board in a hostile takeover situation, while the *Revlon* enhanced scrutiny sets out a general reasonableness standard that will apply in a negotiated transaction when it has become clear that a corporation will inevitably be sold (referred to as being "in play"). The enhanced scrutiny standard accords deference only when the near absolute independence of the board of directors is demonstrated. The rationale for the rules is recognition of the inherent potential for conflict of interest by managers of a corporation in change of control transactions.

14. The duty, commonly referred to as the "Revlon Duty," is described in the seminal case of *Revlon*, *ibid.* and refined in numerous cases that have followed it, most recently in *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235 (Del. Sup. Ct. 2009). The rule in essence provides that when the board of directors has decided to sell the company or when a sale has become inevitable, the board is under a duty to maximize the value received by shareholders.

ensure that the corporation is a "good corporate citizen." The Court described these new "components" of the fiduciary duty without precision and, unfortunately, declined to adequately describe their basis in law. This comment will briefly discuss directors' fiduciary duties in Canada and will summarize the decisions of the Quebec Superior Court and Quebec Court of Appeal, before addressing the difficulties presented by each of these novel components in turn.

II. Fiduciary Duties in Canada

Fiduciary duties are a complex subject and much detail must be excluded from a brief comment of this kind. There are, of course, numerous academic articles and treatises on the subject that provide a thorough analysis from a Canadian perspective.[15] Arguably, the beating heart of the discourse relating to director's fiduciary duties is the question of what it means to act "in the best interests of the corporation." To determine whose interests this refers to calls for an examination of the fundamental conception of the corporate form. This question has been the subject of substantial and vibrant debate in Canada and the common law world for many years.[16] In simple terms, this stakeholder debate has pitted the shareholder primacy model, based on the notion that the corporation's principal purpose is to generate profit for its shareholders and thus, directors' duties require them to act only in the interests of shareholders collectively,[17] against broader concepts of the corporation, such as the stakeholder or pluralist model,[18] which view the corporation as having a social, as well as a profit-making purpose, suggesting that directors should consider the interests of all stakeholders in the corporation when exercising their powers.

It is uncontroversial to observe that the shareholder primacy model informed much of the early development of our system of corporate laws, or that, perhaps until recently, it was clearly understood to be the law in Canada.[19] In the United States, the

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15. See e.g. Leonard I. Rotman, *Fiduciary Law* (Toronto: Carswell, 2005); Donovan W.M. Waters, "The Development of Fiduciary Obligations" in *Gérard V. La Forest at the Supreme Court of Canada 1985–1997* (2000) (QL); Leonard I. Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada" (1996) 24 Man. L.J. 60; Leonard I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34 Alta. L. Rev. 821; and David Thomson, "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000) 58 U.T. Fac. L. Rev. 31.
16. For early examples, see A.A. Berle, Jr., "Corporate Powers as Powers in Trust" (1931) 44 Harv. L. Rev. 1049; and E. Merrick Dodd, Jr., "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145. For more recent examples, see Jacob S. Ziegel, "Creditors as Corporate Stakeholders: The Quiet Revolution—An Anglo-Canadian Perspective" (1993) 43 U.T.L.J. 511; and Poonam Puri & Tuvia Borok, "Employees as Corporate Stakeholders" (2002) 8 J. Corporate Citizenship 49.
17. See Berle, *ibid.*
18. See Dodd, *supra* note 16.
19. See J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 2d ed. (Toronto: Irwin Law, 2003) at 271–72.

shareholder primacy approach has been explicitly accepted, and underlies the "Revlon Duty" of shareholder value maximization in change-of-control situations.[20]

However, in recent years, Canadian courts have diverged from the shareholder primacy approach, instead adopting a more pluralistic approach to "the best interests of the corporation" and expressly allowing corporate directors and officers to consider the interests of non-shareholder stakeholders, even in change-of-control situations. Although some Canadian cases in the 1980s and 1990s had accepted and applied the American "Revlon Duty" of shareholder value maximization,[21] it was in the 2004 *Peoples* case that the Supreme Court entirely reframed the concept of "the best interests of the corporation."

In *Peoples*, the Supreme Court initially stated that, "[f]rom an economic perspective, the 'best interests of the corporation' means the maximization of the value of the corporation."[22] The Court then went on to hold, citing *Teck Corp. Ltd. v. Millar*,[23] that other factors may also be relevant to directors in soundly managing with a view to the best interests of the corporation, such as the consequences of a decision to the corporation's employees or community, though the Court also acknowledged that to confer a benefit to employees without regard to the interests of shareholders would be in breach of its directors' statutory fiduciary duty. The Court summarized its interpretation by stating:

> We accept as an accurate statement of law that 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.[24]

Peoples immediately became a controversial case that was widely criticized for relying on *obiter dicta* from the earlier case of *Teck*,[25] and for leaving a number of issues relating to the fiduciary obligations of directors unresolved.[26]

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20. *Revlon*, *supra* note 13. See explanation at *supra* note 14. See also Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89 Geo. L.J. 439 at 468, where the authors observe: "[T]he standard model of shareholder primacy has always been the dominant legal model in the two jurisdictions where the choice of models might be expected to matter most: the U.S. and the UK." It is notable however, that in recent years, more than 25 U.S. states, (though not Delaware), have enacted "constituency statutes," which explicitly allow directors to consider the interests of non-shareholder stakeholders when making decisions.
21. See e.g. *Corona Minerals Corp. v. CSA Management Ltd.* (1989), 68 O.R. (2d) 425, [1989] O.J. No. 576 (H.C.) (QL); *CW Shareholdings Inc. v. WIC Western International* (1998), 39 O.R. (3d) 755, 160 D.L.R. (4th) 131 (Prov. Ct.) [*CW Shareholdings* cited to O.R.].
22. *Peoples*, *supra* note 8 at para. 42.
23. (1972), 33 D.L.R. (3d) 288, [1973] 2 W.W.R. 385 (B.C.S.C.) [*Teck* cited to D.L.R.].
24. *Peoples*, *supra* note 8 at para. 42.
25. *Teck*, *supra* note 23 at 314.
26. See e.g. Robert Flannigan, "Reshaping the Duties of Directors" (2005) 84 Can. Bar Rev. 365; Wayne D. Gray, "*Peoples v. Wise* and *Dylex*: Identifying Stakeholder Interests Upon or Near Corporate Insolvency—Stasis or

Though the stakeholder debate is nearly as old as the concept of a corporation itself,[27] *Peoples* represented a critical shift away from the traditional model of shareholder primacy in Canadian jurisprudence; instead, it took the pluralist model of the corporation from its customary, cozy place by the academic hearth and thrust it into the harsh light of legal reality. Following *Peoples*, *BCE* was the first case in which the Supreme Court had the opportunity to revisit the issue of directors' fiduciary duties. The case presented an ideal opportunity for the Court to clarify the uncertainties left in *Peoples'* wake. Unfortunately, this opportunity was not fully exploited, and much uncertainty remains.

A. Factual Background and Decisions of the Quebec Superior Court and Court of Appeal

In the course of its analysis in *BCE*, the Supreme Court was called upon to consider the application of the oppression remedy in the context of a court-supervised arrangement under section 192 of the *CBCA*.[28] At the time of the proposed arrangement, BCE's most significant subsidiary, Bell Canada, had $5.17 billion in outstanding debentures. The proposed leveraged buy-out transaction would have increased Bell Canada's contingent debt by approximately $34 billion, substantially increasing its risk of default, and resulting in a downgrade of the credit rating, and therefore the value, of its debt securities. Some of the debentureholders, chiefly institutional investors, would have been forced to sell their debentures at a loss as a result of the downgrade. Though the issue was argued, all levels of court found that there were no specific covenants in the debentures' trust indentures protecting investors in such a circumstance. The debentureholders challenged BCE's plan of arrangement on the basis that it was not "fair and reasonable" as required by the established tests for the approval of a statutory arrangement,[29] for either shareholders or debentureholders,

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Pragmatism?" (2003) 39 Can. Bus. L.J. 242; Warren Grover, "The Tangled Web of the *Wise* Case" (2005) 41 Can. Bus. L.J. 200; Mohamed F. Khimji, "*Peoples v. Wise*—Conflating Directors' Duties, Oppression, and Stakeholder Protection" (2006) 39 U.B.C.L. Rev. 209; Ian B. Lee, "*Peoples Department Stores v. Wise* and the 'Best Interests of the Corporation'" (2005) 41 Can. Bus. L.J. 212; Darcy L. MacPherson, "The Supreme Court Restates Directors' Fiduciary Duty—A Comment on *Peoples Department Stores v. Wise*" (2005) 43 Alta. L. Rev. 383; Janis Sarra, "Class Act: Considering Race and Gender in the Corporate Boardroom" (2005) 79 St. John's L. Rev. 1121; and Jacob S. Ziegel, "The *Peoples* Judgment and the Supreme Court's Role in Private Law Cases" (2005) 41 Can. Bus. L.J. 236.

27. In Ian B. Lee, "Corporate Law, Profit Maximization and the 'Responsible' Shareholder" (2005) 10:2 Stan. J.L. Bus. & Fin. 31 at 33, the author notes that this issue is "persistently ambiguous." See also Dodd, *supra* note 16; and, more recently, William T. Allen, "Our Schizophrenic Conception of the Business Corporation" (1992) 14 Cardozo L. Rev. 261 at 280.

28. *CBCA*, *supra* note 5.

29. See e.g. *Canadian Pacific Ltd. (Re)* (1996), 30 O.R. (3d) 110 at 116, 30 B.L.R. (2d) 297 (Ct. J. (Gen. Div)), aff'd [1998] O.J. No. 3699 (C.A.).

and that they should be granted the right to vote as a separate class on the plan. The debentureholders also claimed that the leveraged buy-out and the related transactions "unfairly disregarded" their interests, entitling them to relief under the oppression provisions of section 241 of the *CBCA*.[30]

At trial, the Quebec Superior Court found that the transactions and the adoption of the plan of arrangement were not oppressive, essentially on the basis that the debentureholders could have protected themselves by contract, but did not.[31] In the course of its analysis of the oppression issue, the Court examined the fiduciary duties of the directors, stating that "these statutory duties . . . form an analytical 'starting point' for any consideration of equity in the matters complained of."[32] The Court went on to endorse the application of the American "Revlon Duty" of shareholder value maximization in change-of-control situations,[33] citing the Canadian cases of *CW Shareholdings*,[34] and *Casurina Ltd. Partnership v. Rio Algom Ltd.*[35]

After considering the Supreme Court of Canada's discussion of the fiduciary duty of directors in *Peoples*, the Quebec Superior Court concluded that the ruling in *Peoples* was "not necessarily incompatible with the application of the *Revlon Duty* by the BCE Board."[36] Justice Silcoff went on to examine the fairness of the arrangement. Though initially asserting that the fairness of the transaction was to be resolved independently of the oppression issue,[37] he ultimately did not conduct an independent analysis of the fairness issue, but simply adopted his reasoning on the oppression

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30. *Ibid.* Section 241 provides that: "(2) If, on an application . . . , the court is satisfied that in respect of a corporation or any of its affiliates (a) any act or omission of the corporation or any of its affiliates effects a result, (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of."

31. *Aegon Capital Management Inc. v. BCE Inc.*, 2008 QCCS 907, [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79 [*Aegon* cited to R.J.Q.] and *Addenda Capital Inc. v. Bell Canada*, 2008 QCCS 906, 43 B.L.R. (4th) 135, 169 A.C.W.S. (3d) 335 referenced in the related arrangement decision of *BCE Superior Court*, *supra* note 1 at para. 128.

32. *Aegon*, *ibid.* at para. 124.

33. In *Aegon*, *ibid.* at para. 131, the Court observed that "[w]hen a corporation is put 'in play,' although the fiduciary duties of directors to act in the best interest of the corporation and, by so doing, maximize the value of the corporation remain fundamentally unchanged, the directors' sole focus changes. They have the added burden of maximizing the value of the corporation's shares for the benefit of its shareholders. While different, these two objectives are not necessarily incompatible or mutually exclusive."

34. *CW Shareholdings*, *supra* note 21 at 768–769, 774.

35. (2002), 28 B.L.R. (3d) 44, 115 A.C.W.S. (3d) 983 (Ont. Sup. Ct.), aff'd (2004), 40 B.L.R. (3d) 112, 128 A.C.W.S. (3d) 491 (Ont. C.A.).

36. *BCE Superior Court*, *supra* note 1 at para. 162, citing *Aegon*, *supra* note 31 at para. 203.

37. *Ibid.* at para. 130, aff'g *Canadian Pacific Ltd.(Re)* (1990), 73 O.R. (2d) 212 at 233, 70 D.L.R. (4th) 349 (H.C.) [*Canadian Pacific Ltd. (Re)* cited to O.R.], where the Court set out that "the jurisprudence has established that for an arrangement to get court approval it must not only be not oppressive, it must be fair and reasonable."

issue,[38] apparently on the basis that an examination of fairness "lies at the very heart of the oppression remedy in Canada."[39] The Court went on to approve BCE's plan of arrangement, finding that the requisite statutory requirements had been fulfilled, that the plan was put forth in good faith, and that it was fair and reasonable to the corporation's shareholders.[40] Justice Silcoff declined to analyze the fairness issue from the perspective of the debentureholders, because their legal rights were not altered by the arrangement. Though the arrangement may have adversely affected the debentureholders' economic interests, he found that this was not sufficient to implicate its fairness or to give them the right to vote as a separate class on the plan.[41]

The Quebec Court of Appeal, in analyzing the debentureholders' concurrent claims that the plan of arrangement was not fair and reasonable and that they had been unfairly prejudiced by the proposed transaction, asserted that "both the approval procedure under s. 192 CBCA and the oppression remedy under s. 241 CBCA are measures that Parliament designed to assure fairness in the conduct of the affairs of a corporation."[42] The Court went on to hold that the "fair and reasonable" standard required under section 192 was higher than the "unfairly prejudicial" standard of section 241, reasoning that the approval of an arrangement requires a holding that it is positively "fair and reasonable," which is a more stringent standard than the finding of "not unfair," which would suffice to overcome an oppression claim. The Court cited a number of Canadian cases reaching similar conclusions.[43] On that basis, the Court

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38. Silcoff J. stated that "[s]eeing the total absence of proof of additional grounds of contestation based on fairness, other than those raised and disposed of in the *Oppression Remedies*, the *Contestations* to the *Motion for Final Order* must fail." *Ibid.* at para. 163 [emphasis in original].
39. *Aegon*, *supra* note 31 at para. 173, citing *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 at 146, 40 B.L.R. 28 (Q.B.); and Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Canada, 2004) at 78.
40. *BCE Superior Court*, *supra* note 1 at paras. 135, 145, 156.
41. *Ibid.* at paras. 152, 164, relying, in part, on the reasoning of Farley J. in *Re Gentra Inc.*, [1993] O.J. No. 2078 at para. 35, 1993 CarswellOnt 3628 at para. 36 (Prov. Ct.) (QL; WLeC); and Industry Canada, *Policy of the Director Concerning Arrangements Under Section 192 of the* Canada Business Corporations Act (Ottawa: Corporations Canada, 2010) (Policy Statement 15.1) at para. 3.09, providing that "the Director is of the view that, as a minimum, all security holders whose legal rights are affected by a proposed arrangement are entitled to vote on the arrangement. . . . At the same time, the Director recognizes that in determining whether debt security holders should be provided with voting and approval rights, the trust indenture or other contractual instrument creating such securities should ordinarily be determinative absent extraordinary circumstances."
42. *BCE Court of Appeal*, *supra* note 1 at para. 77.
43. *Ibid.* at paras. 78–83, citing *Canadian Pacific Ltd. (Re)*, *supra* note 37; *Pacifica Papers Inc. v. Johnstone*, 2001 BCSC 1069, 15 B.L.R. (3d) 249, 92 B.C.L.R. (3d) 158 , aff'd 2001 BCCA 486, 19 B.L.R. (3d) 62, 93 B.C.L.R. (3d) 20; *Re Canadian Airlines Corp.*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, leave to appeal to Alta. C.A. refused, 2000 ABCA 238, 266 A.R. 131, 9 B.L.R. (3d) 86; *3017970 Nova Scotia Co. v. Johnstone*, [2001] O.J. No. 1809, 2001 CarswellOnt 1620 (Sup. Ct.) (QL; WLeC); and *Re Bolivar Gold Corp.*, 2006 YKSC 17, 16 B.L.R. (4th) 17, 146 A.C.W.S. (3d) 644, aff'd 2006YKCA 1, 16 B.L.R. (4th) 10, 223

of Appeal dealt only with the plan of arrangement proceedings, finding that if the plan were fair and reasonable, it could not be said to be oppressive, or to unfairly prejudice or unfairly disregard the debentureholders' interests.[44]

In its consideration of the fairness issue, the Court of Appeal overturned the Superior Court's holding on the basis that the "Revlon Duty" of shareholder value maximization was not applicable in Canada, and that the Superior Court had therefore conducted its fairness assessment erroneously.[45] The Court relied on the Supreme Court of Canada's statement in *Peoples* that "[i]t is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation . . . and not to favour the interests of any one group of stakeholders,"[46] holding that "[i]n Canada, the directors of a corporation have a more extensive duty. . . . They must have regard, *inter alia*, to the reasonable expectations of the debentureholders, and those may be more extensive than merely respecting their contractual legal rights."[47] The Court went on to find that BCE had failed to discharge its burden of proving that this duty had been met, and therefore the arrangement was not approved, on the basis that it was not "fair and reasonable" as required under section 192 of the *CBCA*.[48] BCE and Bell Canada appealed to the Supreme Court, arguing that the Court of Appeal erred in overturning the trial judge's approval of the plan of arrangement. The debentureholders formally cross-appealed on section 241, but argued that the Court of Appeal was correct to consider their complaints as part of its section 192 analysis, such that their appeals under section 241 became moot.[49]

As mentioned above, in its *BCE* decision, the Supreme Court provided a useful clarification of the analytical procedure to be followed when considering an oppression claim in the context of a court-supervised statutory arrangement, holding that the section 192 analysis and the section 241 claim must be evaluated independently. The Court also reiterated the deferential standard of the business judgment rule and restated the fundamental principle of Canadian law that the fiduciary obligations of directors are owed only to the corporation itself, even in a change-of-control situation. These were relatively uncontroversial holdings, but the Court's discussion of the content of directors' fiduciary obligations was less satisfactory, and introduced confusion rather than the clarity that many had hoped to occur.

In particular, the Supreme Court discussed what it described as the "'fair treatment' component" of the fiduciary duty, a fiduciary duty to ensure that the cor-

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B.C.A.C. 50.

44. *BCE Court of Appeal*, *supra* note 1 at para. 87.
45. *Ibid.* at para. 102.
46. *Ibid.* at para. 66, citing *Peoples*, *supra* note 8 at para. 47.
47. *Ibid.* at para. 107.
48. *Ibid.* at paras. 118, 120.

poration meets its statutory obligations and a fiduciary duty to ensure that the corporation is a "good corporate citizen." These new "components" of the fiduciary duty were discussed without precision, and unfortunately the Court declined to adequately describe their basis in law. This comment will address the difficulties presented by each of these novel components in turn.

B. The Fiduciary Duty of Fair Treatment?

In the course of its decision, the Supreme Court discussed what it referred to as the "'fair treatment' component" of the fiduciary duty and asserted that the fiduciary duty to act in the best interests of the corporation "comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly."[50] The Court described this "'fair treatment' component" as "fundamental to the reasonable expectations of stakeholders claiming an oppression remedy,"[51] but did not describe the legal or logical basis upon which it merged this expectation on the part of stakeholders with its interpretation of the director's duty to act honestly and in good faith with a view to the best interests of the corporation. The Court cited "the cases on oppression, taken as a whole"[52] for this proposition, but it is very difficult to discern any such expansion of the statutory duties of directors from the oppression jurisprudence cited by the Court, or any other Canadian jurisprudence.

It is here that we first see the negative consequences of the Court's failure to distinguish between fiduciary duties generally, and the statutory requirement that directors and officers act honestly and in good faith with a view to the best interests of the corporation. The Court has great experience describing and delineating the contours of the fiduciary duty in a broad range of legal contexts, but it has only rarely taken the opportunity to discuss the statutory duties of corporate directors and officers.[53] By choosing to define the statutory duty as the "fiduciary duty" in *BCE*, the Court has opened the door to the confusion of these distinct concepts. Not only do common law fiduciary duties encompass more than the good faith and loyalty required by the statutory duty, they are owed to a different party.

Outside the corporate context, an identifying characteristic of a fiduciary relationship in Canadian common law is whether one party could reasonably have expected that the other party would act in his or her best interests.[54] The content of the fiduciary duty that is owed is then informed by this reasonable expectation.[55] In

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49. *BCE Supreme Court*, *supra* note 1 at para. 29.
50. *Ibid.* at para. 82.
51. *Ibid.* at para. 36.
52. *Ibid.* at para. 82.
53. Recent examples are limited to *Peoples*, *supra* note 8; and *BCE Supreme Court*, *supra* note 1.
54. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409, 97 B.C.L.R. (2d) 1 [*Hodgkinson* cited to S.C.R.].

this context, fiduciary duties are generally owed to the dependent person(s) whose reasonable expectations they are intended to protect, while the statutory fiduciary duty in corporate law is always owed to the corporation itself; the reasonable expectations of others are external to this relationship. The Court specifically acknowledged this in *BCE*,[56] in keeping with its consistent statements of the law in this regard,[57] but did not provide the crucial link between the concepts to explain why the expectations of stakeholders should be relevant to the substance of the duty owed to the corporation. A possible logical connection is that by treating stakeholders in accordance with their expectations, managers lessen the probability of oppression claims, which is in the best interests of the corporation. But incorporating the "duty of fair treatment" into the fiduciary duty owed to the corporation serves only to create a new cause of action in the corporation against its directors, and raises a new source of potential personal liability for directors.

Though not explicitly stated, it is possible that the Court was aligning its statements about the obligations of directors as fiduciaries with its other recent discussions of fiduciary duties in the business law context. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*,[58] Justice La Forest considered the reasonable expectations of all parties to the transaction when formulating the content of the fiduciary obligation, and not merely the reasonable expectation of the purported beneficiary. Similarly, in *Hodgkinson*,[59] the Court considered the expectations of all parties to the transaction, rather than exclusively that of the beneficiary of the obligation. It is possible that the Court was analogizing that, because a corporation cannot have reasonable expectations of its own, the reasonable expectations of all of the stakeholders who comprise it should be considered when determining the content of a director's fiduciary duties to the beneficiary corporation.

However, unlike the business negotiation circumstances in *Lac Minerals* and the professional advisor situation in *Hodgkinson*, stakeholders in a corporate law dispute whose reasonable expectations are not met have a specific statutory remedy. The

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55. *Ibid.* at 412–13.

56. *BCE Supreme Court*, *supra* note 1 at para. 66. The Court states that "[t]he fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. . . . In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation."

57. In *Peoples*, *supra* note 8 at para. 43, the Court stated that "[t]he various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(*a*) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders."

58. [1989] 2 S.C.R. 574, 44 B.L.R. 1.

oppression remedy protects stakeholders from unfair prejudice and unfair disregard of their reasonable expectations. Outside of this protection, shareholders are protected by numerous procedural requirements of the *CBCA*, and by the imposition of the duties of care and loyalty on the corporation's directors, which prohibit conflicts of interest and self-dealing. Thus, the reasonable expectations of stakeholders of Canadian corporations are amply protected by the provisions of the statute itself, and an expansion of the statutory duties of directors is unwarranted.

Further, for shareholders, creditors, directors, officers and other stakeholders who qualify as "complainants" pursuant to section 238 of the *CBCA*, nothing is added to their available remedy by imposing this new duty. If a director has treated or caused the corporation to treat a particular group of such stakeholders unfairly, the stakeholder's remedy of the oppression claim gives the Court a broad discretion to impose personal penalties and make personal awards.[60]

The imposition of the new "'fair treatment' component" of the fiduciary duty also makes the breach of fiduciary duty now potentially easier to prove, and available to a broader range of litigants. In an oppression case, reasonable expectation must be demonstrated. If the fiduciary duty now includes a specific duty to treat stakeholders fairly, then, presumably, a breach of fiduciary duty can be established if unfair treatment is demonstrated, regardless of the reasonable expectations of the stakeholder. There is no basis for this in existing law. Additionally, the term "stakeholder," as used by the Court, encompasses a broader range of potential litigants than the "complainant[s]" that are defined in section 238 of the *CBCA*. Such an expansion of duties and potential liability should not be introduced without substantive discussion.

Additionally, prior to *BCE*, the Supreme Court's decisions have avoided imposing an obligation on directors to consider stakeholder interests, with the consideration of such issues consistently stated in permissive terms. In *Peoples*, the Supreme Court stated that, "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."[61] The consideration of various stakeholder interests was stated in permissive terms; it was not mandated as a duty.

The Court in *Peoples* went on to observe that the interests of shareholders and creditors would starkly diverge as the corporation entered into the "vicinity of insolvency," and that directors would therefore, by necessity, be likely to make decisions

59. *Supra* note 54.
60. *Supra* note 30.

to the benefit of one group and to the detriment of the other. The Court observed that, "[i]n using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a 'better' corporation, and not to favour the interests of any one group of stakeholders."[62] However, in *Peoples*, the Court concluded specifically that the availability of the oppression remedy obviated the need to expand the statutory fiduciary duty to include an obligation to consider the interests of the corporation's stakeholders, stating:

> Section 241 of the CBCA provides a possible mechanism for creditors to protect their interests from the prejudicial conduct of directors. In our view, the availability of such a broad oppression remedy undermines any perceived need to extend the fiduciary duty imposed on directors by s. 122(1)(*a*) of the CBCA to include creditors."[63]
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> . . . .
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> In light of the availability both of the oppression remedy and of an action based on the duty of care, which will be discussed below, stakeholders have viable remedies at their disposal. There is no need to read the interests of creditors into the duty set out in s. 122(1)(*a*) of the CBCA.[64]

Thus, it is perplexing that, in *BCE*, the Court begins its analysis with an assertion that "this case . . . involve[s] the fiduciary duty of the directors to the corporation, and particularly the 'fair treatment' component of this duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy."[65]

In the course of its discussion of the oppression remedy, the Court takes the opportunity to explain the expectation of fair treatment in the following terms: "The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment—the central theme running through the oppression jurisprudence—is most fundamentally what stakeholders are entitled to 'reasonably expect.'"[66] This seems to be a clear and uncontroversial summary of the law on reasonable expectations in the oppression context, but the Court goes on to assert that:

> The cases on oppression, taken as a whole, confirm that the duty of the 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. In each

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61. *Peoples*, *supra* note 8 at para. 42 [emphasis added].
62. *Ibid.* at para. 47.
63. *Ibid.* at para. 51 [emphasis in original].
64. *Ibid.* at para. 53 [emphasis in original].
65. *BCE Supreme Court*, *supra* note 1 at para. 36.

> 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. . . . [67]

This appears to be an overstatement of the law set out in earlier oppression cases. The cases on oppression clearly enforce a statutory remedy where stakeholders have been affected by corporate decisions in an unfair, inequitable manner. To expand this and conclude that, because an equitable remedy is available, a duty must be owed, however, is without logical basis. To conclude, further, that the duty that is owed must therefore form a component of the fiduciary duty to act in the best interests of the corporation is also without logical basis. The Court has erred in transforming the protection of stakeholders' reasonable expectations into a positive fiduciary duty for a corporation's directors and officers.

C. The Fiduciary Duty to Meet Statutory Obligations?

The Court has also expanded the duties of directors and officers by its statement that "the fiduciary duty of the directors to the corporation is a broad, contextual concept. . . . The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements."[68] This seems to be an injudicious statement. Surely, there is no question that there will always be other requirements of a director's fiduciary duty, but more importantly, the assertion that the fiduciary duty requires the directors to ensure that statutory obligations are met is completely novel. The Court provides no further discussion or analysis of this point.

The statutory obligations of a modern corporation are immensely numerous, ranging from the mundane (e.g. the obligation to file notice of a change of address, or to maintain an appropriate number of parking spaces for a given office size), to the procedural (e.g. the requirement to maintain a separate stated capital account for each class and series of shares, or the requirement to have certain machinery inspected regularly), to the fundamental (e.g. the requirement to remit taxes, or the prohibition against carrying on the business of a bank or insurance company). In most cases, the vast majority of mundane or procedural compliance matters are delegated to employees. At times, they are neglected and technical defaults can occur which are later remedied without disruption or consequence. Surely the Court is not suggesting that every director and officer of a corporation with an out-of-date minute book or an insuffi-

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66. *Ibid.* at para. 64.
67. *Ibid.* at para. 82.

cient number of parking spaces is in breach of his or her fiduciary duties. Such an interpretation would distort the very purpose and meaning of those duties.

The meaning of the Court's assertion that, "[a]t a minimum, [the fiduciary duty] requires the directors to ensure that the corporation meets its statutory obligations" is therefore mysterious. Perhaps the Court is referring to some statutory obligations and not others. In any event, ensuring statutory compliance ought not to be conflated with the duty of loyalty set out in paragraph 122(1)(a).

To expand the duty of loyalty in this way and to impose the corresponding liability on directors would be unnecessary and impractical. The statutes to which corporations are or may be subject generally contain their own specific penalties for non-compliance. These penalties range from minor to severe, depending on the nature of the obligation, and the legislature's assessment of the appropriate sanction for non-compliance. In some cases, statutes provide specifically for personal liability of directors in the event of default,[69] but such instances are relatively rare. To expand fiduciary obligations in this way would interfere with many well-understood schemes of sanction that have been functioning satisfactorily for years.

The *CBCA* imposes a duty on officers and directors to comply with the statute and other constating documents in subsection 122(2),[70] which, at first blush, may appear to render the Supreme Court's statement inconsequential. But the statutory duty of compliance is subject to a specific due diligence defence in subsection 123(4) and the defence of good faith reliance in subsection 123(5). The *CBCA* also contains the specific remedy of the compliance order under section 247, giving courts the power to make an order directing the corporation or its directors or officers to comply with the Act, and to "make any further order it thinks fit."[71] To expand directors'

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68. *Ibid.* at para. 38.

69. See e.g. the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1; the *Canada Labour Code*, R.S.C. 1985, c. L-2; and the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

70. *CBCA*, *supra* note 5. Section 122 provides that "(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement. (3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof."

71. *Ibid.* Subsection 123(4) provides that "[a] director is not liable under section 118 or 119, and has complied with his or her duties under subsection 122(2), if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on (*a*) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or (*b*) a report of a person whose profession lends credibility to a statement made by the professional person." Section 123(5) provides that "[a] director has complied with his or her duties under subsection 122(1) if the director relied in good faith on. . . ." (the same subsections (a) and (b) as in 123(4) apply). Finally, section 247 provides "[i]f a corporation or any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation does not comply with this Act, the regulations, articles, by-laws, or a unanimous shareholder agreement, a complainant or a creditor of the corporation may, in addition to any other right they have, apply to a court for an order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions thereof, and on such application the court may so order and make any further order it thinks fit."

fiduciary duties to include a duty to ensure that the corporation meets its statutory obligations goes well beyond the familiar statutory regime set out by Parliament.

Though it may be that it is generally in the best interests of a corporation to comply with its statutory obligations, it should be recalled that subsection 122(1)(a) does not stipulate that a director must at all times act in the best interests of the corporation. Rather, it provides that he or she must act honestly and in good faith *with a view to* the best interests of the corporation. The provision speaks to honesty and good faith, the cornerstones of the traditional conception of the duty of loyalty, and not to a rigid adherence to specific rules. This is complemented by the due diligence defence in subsection 123(4) and the good faith reliance defence in subsection 123(5).

To find that the fiduciary duty of directors and officers includes a duty to ensure that the corporation complies with its statutory obligations would significantly expand the existing regimes for ensuring statutory compliance. The statement of the Supreme Court in this regard, read literally, would extend beyond compliance with the *CBCA*, to include obligations under whatever other statutes may apply to a corporation's operations.

The imposition of such an additional duty might seem innocuous, or even desirable, in this modern era of increased accountability and transparency on the part of corporate decision-makers, but its appropriateness must be scrutinized more closely. Clearly, such an expansion of director's fiduciary obligations would distress those who strive for doctrinal clarity, and for whom the fiduciary duties of directors ought never to be extended beyond their traditional duty of loyalty boundaries. But there are also practical arguments against such an expansion.

First, it is unnecessary to impose personal liability for statutory defaults on directors beyond that which is already available through the statutory duty of compliance, the statutory duty of loyalty, and the oppression remedy. If a director is acting in good faith and his or her conduct cannot be shown to be self-interested or unfairly prejudicial to a stakeholder, then there is nothing to be gained from imposing such liability. Such a duty could allow a corporation that has been subject to substantial fines for statutory non-compliance to seek to recover damages from its directors, even those acting in good faith.

Any such additional liability would needlessly create a new potential cause of action which would, in turn, increase the complexity of pleadings and necessitate increased costs for litigants and increased judicial investment in disputes. In the case of insolvent companies, directors (and their insurance coverage) may be a tempting target for litigation.[72] Additionally, to create such additional obligations would serve

72. For a discussion of this problem in the US context, see John A. Humbach, "Director Liability for Corporate Crimes: Lawyers as Safe Haven?" N.Y.L. Sch. L. Rev. [forthcoming in 2010].

as yet another deterrent to service on corporate boards of directors, particularly on boards of distressed and poorly-managed companies that are in the greatest need of quality stewardship. Fear of liability has for some time been cited as the primary reason for candidates declining board positions. Anecdotal reports strongly suggest that personal liability for directors and officers is widely perceived to be increasing, making quality candidates more difficult to recruit, particular for companies in challenging circumstances.[73]

D. The Fiduciary Duty to Manage the Corporation as a Good Corporate Citizen?

In *BCE*, the Supreme Court makes two references to director's fiduciary duty as: "to act in the best interests of the corporation, viewed as a good corporate citizen."[74] The Court later also refers to the director's obligation to act in the best interests of the corporation, having regard to, amongst other things, "the corporation's duties as a responsible corporate citizen."[75] The Court provides no substance or context for the assertions that both the directors *and the corporation itself* have a duty of "good corporate citizenship." *BCE* is, in fact, the first case in which the Supreme Court has made reference to "good corporate citizenship," other than as a marketing objective.[76] Other courts have occasionally mentioned "good" or "responsible" corporate citizenship to describe situations in which a corporation makes choices beneficial to its community or employees that it is not legally obliged to make; however, no other court in Canada has asserted or even suggested that a corporation is under a duty to act as a good corporate citizen, or that its managers have a duty to ensure that it does so. Already, some commentators have begun to speculate as to the implications of the Court's holding, suggesting, for example, that corporate directors may now have a duty to consider environmental issues when making strategic decisions.[77]

Good corporate citizenship, in the abstract, certainly seems to be a desirable thing. But fiduciary duties have the potential to result in personal liability for corpo-

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73. Bernard Black, Brian Cheffins & Michael Klausner, "Outside Director Liability" (2006) 58 Stan. L. Rev. 1055 at 1058.
74. *BCE Supreme Court*, *supra* note 1 at paras. 66, 81.
75. *Ibid.* at para. 82.
76. The Court makes a brief reference to this in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610 at para. 117, 281 D.L.R. (4th) 589: "Tobacco manufacturers have a long tradition of sponsoring sporting and cultural events and facilities as a means of promoting their product and, they would argue, acting as good corporate citizens."
77. See e.g. Jeffrey Bone, "Corporate Environmental Responsibility in the Wake of the Supreme Court Decision of BCE Inc. and Bell Canada" (2009) 27 Rev. Legal & Social Issues 5 (QL).

rate directors and to drive litigation. If they are to be expanded, a careful analysis of the legal rationales and consequences of the change is required. The Supreme Court undertakes no such analysis in *BCE*. It is entirely unclear why the Court has stipulated the duty of good corporate citizenship and what its intended meaning might be. The Court's references to good corporate citizenship might be read as permissive, so that directors can consider and perhaps give weight to matters relevant to good citizenship when making strategic decisions, but the words chosen by the Court are not stated in permissive terms. Still, there is little doubt that a permissive reading of the new obligation would accord with our existing understanding of fiduciary duties far more than a literal, mandatory reading.

Perhaps the most immediate question raised by the Court's assertion is what the Court might have meant by "good corporate citizenship." Since corporations are not, in fact, citizens, and assessments of "goodness" are not usually the subject of judicial determination, it would appear that the Court is attempting to suggest a contextual social standard, rather than a legally precise one. It may be that, by referencing good corporate citizenship, the Court is seeking to engage a broader, non-legal audience. There is a natural tendency in popular culture and in our collective imagination to anthropomorphize corporations, expanding upon their legal personality by imagining them as amorphous, person-like entities, with sentiments, morality, citizenship, and other human characteristics. There seems to be a growing public awareness of the role of corporations in society, and increasing discourse on the subject of corporate social responsibility.[78] Perhaps the meaning of the Court's statement is that it is the reasonable expectation of the stakeholders of a corporation, or perhaps society at large, that corporations will be good, responsible, and make choices that a good human citizen would make. However, this is a flawed analogy. Human citizens are not legally required to always act in their own best interests, as corporations are, and, of course, human citizens are not under any duty to be good or responsible. Indeed, it is difficult to imagine that a consensus could ever be reached upon the meaning of "good citizenship."

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78. See e.g. Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, Ont.: LexisNexis, 2009); Allan C. Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Toronto: Irwin Law, 2005); Aaron A. Dhir, "The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights" (2009) 47 Osgoode Hall L.J. 47; Leo E. Strine, Jr., "Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour" (2008) 58 U.T.L.J. 241; and D. Dossing, "The Business Case for CSR" in *Guide to Global Corporate Social Responsibility* (International Chamber of Commerce U.K., 2003) at 34 (outlining the evolution of three generations of CSR).

The Court says: "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."[79] Unfortunately, this statement raises a number of issues. First, the statement is unclear as to whether it is permissive or obligatory for directors to consider the impact of corporate actions on stakeholders. To say that they "may be obliged," without describing when such an obligation will arise and when it will not, is vague. Second, it is unclear if the Court is merely observing that the debentureholders in these appeals are corporate stakeholders, or if the Court is stating that the directors of BCE were obliged to consider the impact of their decisions on the debentureholders as part of their fiduciary duty. If the latter is the correct interpretation, then it inappropriately conflates the reasonable expectations of the stakeholders with directors' fiduciary duty. Later in its consideration of the oppression claim, the Court finds that the debentureholders had a reasonable expectation that directors of BCE would consider their position, and that this expectation had been met.[80] In the quote above, however, the Court integrates this reasonable expectation into its discussion of the fiduciary duties of directors. Third, the Court's reference to good corporate citizenship is superfluous. Canadian courts have occasionally discussed the issue of directors' consideration of stakeholder interests (always in permissive terms)[81] when discussing the meaning of the duty to act in the best interests of the corporation. The Supreme Court in *BCE* has unfortunately opted not to take up this discussion substantively, or to clarify the issue of such considerations; rather, it has simply added the words "as a good corporate citizen."

Numerous questions arise from this statement, which the Court does not discuss, such as: is there a difference in how stakeholder interests are to be weighed when the director is acting in the best interests of the corporation, as opposed to acting in the best interests of the corporation viewed as a good corporate citizen? Could a decision to operate exclusively for profit be consistent with such a duty? Does it matter whether the stakeholders expect the corporation to comport itself as a good corporate citizen? Could managers avoid this duty if they could show that the stakeholders of the corporation did not expect it to be run as a good corporate citizen? What if the corporation's activities are inherently polluting or dangerous? Would a good corporate citizen ever manufacture phosphorous grenades, for example, or

79. *BCE Supreme Court*, *supra* note 1 at para. 66 [emphasis added].

80. *Ibid.* at paras. 102–03.

81. See e.g. *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177, [1998] O.J. No. 4142 (QL) [*Maple Leaf* cited to O.R.]; and *Peoples*, *supra* note 8.

decide to transport oil near an ecologically sensitive habitat because it is the most profitable route?

It may be that the Court, by introducing the concept of "good corporate citizenship," is acknowledging the influence of the corporate social responsibility movement in modern society and reflecting what appears to be a growing public sentiment that, in light of the many corporate scandals, frauds, economic collapses, and environmental catastrophes, the legal standard that imposes a corporate profit imperative should be tempered somewhat, or perhaps reconsidered. Though the call for increased corporate social responsibility has been sounded for decades by a variety of social commentators and academics, recent notorious instances of large-scale corporate fraud, together with the recent recession, have led many to seriously reconsider the theoretical underpinnings of our current economic system and the rules of corporate law that facilitate it.[82] Even Pope Benedict XVI, reiterating the Catholic Church's longstanding position, has recently commented on corporate social responsibility and the shareholder primacy model in the context of the global recession.[83]

Aaron Dhir has recently considered the correlation between the Supreme Court's statements relating to fiduciary duty and the movement toward enhanced social disclosure standards.[84] He discusses recent social disclosure provisions in the UK that are linked to newly expanded fiduciary duty provisions, suggesting a parallel to our Court's apparent direction.[85] In October 2007, changes to the UK *Companies Act 2006*[86] came into force, changing the statutory duties of directors from an obligation to "act in good faith and in the interests of the company" to providing a statutory statement of directors duties, which include a duty to:

> [A]ct in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

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82. See e.g. Margaret M. Blair, "Shareholder Value, Corporate Governance, and Corporate Performance: A Post-Enron Reassessment of the Conventional Wisdom" in Peter K. Cornelius & Bruce Kogut, eds., *Corporate Governance and Capital Flows in a Global Economy* (Oxford: Oxford University Press, 2003) 53; and John Armour & Joseph A. McCahery, eds., *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Portland, OR: Hart Publishing, 2006).

83. See Encyclical Letter from Pope Benedict XVI (29 July 2009) *Caritas Inveritate* ("Charity in Truth") (Vatican City: Libreria Editrice Vaticana, 20 June 2009) at para. 40, online: <http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_benxvi_enc_20090629_caritas-in0veritate_en.html>, where Pope Benedict states: "Today's international economic scene, marked by grave deviations and failures, requires a *profoundly new way of understanding business enterprise*. . . . Without doubt, one of the greatest risks for businesses is that they are almost exclusively answerable to their investors, thereby limiting their social value . . . there is . . . a growing conviction that *business management cannot concern itself only with the interests of the proprietors, but must also assume responsibility for all the other stakeholders who contribute to the life of the business*: the workers, the clients, the suppliers of various elements of production, the community of reference" [emphasis in original].

84. Dhir, *supra* note 78.

85. *Ibid.* at 80.

86. *Companies Act 2006* (U.K.), 2006, c. 46.

> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> (f) the need to act fairly as between members of the company.[87]

Though framed in mandatory terms, this revised UK statutory fiduciary obligation echoes the statements of our Supreme Court in *Peoples*,[88] and earlier cases, such as *Maple Leaf*,[89] and is perhaps indicative of a trend towards the imposition of a duty of corporate social responsibility in the common law world.

For decades, companies, particularly large companies, have attempted to project the image of good corporate citizenship. It is a corporate attribute thought to be beneficial from the perspective of marketing, profile and employee morale. Such good citizenship generally involves the corporation using some of its profits or its economic power to engage in acts of care and stewardship for the company's employees, community and environment. It may involve acts of direct charity. When a corporation spends its resources on such activities, it generally publicizes its activities as a way of demonstrating what it hopes will be perceived as its goodness, its social responsibility. However, incorporating such socially desirable good citizenship into a legally binding duty is fraught with difficulty. This difficulty is illustrated by the uncertainty that currently exists with the *Peoples* standard of permissive consideration of stakeholder interests. Unfortunately, the Supreme Court's statements in *BCE* will add to, rather than diminish, this difficulty, and an important opportunity for clarification has been lost.

III. Conclusion

In the course of its decision in *BCE*, the Supreme Court has introduced a number of seemingly novel aspects of the fiduciary duty imposed by the *CBCA*. In particular, the Court has introduced what it describes as the "'fair treatment' component" of the fiduciary duty, a fiduciary duty to ensure that the corporation meets its statutory obligations, and a fiduciary duty to ensure that the corporation is a "good corporate citizen." The Court discusses these new "components" of the fiduciary duty without precision, and unfortunately has not adequately identified their basis in law.

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87. *Ibid.*, s. 172(1).
88. *Supra* note 8.
89. *Supra* note 81.

Such an expansion of fiduciary duties is not without consequence. Aside from concerns regarding doctrinal precision, this article has discussed the practical need for certainty in this area of law and presented compelling policy rationales against the expansion of directors' duties. Fiduciary duties have the potential to result in personal liability for corporate directors, and if they are to be expanded, careful analysis of the legal rationales and consequences is required. Corporate law and legal systems that affect corporations throughout the common law world have well established doctrines that impose personal liability on directors in only the most circumscribed situations, respecting their traditional role as providers of strategic guidance and oversight of the professional managers of the corporation. Directors, particularly in the context of larger corporations, are not engaged on an exclusive basis, but rather are expected to act in an advisory and monitoring capacity. Expansion of the personal liability of these essential advisors and monitors will reduce the attractiveness of the role of director for skilled senior professionals. It may also needlessly increase litigation, negatively affecting the very stakeholders whose interests fiduciary obligations are intended to serve.

One can hope that, when the Supreme Court is next presented with the opportunity to opine on directors' fiduciary obligations, it will seize the chance to provide clarity in this important area of law. Particularly useful would be a clear statement distinguishing the statutory duties of directors under section 122 of the *CBCA* from the common law duties of fiduciaries, and constraining the statutory duties to the fundamental duties of care and loyalty. Also needed is a clear statement from the Court that corporate directors are not under any specific duty to consider stakeholder interests in reaching their decisions, even in a change-of-control situation.

The issues of fair treatment for stakeholders, statutory compliance and corporate social responsibility ought not to be incorporated into or conflated with the fiduciary duty of directors under the *CBCA*. Fair treatment for stakeholders in the corporate context is already amply assured by the existing statutory oppression remedy, the consequences of statutory non-compliance are already specifically set out in the statutes themselves, and the encouragement of corporate social responsibility is not a matter that is appropriately addressed by the court system, particularly not through the expansion of the existing doctrine of fiduciary duty. What is called for is a clear discussion from Canada's highest court regarding the nature of fiduciary duties in the corporate context that is doctrinally precise and provides guidance in this area of law that is so essential to the economic health of Canadian society.