CORPORATE MANAGERS AND THE WIDE DISCRETION FOR THEIR FIDUCIARY DUTIES: PROBLEMATIC OR NOT?

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Abstract
As a result of the Supreme Court’s broad definition for ‘best interests of the corporation’ in recent decisions, the author examines to whom managers ought to owe their fiduciary duties normatively and what role managerial discretion has in this debate. The author argues that the lack of clarity offered by the judiciary, in this area of corporate law, has led to the adoption of a wide discretion being afforded to managers. An examination of several rationales fails to justify this continued adoption of a broad discretion. The author argues that granting managers with wide discretionary powers is problematic because the interests of constituencies will not be adequately protected. At the very least, statutory reform is necessary to protect the most vulnerable stakeholders. The author recommends that the law be amended to require that managers, in performing their fiduciary duties, regard the interests of employees and shareholders.
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INTRODUCTION

I will examine to whom managers ought to owe their fiduciary duties normatively, when they are acting in ‘the best interests of the corporation’. In particular, have the courts interpreted this phrase to mean that managers owe a fiduciary duty to only the shareholders of the corporation or are duties also owed to the other stakeholders, such as employees, suppliers and creditors of a firm? Or rather, should managers owe their fiduciary duties only to the corporate entity itself? In essence, my discussion will focus on how managers’ fiduciary duties ought to be defined in corporate law and the role managerial discretion should play in regards to this interpretation.

One may wonder why this topic warrants discussion. First, I believe it is important to define whom the beneficiaries of managers’ fiduciary duties are, in order to provide management with a comprehensible guideline to carry out their duties. Given that our legislation fails to adequately define what it means to act in the ‘best interests of the corporation’, we turn to jurisprudence for direction. As such, it is important for our judiciary to resolve this issue so managers can conduct their affairs efficiently. Also, seeing that managerial decision-making could adversely affect the welfare of various constituencies, we ought to clarify our definition for fiduciary duties in order to protect these individuals.

In Part I, I begin by reviewing the various corporate governance models that account for the court’s diverse interpretations of fiduciary duties. Then I attempt to show, in Part II, that although the Canadian jurisprudence may have traditionally adopted the shareholder primacy model, evidence suggests there is a shifting trend towards the greater acceptance of communitarian theories of corporate law. However, despite this
movement in corporate governance, it remains unclear whether these communitarian theories can accurately depict the locus of managers’ fiduciary duties, given that the court continues to adopt an open-ended interpretation for ‘best interests of the corporation’. In view of this, I suggest that managers have been granted with wide discretionary powers to coincide with the court’s broad definition for fiduciary duties.

In Part III, I consider other rationales for why the Supreme Court of Canada has carved out such a wide discretion for managers’ fiduciary duties. In particular, I hope to demonstrate that the business judgment rule may offer one such justification. Following that, I will consider various rationales from the standpoint of communitarianism and illustrate the consistencies this model shares with the court’s adoption of a wide managerial discretion. In Part IV, I consider whether these rationales for implementing a wide discretion are problematic and argue that, not only should they not be taken into account, but that, a wide discretion for fiduciary duties poses other problems more generally. Then, I attempt to reconcile the different views between contractarianism and communitarianism on managerial fiduciary duties and discretion for purposes of my recommendation. In Part V, I offer my proposal for law reform, which I believe is consistent with the views of both schools. My concluding remarks will then follow in Part VI.

However, before I begin my discussion, I believe it is necessary for me to clarify some of the terminology that will be used in my paper. Firstly, when I speak of communitarianism, I am referring to the general view that managers ought to consider the interests of all constituencies (shareholders, employees, creditors, suppliers, customers, the government, the general public and society). I am aware within communitarianism,
there are different views based on the number of stakeholders that managers should be considering in their decision-making. For purposes of my paper, I am referring to all of the constituencies when I make reference to communitarianism, unless stated otherwise. Secondly, the term ‘managers’ encompasses more individuals than on its literal meaning. Terms such as ‘directors’, ‘officers’ and ‘managers’ will be used synonymously. In other words, when I speak of managers I am referring more generally to the individuals who are responsible for the management of the business and affairs of a corporation. As such, the term ‘manager’, as used throughout my paper, is intended to cover both the directors and officers of a firm. Lastly, I will be using the terms ‘corporation’ and ‘firm’ interchangeably in my paper.
I. Managerial Fiduciary Duties

In this part of my discussion, I will provide a brief overview of the various corporate governance models to help explain the court’s inconsistent treatment of managers’ fiduciary duties. However, prior to my literature review, I believe it is necessary to first define the different elements of managerial duties, and secondly, I wish to demonstrate the inadequateness of the corporate personality principle as a means for determining the beneficiaries of managers’ fiduciary duties.

a) Introduction and Background

A fiduciary relationship is one in which a “person is under a duty to act for the benefit of the other on matters within the scope of the relationship”.¹ In the context of corporate law, a fiduciary duty refers to the legal obligation that managers owe to the firm while performing their duties. By accepting office, this individual has agreed to act in a manner consistent with the fiduciary relationship. In Canada, there are two distinct components of managerial duties. The first element, often referred to as the duty of loyalty or fiduciary duty, entails 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”.² The fiduciary duty recognizes managers must put aside their self-interests and be loyal to the corporation when performing their duties.³

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¹ Black’s Law Dictionary, 7th ed., s.v. “fiduciary”.
² Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1)(a) [CBCA].
³ Margot Priest, Director duties in Canada: Managing Risk (North York: CCH Canadian, 1995) at 19.
The second component expects directors and officers to “exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances”.⁴ This aspect of managers’ duties is referred to as the duty of care and is measured by a less strict standard than the duty of loyalty.⁵ By and large, the legal principle derived from combining the separate duties together is that a manager must act to the best interests of the corporation as a whole, in a reasonable and honest manner. However, notwithstanding this clear statutory definition provided for managerial duties, the Canadian jurisprudence has developed an array of interpretations for the beneficiaries of fiduciary duties. One may inquire why this is the case.

Normatively, the difficulty lies with what is meant by the phrase ‘to act in the best interests of the corporation’. The law recognizes the firm as a separate legal entity, bearing the rights and capacity of a natural person.⁶ Logically, however, it is not possible for this artificial entity to experience benefits derived from managerial decision-making.⁷ For example, a corporation is not able to experience human feelings of misery or happiness. Statutory rights and duties afforded to corporations are only intended to serve as “a matter of convenience rather than reality” for the state to hold firms directly

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⁴ See CBCA, supra note 2, s.122(1)(b).
⁵ Priest, supra note 3 at 28.
⁶ See CBCA, supra note 2, s.15.
accountable for their conduct. The corporation is not real, but rather, a legal fiction with statutorily created rights and duties. Consequently, courts have looked behind the corporate veil to determine whom the firm should be beneficially managed for. The task of specifying the beneficiaries of fiduciary duties may be challenging since the term ‘corporation’ could encompass just about everything and everyone. As a result, courts should view the corporation as being managed for the benefit of only certain constituencies. Naturally, this led to the question of which particular constituencies should ultimately benefit from managers’ fiduciary duties. Seeing that the corporate personality doctrine and our statute have both failed to adequately delineate which constituencies ought to benefit, it is time to direct our attention to the competing theories on corporate governance for guidance.

b) Corporate Governance Models

One of the most significant debates in corporate law took place in the 1930s, between Professors Berle and Dodd of Harvard Law School. Professor Berle viewed corporate law as “a branch of the law of trusts” where managers were acting as trustees holding property for the benefit of shareholders. He argued that all powers granted to

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10 Neyers, supra note 7 at 186.
13 Berle, ibid. at 1074.
management must be exercised in a manner consistent with protecting the interests of shareholders.\textsuperscript{14} Professor Berle suggested that many of the rules protecting the rights of shareholders were equitable remedies that needed to be broad, in order for the courts to adjust and preserve shareholder control over the directors.\textsuperscript{15}

Meanwhile, Professor Dodd believed that businesses owed social and economic responsibilities to the community.\textsuperscript{16} He argued that when managers considered the interests of all corporate constituencies in their decisions, the profits of investors would be enhanced over the long-term.\textsuperscript{17} Interestingly enough, this debate continues to take place in modern day corporate law, among the courts and academia, and is generally classified under one of the two leading schools on corporate governance – contractarianism and communitarianism.

Approximately five years after the famous debate took place between Professors Berle and Dodd, Ronald Coase contributed to the corporate governance literature by suggesting there were advantages with carrying out economic activity through the corporation since it served as “a vehicle that internalized the multiple relationships existing between the various constituencies”.\textsuperscript{18} To this scholar, it was more logical for the corporation to internalize all the relationships between the various constituencies, than to engage in numerous individual contracts. This suggestion was further adopted and elaborated on by others in the following years.

\begin{flushleft}
\textsuperscript{14} Berle, \textit{ibid.} at 1049.
\textsuperscript{15} Berle, \textit{ibid.} at 1074.
\textsuperscript{16} Dodd, \textit{supra} note 12 at 1153.
\textsuperscript{17} Dodd, \textit{ibid.} at 1156.
\end{flushleft}
For instance, Jensen and Meckling argued that the corporation was a legal fiction, which served as a nexus or web of contracting relationships that took place between the corporation and the various owners of labour, material, capital inputs and outputs.\(^\text{19}\) Since shareholders risked losing their invested equity in the firm, it was believed they should be given exclusive control rights over the management of the enterprise.\(^\text{20}\) Furthermore, it was important to align the interests of shareholders with those of management in order to avoid agency problems, which often arose from the separation of ownership and control.\(^\text{21}\) This nexus of contracts approach to governance has dominated corporate law for decades and has been coined the contractarian view.

Professors Easterbrook and Fischel made further contributions to the nexus of contracts model. They added that contracts entered into between the corporation and non-shareholder constituencies contained terms of fixed payments to these stakeholders, while shareholders, being residual claimants of the firm, were paid only after all the fixed claims were received.\(^\text{22}\) It was also posited that shareholders were not able to predict the future well enough to account for all of the contingencies arising in their contract, and therefore, relied on fiduciary duties to fill in these gaps.\(^\text{23}\) These duties should only be owed to shareholders because there was no other suitable way to afford them with

\(^{19}\) Jensen & Meckling, supra note 9 at 41.
\(^{20}\) Jensen & Meckling, ibid.
\(^{21}\) Jensen & Meckling, ibid. See also “Easterbrook & Fischel, “Corporate Contract”, supra note 8 at 1425 for a description on agency costs. These professors state that the separation between management and shareholder risk-bearing tends to increase agency costs. The implication of this separation of management and control is that when managers do not have a stake in the firm, their interests will likely diverge from the rest of the firms’ interests.
\(^{23}\) Easterbrook & Fischel, ibid. at 90.
adequate protection over their investment.\textsuperscript{24} On the other hand, other constituencies could look to their contractual rights as these were clearly set out in their contracts.\textsuperscript{25} Contractarians believe that since shareholders were the firm’s sole residual claimants, managers should owe their fiduciary duties exclusively to them.\textsuperscript{26}

Professors Hansmann and Kraakman more recently argued that, despite the various corporate governance approaches throughout the twentieth century, there is no doubt “the pressures for further convergence are now rapidly growing”.\textsuperscript{27} According to these professors, the shareholder primacy model dominates corporate law and “there is no longer any serious competitor to the view” that management ought to maximize shareholder value.\textsuperscript{28} Consistent with the views of Professors Easterbrook and Fischel, some of the principal elements of this emerging consensus are that shareholders retain ultimate control over the corporation; managers are obliged to manage the firm in accordance with shareholders’ best interests; and lastly, the welfare of other constituencies can be protected through contractual or regulatory means.\textsuperscript{29} In order to attain social welfare, managers should be made “strongly accountable to shareholder interests and, at least in direct terms, only to those interests”.\textsuperscript{30}

In short, the nexus of contracts theory (or contractarian view of corporate governance) models the firm as a legal fiction, comprised of a set of implicit and explicit

\begin{itemize}
\item \textsuperscript{24} Jonathan R. Macey & Geoffrey P. Miller, “Corporate Stakeholders: A contractual perspective” (1993) 43 U.T.L.J. 401 at 423.
\item \textsuperscript{25} “Easterbrook & Fischel, Economic Structure, supra note 22 at 90.
\item \textsuperscript{26} Macey & Miller, supra note 24 at 423.
\item \textsuperscript{27} Henry Hansmann & Reinier Kraakman, “The End of History for Corporate Law” (2001) 89 Geo. L.J. 439 at 439.
\item \textsuperscript{28} Hansmann & Kraakman, \textit{ibid.}
\item \textsuperscript{29} Hansmann & Kraakman, \textit{ibid.} at 441.
\item \textsuperscript{30} Hansmann & Kraakman, \textit{ibid.}
\end{itemize}
contracts between the various stakeholders.\textsuperscript{31} For the firm to be successful in the various markets, there are certain costs it should aim to minimize. Firstly, transaction costs must be kept to a minimum, which means lowering the cost of uncertainties, complexities and opportunism that occur in everyday business.\textsuperscript{32} It is also crucial for agency costs to be kept low and for shareholders to control any shirking that may occur.\textsuperscript{33}

Although most contractarians would adopt a shareholder primacy model, at least some have argued that a director primacy model would be more ideal for achieving the goal of profit maximization.\textsuperscript{34} In the latter model, directors and officers are provided with full control over the management of the corporation. For instance, managers are given wide discretionary powers to make decisions they believe are in the best interests of the shareholders. However, regardless of whether a director or shareholder primacy model is adopted, contractarians ultimately hold the view that managers should owe their fiduciary duties exclusively to shareholders, while the interests of other stakeholders can be addressed through contract law or regulatory means. Furthermore, it is widely held by scholars on the contractarian side of the debate that, since shareholders are the true owners of the corporation and its assets, it is necessary for managers to focus solely on maximizing profits for shareholders.\textsuperscript{35}

\textsuperscript{32} Bainbridge, \textit{ibid.} at 27.
\textsuperscript{33} Bainbridge, \textit{ibid.} See footnote 21 for a description of when agency costs are likely to be high. Shirking refers to the act of any member of the production team that deviates from the best interests of the corporation.
\textsuperscript{34} One such scholar is Stephen Bainbridge. See Stephen M. Bainbridge, “Director Primacy: The Means and Ends of Corporate Governance” (2003) 97 Nw. U.L. Rev. 547 [Bainbridge, “Director Primacy”].
\textsuperscript{35} Milton Friedman, “The Social Responsibility of Business is to increase profits”, \textit{N.Y. Times Magazine} (13 September 1970) at 32.
On the contrary, communitarians view the firm’s purpose as serving a broader function, where managers ought to consider the welfare of multiple constituencies.\textsuperscript{36} Interestingly though, communitarians share different beliefs over whom managers should owe their fiduciary duties to. For instance, at least one academic holds the view that there ought to be a fiduciary duty owed to all of the constituencies.\textsuperscript{37} While, others have contemplated a fiduciary duty owed to only the corporation, but added, that managers could consider the interests of various stakeholders while performing their duties.\textsuperscript{38} Communitarians also possess distinct opinions on which constituencies’ interests should be regarded by management.\textsuperscript{39} However, notwithstanding these differences, most communitarians tend to share common views.

For instance, most believe the goal of profit maximization for corporations is harmful to non-shareholders. Contractual and bargaining processes that take place, between the constituencies and firm, fail to offer stakeholders sufficient protection against harmful corporate decisions.\textsuperscript{40} This is because it is not possible to foresee and predict the complete terms of the contract ahead of time.\textsuperscript{41} Therefore, it is necessary to afford greater protection to stakeholders who may become adversely affected by corporate decision-making.

\textsuperscript{39} For purposes of my paper, when I refer to ‘constituency’, I am referring to employees, creditors, suppliers, consumers, community, society, the state and etc. In other words, the term constituency is to receive a very broad interpretation, intended to include both the corporate constituencies and the public at large.
\textsuperscript{40} “Millon, “Communitarianism”, \textit{supra} note 38 at 1.
\textsuperscript{41} Millon, \textit{ibid.}
Contrary to what contractarians believe, communitarians view the corporation as “a community of interdependence, mutual trust and reciprocal benefit”. Individuals in a firm owe one another obligations and together they are responsible for promoting the overall welfare of society. To attain corporate and societal welfare, the law must permit management to regard the interests of multiple stakeholders in their decision-making. As mentioned earlier, some communitarians have proposed a ‘multi-fiduciary model’ that redefines managerial duties to make the consideration of non-shareholders’ interests mandatory, rather than only discretionary. Communitarian theories of corporate governance are often referred to under different classifications. One such categorization is the stakeholder theory of corporate governance. Generally, this model adheres to the main tenets of communitarian theories. It proposes that managers take into account the interests of all corporate constituencies, including shareholders, employees, creditors, suppliers, the state and public at large.

One of the more recent communitarian movements has envisioned a model that incorporates social responsibility into modern day corporations. Corporate social responsibility policies are typically expressed in the firm’s code of conducts and involves a commitment by the firm for “enhanced concern for the environment, human rights, fairness to suppliers and customers, and opposition to bribery and corruption”. With the rise of multinational corporations globally, corporate social responsibility has played

42 Millon, ibid. at 10.
43 Millon, ibid. at 12.
an increasingly dominant role in the governance of corporations abroad. For instance, a
number of scholars have written over the meaning of corporate social responsibility in
international law and the role that human rights obligations may have in the governance
of these multinational corporations.  

Arguably as falling somewhere in the middle, between contractarianism and
communitarianism, is the Team Production Model. This approach views managers as
“mediating hierarchs” who serve the interests of all constituencies collectively.  
Fiduciary duties are owed neither to shareholders nor non-shareholders, but rather, only
to the corporate entity itself. The board of directors enjoys the sole decision-making
authority to determine the use of assets, since all members have given up control over
their inputs and outputs. For this reason, the team production model can be viewed as a
director primacy model because the ‘mediating hierarch’ is granted full discretion to
conduct the business and affairs of the corporation. Managers are not to focus on
maximizing shareholders’ wealth, but rather, “the ideal rule of corporate governance is to
require corporate directors to maximize the sum of all the risk-adjusted returns enjoyed
by all of the groups that participate in the firm”.

To sum us thus far, I have discussed how the CBCA has not adequately defined
what it means for managers to act in ‘the best interests of the corporation’. Furthermore,
it appears the corporate personality doctrine also fall shorts of providing a clear definition

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46 See Peter Muchlinski, “Corporate Social Responsibility and international law: the case of human rights
and multinational enterprises” in McBarnet, ibid. at 431.  
Rev. 247 at 271.  
48 Blair & Stout ibid. at 254.  
49 Blair & Stout, ibid. at 276.  
50 Lynn A. Stout, “Bad and not-so-bad arguments for shareholder primacy” (2002) 75 S. Cal. L. R. 1189 at
1198.
for who the recipients of managers’ fiduciary duties ought to be. In light of this dilemma, we turned our attention to the leading models on corporate governance, but only to find that the debate between contractarians and communitarians, as to whom managers should owe their fiduciary duties, remains unresolved in the literature. Given that a clear definition for managers’ fiduciary duties is lacking thus far, it may be helpful at this time, to explore how the courts have interpreted the phrase ‘best interests of the corporation’ at common law.
II. What does ‘Best Interests of the Corporation’ mean?

Recall that our statute states that managers, in performing their fiduciary duties, must act to the best interests of the corporation. On a descriptive basis, it seems clear that managers owe their fiduciary duties to the corporate entity itself. However, this definition is inoperable functionally, given that the corporation is incapable of benefiting directly from managerial duties. As a result, the phrase ‘best interests of the corporation’ needs to be properly defined at common law. However, in attempting to define this duty, I will demonstrate that the judiciary has also struggled with how to characterize the beneficiaries of managers’ fiduciary duties. Although there is evidence demonstrating the Supreme Court’s adoption of communitarianism in their recent decisions, I will argue that their position remains unclear.

a) Judicial Interpretation of ‘Best Interests of the Corporation’

Traditionally, the weight of authority revealed that the best interest of the corporation was often associated with the interests of shareholders. This view existed because shareholders were believed to be the true owners of the corporation since they contributed capital to the corporation. As such, the traditional legal approach to fiduciary duties directed managers to align the best interests of the corporation with those of shareholders. For instance, an American court in Dodge v. Ford Motor Co found that managers breached their fiduciary duties when they proposed to limit dividends that

51 See footnote 2.
53 Fiesel, supra note 44 at 62.
were usually paid out to stockholders, in order to lower the price of the cars and to increase employment opportunities for the community. The court found that the board of directors violated their duty by placing the interests of employees and community ahead of the stockholders. The principle derived was that:

A business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the non-distribution of profits among stockholders in order to devote them to other purposes.\(^{56}\)

As demonstrated by the court’s judgment, there is strong evidence pointing to the dominance of the shareholder primacy model in corporate law traditionally.

The most common situation where courts have found, and continue to find, that managers should consider the interests of shareholders is in the realm of takeover bids. Managers are faced with the dilemma of having to decide whether it would be in the best interests of the corporation to preserve the enterprise by blocking the bid, or rather, to proceed with the takeover. With takeovers, the court has articulated that managers must act to the best interests of the shareholders as a whole, by taking reasonable steps to ensure that shareholder value is maximized.\(^{57}\) Yet, the rise of takeover bids in the 1980s has also led to the recognition that non-shareholder constituencies could be harmed by managerial decisions.\(^{58}\) In response to this, the legislature and courts granted managers with greater freedom to make decisions that were not necessarily consistent with shareholder primacy norms.\(^{59}\) In other corporate dealings, it was often found that

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\(^{56}\) *Dodge*, *ibid.*


\(^{58}\) David Millon, “Redefining Corporate Law” (1991) 24 Ind. L. Rev. 223 at 233 [Millon, “Redefining Corporate”].

\(^{59}\) Millon, *ibid.*
managers breached their fiduciary duties when they obtained a profit or where there was a conflict of interest. In these situations, managers were found personally liable to return all profits obtained, as they were deemed property belonging to the shareholders.⁶⁰

Thus far, I have described several instances where managerial fiduciary duties are particularly scrutinized by the judiciary for the benefit of shareholders. However, notwithstanding this, it appears the court has begun adopting the view that managers may consider the interests of other constituencies in their decisions. A review of some of the more recent judgments, in the realm of fiduciary duties, reveals that the court no longer defines the ‘best interests of the corporation’ to mean only the interests of shareholders. Instead, the judiciary has explicitly endorsed the view that, in their decision-making, corporate managers ought to consider an array of constituencies.

For instance, the British Columbia Supreme Court in Teck Corp. Ltd. v. Millar⁶¹ found it was suitable for managers to consider the welfare of non-shareholders when acting in the best interests of the corporation. Although the court found that managers did not owe their fiduciary duties to anyone but the corporation and its shareholders, they held that it was not improper for management to consider the interests of other constituencies. The court concluded where “directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself”.⁶² This principle was further developed in Peoples Department Stores Inc. (Trustee of) v. Wise.⁶³

⁶² Teck, ibid.
This case arose from the acquisition of Peoples Department stores by the Wise stores. The Wise brothers, directors and officers of both stores, implemented a new inventory procurement policy in hopes of ameliorating the financial losses suffered by the two companies. However, the new policy failed and consequently both stores petitioned into bankruptcy. The trustee in bankruptcy for Peoples alleged that the Wise brothers had breached their fiduciary duties to the creditors by placing the interests of the Wise creditors over the Peoples creditors. The court found that it was acceptable for management to consider the interests of multiple constituencies, when determining what is in the best interests of the corporation.\textsuperscript{64} Although the court held that managers owed their fiduciary duties to the corporation as a whole and not to any particular stakeholder, it was ultimately found that “the best interests of the corporation should be read not simply as the best interests of the shareholders”.\textsuperscript{65}

The Peoples decision impacts our Canadian corporate law in a significant way. It demonstrates the court’s reluctance to accept that corporate decision-making should be made in accordance with the traditional shareholder primacy model. Peoples opened the doors for non-shareholders to potentially benefit from managerial conduct and decision-making. However, the court remained adamant that no fiduciary duty was owed to any particular stakeholder.\textsuperscript{66}

\textsuperscript{64} Peoples, \textit{ibid.} at para 42.  
\textsuperscript{65} Peoples, \textit{ibid.}  
\textsuperscript{66} Peoples, \textit{ibid.} at para 53. The court found that a fiduciary duty was not owed to any particular stakeholder because there was no need to read the interests of creditors into the duty set out under s.122 (1)(a) of the CBCA.
Very recently, the same court revisited this same issue in *BCE inc. v. 1976 Debentureholders*.\(^{67}\) At the lower court ruling, it was determined the proposed plan of arrangement, consisting of the share purchase of BCE by way of leveraged buyout, was unfair and unreasonable to Bell Canada’s bondholders. The Quebec Court of Appeal concluded that managerial duties were not limited to maximizing share value for shareholders and that managers *must* consider the interests of other constituencies.\(^{68}\) This decision “took Canada’s business community by surprise” since the court expanded the scope of duty, which some academics believed was not permitted by the statute.\(^{69}\) Furthermore, the courts’ reasoning seemed to be in direct conflict with the *Peoples* decision, as the Supreme Court there concluded that managers did not owe their fiduciary duties to any particular stakeholder.

Accordingly, the Supreme Court in *BCE* overturned the lower ruling, and by doing so, they reaffirmed their position in *Peoples*. The fiduciary duty of the manager is to act in the best interests of the corporation and not any particular stakeholder, but managers are permitted to regard the interests of multiple stakeholders.\(^{70}\) Where a conflict exists, managers are free to make decisions as long as they are made in accordance with the interests of the corporation collectively.\(^{71}\) The court will look to whether the “director acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected

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\(^{69}\) Luis Millan, “BCE appeal ruling rattles business” *The Lawyers Weekly* 28:6 (6 June 2008). Professor Anita Anand was one particular academic who shared this view.  
\(^{70}\) *BCE*, *supra* note 67 at para 37.  
\(^{71}\) *BCE*, *ibid.*
stakeholders in a fair manner, commensurate with the corporation’s duties as a responsible corporate citizen”.

Once more, the Supreme Court was reluctant to find that management owed a fiduciary duty to any individual stakeholder. Nevertheless, the view that managers may consider a broader range of stakeholders’ interests has offered support for the communitarian theories on corporate governance.

The court’s recent adoption of communitarian views appears to be consistent with what several scholars have written. For instance, it was suggested the phrase ‘best interests of the corporation’ was intentionally left broad to enable the courts to formulate their own interpretations, based on the corporate reality at a given time. Perhaps then, the proper modern approach to defining the best interests of the corporation would be one that is equated with the stakeholder theory. In determining the beneficiaries of fiduciary duties, the court should apply the statute literally by considering the interests of the corporation, which is to mean all stakeholders collectively.

Consistent with these scholarly views, the Supreme Court of Canada has demonstrated their unwillingness to continue adhering to the shareholder primacy model of fiduciary duties. Although deference has been afforded to this model in the past, there is evidence to suggest the courts are currently recognizing that the interests of other stakeholders are equally important. However, the question remains whether the judiciary has permanently moved away from the shareholder primacy norm, and whether, it is

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72 BCE, ibid. at para 82.
74 Borok, ibid.
75 Fiesel, supra note 44 at 94.
absolutely clear that a communitarian approach to managers’ fiduciary duties has been adopted.

In order for the court to embrace a stakeholder approach to fiduciary duties, it must be clear they have rejected the shareholder primacy model, as it would be difficult for the two regimes to operate simultaneously. In recent decisions, we see how the Supreme Court of Canada finds that managers do not owe their fiduciary duties to any particular stakeholder, but rather, only to the corporate entity. Therefore, it can be reasonably inferred that neither the shareholder primacy norm nor the stakeholder theory were explicitly incorporated in the court’s judgments. Instead, these decisions reveal how the Supreme Court has deliberately chosen to leave the meaning of ‘best interests of the corporation’ wide open. This lack of preciseness in the court’s treatment of fiduciary duties has led several academics to debate over this inconsistency.

b) Commentaries on the Court’s Interpretation of ‘Best Interests of the Corporation’

A few academics have argued that Peoples fails to demonstrate the court’s adoption of communitarianism. In particular, Professor MacPherson believes the court incorrectly stated that the law always recognized that managerial duties were owed to all constituencies. He criticizes the fact that the authority in which the Supreme Court relied upon to reach their findings was clearly an obiter statement from Teck. In his view, the Supreme Court has explicitly chosen not to resolve which one of the two approaches, between shareholder primacy and stakeholder, is to govern corporate law.

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76 MacPherson, supra note 52 at para 8.
77 MacPherson, ibid. at para 11.
78 MacPherson, ibid. at para 27.
I must point out Professor MacPherson says early on in his paper that the court did not reject the shareholder primacy model, and instead, was only attempting to broaden that perspective.\textsuperscript{79} He then goes on to argue at some later point, however, that \textit{Peoples} may have ultimately discarded the shareholder primacy model.\textsuperscript{80} Undoubtedly, there is a contradiction in his commentary.

Perhaps, this inconsistency could be explained by his refusal to accept movement away from the shareholder primacy norm in the corporate governance debate. Notwithstanding this, his main concern, that the court has provided insufficient information to managers to help guide them in their future decision-making, is a valid point. He believes the court has not only created uncertainties, but has also failed to provide an operative framework for managers to perform their duties.\textsuperscript{81} Although Professor MacPherson has not provided sufficient reasons for his resistance of communitarian views, he should be credited for his criticism over the court’s open-ended application of fiduciary duties.

Another academic has also maintained that \textit{Peoples} has not rejected the shareholder primacy model. Professor Khimji states that, although the court permits managers to consider the interests of multiple constituencies, the shareholders remain the only beneficiaries of fiduciary duties in the end.\textsuperscript{82} Therefore, it is evident that several scholars have interpreted \textit{Peoples} to find that the shareholder primacy model continues to flourish in our corporate law.

\textsuperscript{79} MacPherson, \textit{ibid.} at para 12.
\textsuperscript{80} MacPherson, \textit{ibid.} at para 30.
\textsuperscript{81} MacPherson, \textit{ibid.} at para 46.
\textsuperscript{82} Khimji, \textit{supra} note 11 at 24.
On the other hand, there are some academics that believe the court adopted a communitarian approach to managerial fiduciary duties in *Peoples*. Professor Lee has argued that the Supreme Court rejected the shareholder primacy model but has failed to offer adequate reasons for doing so.\(^\text{83}\) For instance, in support of the court’s decision to consider the interests of creditors the court relied on *Teck*, which appears to be “a solitary judicial endorsement, likely obiter”.\(^\text{84}\) Rather than clarifying this ambiguous area of corporate law, the court neglected to address any of the real issues underlying managers’ fiduciary duties.\(^\text{85}\) Some communitarians are concerned that since the court did not find that duties were owed specifically to non-shareholders, *Peoples* has fallen short of providing clear evidence for the presence of communitarianism in Canadian corporate law.\(^\text{86}\) Not surprisingly, the flexible definition currently afforded to managerial fiduciary duties has even prompted literature to be written by team production model adherents.

One academic argued that the Supreme Court in *Peoples* interpreted the fiduciary duties of managers in accordance with the Team Production Model.\(^\text{87}\) Since the model views managers as ‘mediating hierarchs’ who are left free to make decisions, it appears consistent with the court’s adoption of a wide managerial discretion in *Peoples*. However, the fact that managers should be regarding the interests of various constituencies in their decisions refutes the team production characterization of fiduciary duties. This is because management is not left truly free to make independent decisions.

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84 Lee, *ibid.* at 217.
85 Lee, *ibid.* at 222.
86 Fiesel, *supra* note 44 at 84.
In the end, it remains uncertain whether or not the Supreme Court, in *Peoples*, has adopted the team production model.

What remains clear, however, is that in recent years, the Supreme Court of Canada has consistently held that managers owe their fiduciary duties to the corporation as a whole. Managers, in making their decisions, may consider the interests of other constituencies. This meant it was possible for corporate action to benefit some stakeholders to the detriment of others, as long as the overall welfare of the firm was met. The court no longer adheres strictly to the classical shareholder primacy model of fiduciary duties, since managers may now take into account the broader interests of the firm. Yet, at the same time, the court has not indicated that the shareholder primacy model be replaced by the communitarian theories of corporate governance.

Perhaps, the fiduciary duties of managers are defined broadly as a result of the Dickerson Committee selecting to draft their words in the most liberal manner possible. This committee predicted that their unclear wording would be ultimately rectified by the developments taking place at common law. As pointed out by the court, the “fiduciary duty of the directors to the corporation is a broad, contextual concept”, thereby allowing for a liberal application of this duty. Regardless of what the reasons may be, it is undeniable that the Supreme Court of Canada has left the meaning of ‘best interests of the corporation’ wide open. Since both our statute and common law have offered only vague definitions, managers must decide on their own which stakeholders will benefit

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89 *BCE, supra* note 67 at para 38.
from their fiduciary duties. In light of this, the courts have granted managers with wide discretion to decide who ought to be the recipients of their duties.

When I make reference to a wide managerial discretion, I am referring to two distinct things collectively. Firstly, I am making reference to the broad scope of legal authority the courts have afforded to managers at common law. Secondly, I am referring to the large degree of judicial deference that has been granted to managerial decision-making through the business judgment rule. In determining who ought to benefit from managerial fiduciary duties, I find the Supreme Court has allotted a wide discretion in both respects. It is important to note, however, these different concepts do not necessarily have to correlate with one another, but often do so.

Take, for example, the instance where managers are required to disclose to the corporation any personal interests they may have in a material contract or transaction.\(^90\) The mandatory nature of this rule requires a constricted managerial discretion to ensure that all officers comply with this statutory requirement. Mandatory provisions generally do not provide managers with a large scope of authority because they require, at a minimum, that they act in a specified manner. Otherwise, failing to do so will result in a breach of managerial duties. Additionally, with decisions involving managerial personal interests or conflicts, the court may feel more compelled to review these strictly. Thus, with this particular example of material contracts, both the scope of legal authority and the degree of judicial deference awarded to managers ought to be narrow.

In regards to corporate fiduciary duties, managers have been granted with a wide discretion by way of a broad scope of legal authority and judicial deference.

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\(^90\) See \textit{CBCA}, supra note 2, s.120 (1).
Interestingly, the fiduciary requirement in the *CBCA* appears to be mandatory in form since it requires that all directors and officers owe their duties to the corporation. However, the fact there is an unclear definition provided for the locus of duties offers evidence of a more enabling view, which is consistent with a wide managerial discretion. It seems the Supreme Court of Canada has granted broad discretionary powers to managers, as a result of its desire to continue adopting a liberal interpretation for ‘best interests of the corporation’. Since it has been established that managers have been granted with a wide discretion by the court to conduct their fiduciary duties, it may be helpful to explore other rationales to account for the court’s preference.

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91 MacIntosh, Jeffrey, “The Role of Corporate Law” (Lecture, University of Toronto, January 2009). Professor MacIntosh states that there are two competing views for the purpose served by corporate law. He argues that some provisions are ‘enabling’, while others are more ‘mandatory’ in nature. He believes that the fiduciary duty provision in the *CBCA* is mandatory in form but enabling in substance. An example of an enabling provision is section 102(1), which states that subject to a unanimous shareholder agreement, managers shall supervise and manage the affairs of the corporation (see *CBCA supra* note 2, s.102 (1) for the exact wording of this provision). An example of a mandatory provision is section 120 (1), which requires that managers shall disclose their personal interests in contracts to the corporation (see *CBCA supra* note 2, s.120 (1) for the exact wording of this provision).

92 MacIntosh, *ibid.*
III. Rationales for Adopting a Wide Discretion for Managerial Fiduciary Duties

I suggested previously that, in maintaining a broad definition for ‘best interests of the corporation’, it was necessary for the court to afford managers with a wide discretion to perform their duties. In this part of my paper, I will show that it is possible the Supreme Court of Canada, in both *Peoples* and *BCE*, relied on other rationales for adopting a wide discretion for managers’ fiduciary duties. Accordingly, the rationales I will be discussing are the business judgment rule and some of the key tenets of communitarianism.

a) Consistent with the Business Judgment Rule

In order to appreciate that the business judgment rule is consistent with a wide discretion for managers’ fiduciary duties, it would be important to first consider some of the rationales behind this rule. It is often said, and rightfully so, that judges lack the business expertise which directors possess. Judges are appointed for their legal expertise and for their ability to apply the law to the facts of the case. On the other hand, making decisions on whether one investment was a better business decision than another does not typically involve legal reasoning and questions. As managers are participating in corporate matters on a routine basis, they are generally expected to make better business decisions than the courts. Therefore, the judiciary has often deferred to managerial decision-making through the ‘business judgment rule’.

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Another rationale behind this rule of deference can be understood under a law and economics framework. Professors Easterbrook and Fischel hypothesized, that if the business judgment rule were inapplicable, shareholders’ wealth would be lowered as a result of managerial decisions being routinely scrutinized.\(^\text{94}\) According to these scholars, too much judicial review would be problematic because the markets are equipped at valuing managerial decisions more accurately than the courts.\(^\text{95}\) For instance, judges are unable to measure managerial efforts or outputs on an efficient and cost-effective basis, since they lack the tools necessary to review business decisions.\(^\text{96}\) Meanwhile, pressures that arise from the various markets, such as the managerial or product one, provide a much greater incentive for management to do a better job. In turn, this would lower agency costs in the firm and benefit shareholders by increasing their profits. As such, it would be more beneficial for shareholders if managerial decisions were insulated from judicial scrutiny.\(^\text{97}\) Thus, the court’s deference to the business judgment of managers appears consistent with the law and economics approach to corporate governance.

Communitarians would also encourage the application of the business judgment rule because of the protection it offers to managers when they consider the interests of non-shareholders. This principle assures constituencies that it would be management, and not the shareholders, who are setting corporate policy and making decisions.\(^\text{98}\) However, special care must be made to ensure that managers are, in fact, taking into

\(^{94}\)“Easterbrook & Fischel, Economic Structure, supra note 22 at 93.
\(^{95}\)Easterbrook & Fischel, ibid. at 100.
\(^{96}\)Easterbrook & Fischel, ibid. at 99.
\(^{97}\)Easterbrook & Fischel, ibid. at 100.
account the interests of non-shareholders. Otherwise, the applicability of the business judgment rule may cause greater harm than benefit to the various constituencies’ welfare.

A further rationale for the business judgment rule is if courts scrutinized managerial decisions frequently, it would be likely that “fewer talented people be willing to serve as directors”.99 Like other human beings, managers will also make mistakes in their decision-making.100 In view of this, managers will be reluctant to take office in fear they will be held personally liable for their decisions.101 Even assuming they were to accept office, there would still be the risk that managers would under-perform their duties, and perhaps, opt for a more conservative approach if their decisions were not protected by the business judgment rule. This poses a concern because, in some instances, it may be more beneficial for managers to take larger risks in order to maximize the overall corporate value.

For example, if a corporation was approaching insolvency, it may be more advantageous to provide managers with flexibility so they can pursue riskier investments and potentially recapture profits. The application of the business judgment rule enables managers to achieve this goal by deferring to their decision-making. In sum, it is evident there are several underlying principles that justify the court’s application of the business judgment rule. In view of this fact, I shall now discuss this legal concept in greater detail, and suggest, that it may be one of the rationales relied upon by the judiciary for implementing a wide discretion for managers’ fiduciary duties.

99“Easterbrook & Fischel, Economic Structure, supra note 22 at 94.
100 Brennan, supra note 98 at 302.
101 Harris et al., Cases, Materials and Notes on Partnerships and Canadian Business Corporations, 4d ed. (Toronto: Thomson Carswell, 2004) at 344.
Canadian jurisprudence reveals the court’s enthusiasm to invoke the business judgment rule where managerial duties are concerned. In *Peoples*, the court found the implementation of the new policy was a reasonable business decision made to address a serious issue, in which no alternative solution was possible.\textsuperscript{102} The court concluded that as long as managers acted within an appropriate range of reasonableness, it was improper for them to question the decision. There was an explicit understanding by the court that directors and officers often possess business expertise in which they lack.\textsuperscript{103} They recognized that business decisions are often made under urgent circumstances, such as time pressures and high stakes, and therefore it would be appropriate for the judiciary to defer to managerial decision-making.\textsuperscript{104}

Notwithstanding this, the court did indicate there would be times when the business judgment rule would not be invoked:

> Courts are ill suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision-making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.\textsuperscript{105}

This part of the judgment demonstrates the court’s readiness to apply the business judgment rule. At the same time, however, the court has stated their disinclination to defer to decisions where managers have not acted in accordance with their proper standard of care.

The same court, in *BCE*, has affirmed the appropriateness for the business judgment rule to apply to managerial decision-making. This principle reflects the reality

\textsuperscript{102} *Peoples*, supra note 63 at para 68.
\textsuperscript{103} *Peoples*, ibid. at para 64.
\textsuperscript{104} *Peoples*, ibid.
\textsuperscript{105} *Peoples*, ibid. at para 67.
that managers, rather than courts, are better at determining what is in the best interests of the corporation since they are responsible for managing the affairs and business of the firm.\textsuperscript{106} It was found that courts should give suitable deference to the business judgment of managers who consider the interests of various stakeholders.\textsuperscript{107} Thus, it is apparent that in both \emph{Peoples} and \emph{BCE}, the Supreme Court of Canada welcomed the application of the business judgment rule to managerial conduct.

Generally, courts have deferred to the decisions of managers and have been hesitant to second-guess their business expertise in accordance with the business judgment rule.\textsuperscript{108} Since there is the possibility for hindsight bias resulting from inexpert courts reviewing a decision later on, the business judgment rule allows the court to defer to managerial decisions made at the time, unless it can be shown that they breached their standard of care.\textsuperscript{109} Courts will look to see that managers made a reasonable decision, not a perfect one.\textsuperscript{110} As long as managers can demonstrate that reasonable steps were taken to reach their decisions, they will be protected by the business judgment rule.

To return to the question of why the court has carved out such a wide discretion for managerial fiduciary duties, I offer the reason this is consistent with the business judgment rule. Since the scope for the beneficiaries of fiduciary duties has been extended

\begin{footnotesize}
\begin{enumerate}
\item \textit{BCE, supra} note 67 at para 40.
\item \textit{BCE, ibid.}
\item Iacobucci, supra note 93 at 410.
\item \textit{Maple Leaf Foods, supra} note 108 at para 36.
\end{enumerate}
\end{footnotesize}
to include non-shareholders, it makes complete sense from a normative point of view for the court to rely on the business judgment rule. The application of this rule permits courts to continue adopting a broad definition for ‘best interests of the corporation’. Without this legal principle, the judiciary would be forced to narrow their interpretations in order to provide sufficient guidance to the corporate managers. By insulating managers from liability through the rule, the court is able to grant them with wide discretionary powers to consider the welfare of multiple constituencies. In this regard, the rule broadens managerial discretion by offering managers greater legal authority to consider and protect the various interests of the firm.

Moreover, if the rule were inapplicable, the court would be compelled to scrutinize managerial conduct more closely. Managers may feel pressured to neglect the interests of various stakeholders if they knew their decisions would be under strict judicial review. The application of the business judgment rule protects managers from liability as long as they have demonstrated the appropriate standard of care. This rule expands managerial discretion by offering them a high level of judicial deference over their decision-making. Accordingly, managers can make decisions and conduct their affairs in a broad manner.

It appears then, that both the legal authority and judicial deference granted to managerial decisions, in the realm of fiduciary duties, are quite extensive. I have argued that this result is caused by the business judgment rule, for it is through this principle that managers are permitted to engage in corporate decision-making freely. The deference provided through this rule allows managers to balance the interests of the various constituencies in their decision-making with minimal court review. Moreover, the broad
statutory duty allows managers to select from the various corporate governance models to adhere, when determining which particular stakeholders ought to benefit. It may be that in one circumstance, such as a plant closing, it would be more appropriate for the managers to give greater consideration to employees’ interests over those of shareholders. While in a bankruptcy context, it would be more prudent for managers to consider the interests of creditors over the other stakeholders. In any case, the decision rests completely in the hands of management who have been granted with extensive discretionary powers. Therefore, the carving out of a wide discretion for managers’ fiduciary duties is consistent with the court’s application of the business judgment rule.

In the following section, I will demonstrate that the court likely relied upon communitarian beliefs, as rationales, for implementing a wide discretion for managers’ fiduciary duties. Communitarians insist on a model of duties that welcomes state regulation and reform to accommodate the interests of multiple constituencies. The Supreme Court of Canada has already stated that managers may consider the interests of different constituencies in their decision-making. In that regard, the court’s granting of a wide discretion for managers’ fiduciary duties appears consistent with communitarianism.

b) Consistent with Communitarianism

The Peoples and BCE decisions exemplify the court’s embracement of communitarian views. It was found that the “best interests of the corporation should be
read not simply as the best interests of the shareholders” any longer.\textsuperscript{111} In fact, it was acknowledged in \textit{BCE} that managers, when acting in the best interests of the corporation, should consider the effect of their decisions on other stakeholders.\textsuperscript{112} These propositions demonstrate how the Supreme Court likely relied on the communitarian view that multiple stakeholders’ interests ought to be regarded by management. To accomplish these communitarian goals, the judiciary has found it necessary to provide managers with a broad discretion to carry out their duties.

The court’s granting of a wide discretion for managerial fiduciary duties is consistent with communitarianism because managers are left free to regard the welfare of multiple constituencies. This is very important for communitarians because they focus on the moral phenomenon of the firm and regard it as a community comprised of individuals.\textsuperscript{113} Corporations function within a community, where the main emphasis is placed on the social and communal goals that are shared equally among all persons. This is to be contrasted with the contractarian view, which focuses more on the individualistic and self-reliant aspects of the corporation.\textsuperscript{114}

Furthermore, communitarians believe that every individual is entitled to the basic human needs first and foremost.\textsuperscript{115} Without these basic necessities, it is impossible for a community to function efficiently, despite the economic wealth it may experience. One professor has noted that:

\begin{quote}
Without adequate physical comforts, opportunities for intellectual, emotional and moral growth, and stimulating and nourishing social interactions, individuals cannot hope to exercise effectively
\end{quote}

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\textsuperscript{111} \textit{Peoples, supra} note 63 at para 42. \\
\textsuperscript{112} \textit{BCE, supra} note 67 at para 66. \\
\textsuperscript{113} “Millon, “Communitarianism”, \textit{supra} note 38 at 1. \\
\textsuperscript{114} Millon, \textit{ibid.} \\
\textsuperscript{115} Millon, \textit{ibid.} at 8.
\end{flushleft}
the freedom to define and pursue for themselves their own conceptions of a good life. For communitarians, all people are entitled to minimally adequate living conditions. If some are unable to provide themselves with whatever is necessary to achieve that standard, the larger community owes it to them to help.¹¹⁶

Consistent with communitarianism, the court has awarded a wide managerial discretion so managers can regard the essential needs of various constituencies.

Moreover, communitarians see corporations as powerful institutions capable of engaging in conduct that can adversely affect those around them.¹¹⁷ Communitarians believe that all members of society, including corporations, owe obligations to each other outside of contracts and by virtue of their membership in a community.¹¹⁸ One cannot live in a society and reap the benefits while harming others. This act would be immoral and inconsistent with communitarianism, since all individuals are responsible for promoting the overall welfare of society. As a result of this collective responsibility, managers are responsible for ensuring that corporate conduct does not adversely impact the quality of life for any particular constituency.¹¹⁹ Managers will be able to fulfill this moral responsibility through their wide discretionary powers and by selecting only welfare-increasing conduct that benefits general society.

Communitarians also focus on the importance of social values, rather than profits, as goals for corporations. They suggest that managers should focus on things such as enhancing workers’ earnings, maintaining firm stability and ensuring the highest quality of products and services to consumers.¹²⁰ Since the firm’s overall purpose is to serve the collective good and meet its social values, it should not be permitted to continue its

¹¹⁶ Millon, ibid.
¹¹⁸ Millon, ibid. at 1382.
¹¹⁹ Millon, ibid.
¹²⁰ Greenfield, supra note 37 at 128.
operation if it fails to meet this end, despite being profitable.\textsuperscript{121} This appears consistent with the Supreme Court’s finding that managerial fiduciary duties should not be limited to short-term profits or share value, but rather, should focus on the long-term interests of the corporation.\textsuperscript{122} The court has granted managers with a large discretion to concentrate on, and perhaps, prioritize social values when performing their fiduciary duties.

Communitarians advanced a further argument that when autonomy is privileged over community welfare, the element of trust in corporate relationships vanishes.\textsuperscript{123} One academic who has set forth such argument is Professor Mitchell. He maintains that the absence of trust in corporate law leads to a doctrinal framework that discourages constituencies to trust one another, which in turn leads to opportunism and self-interests.\textsuperscript{124} A legal system that relies on either procedural fairness or on the law of contracts, to promote autonomy, erodes trust and can be detrimental to the community as a whole.\textsuperscript{125}

For instance, when corporate constituencies enter into contracts with one another, they are bound by certain terms and conditions. Each party to the contract owes the other obligations and is expected to fulfill these duties. When a party refuses to carry through with their obligations, the aggrieved party can seek a remedy in law to redress this wrong. Trust is lacking in contractual relationships because all of the rights and duties have been specified in the agreement ahead of time. Relationships between various constituencies that are based on trust are superior to those based on contracts because trust encourages

\textsuperscript{121} Greenfield, \textit{ibid.} at 127.  
\textsuperscript{122} BCE, \textit{supra} note 67 at para 38.  
\textsuperscript{124} Mitchell, \textit{ibid.}  
\textsuperscript{125} Mitchell, \textit{ibid.}
stakeholders to contribute more to the firm. Stakeholders who rely on contractual terms will invest in the firm, but only, to the extent of their required duties set out in their contracts. Returning to our main discussion, the question then becomes how relevant is trust to the adoption of a wide managerial discretion.

Professor Mitchell recommends that we incorporate trust into managerial discretion. Directors need to be free “from the structural pressures of stockholders and capital markets, to loosen the legal and cultural constraints upon them so that they can act as we expect them to – as natural human beings who work to increase corporate profit the way people with human moral and social values act”.

When the legal system trusts management to make the correct business decisions, they will be able to exercise their responsibility more freely, and in a manner, that will enable courts to hold them more accountable. On the other hand, if courts impose strict guidelines, managers can escape liability by simply showing that certain procedural and contractual components have been met. Therefore, it would be more appropriate for the law to offer its trust to management. In Canada, it seems this trust has taken the form of a wide discretion being afforded to managers in performance of their fiduciary duties.

Generally, communitarians believe that one of the main causes of corporate irresponsibility is the firm’s sole quest to maximize short-term share prices. To address this concern, the law should step in and encourage managers to develop a long-term focus by investing for the future and ensuring that profits are made in the most

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126 Mitchell, *ibid.*
129 Mitchell, *ibid.* at 3.
Managers ought to focus on maintaining a stable and satisfied workforce, ensuring shareholders are happy and holding a good reputation for being a good corporate citizen in the community. The legal system should facilitate the means by which these long-term objectives can be achieved and should discourage the sole focus on profit maximization.

To attain these goals, Professor Mitchell views the solution to corporate irresponsibility as a normative one and not a legal one. He argues that the legal system should not assume that managers would shirk if they were not being routinely monitored. Rather, the courts should free managers to “manage our business economy and free them with the knowledge that we will hold them accountable for the means they choose to accomplish that end”. In Canada, the court has appropriately awarded wide discretionary powers to encourage managers to make correct business decisions.

It can be also be argued there is an implicit trust present in the relationship between managers and the courts in Canada. The court relies on the business expertise of managers and therefore entrusts them to make appropriate decisions. In return, managers are permitted to manage the affairs of the corporation freely. The wide discretion enables managers to remove themselves from the constraints of the legal system. More importantly, these broad powers allow managers to focus on societal welfare in their decision-making. Thus, the communitarian view that trust should guide corporate

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130 Mitchell, ibid.
131 Priest, supra note 3 at 22.
132 “Mitchell, Corporate Irresponsibility, supra note 127 at 277.
133 Mitchell, ibid. at 278.
134 Mitchell, ibid.
relationships is consistent with the court’s election of a wide discretion for managers’ fiduciary duties.

Finally, communitarians believe the function of corporate law is to ensure that stakeholders’ interests are sufficiently protected from any harm that may develop over the course of the relationship. With corporate contracts, it is impossible to predict and accurately specify what the harmful acts of the firm may be ahead of time.\textsuperscript{135} Furthermore, stakeholders’ interests and expectations change over time, and consequently, the written contract may be different in content from those expectations arising over the course of the relationship.\textsuperscript{136} Communitarians argue that it may not be possible for non-shareholders to bargain for their interests, and even if it were, the discrepancy in bargaining power would prevent them from obtaining sufficient protection from the costs of shareholder wealth maximization.\textsuperscript{137} In sum, communitarians believe that contractual and bargaining processes fail to offer adequate protection for stakeholders’ interests. In order to rectify this problem, they argue that law reform is necessary. However, among communitarians, there exist a variety of proposals for law reform.

For instance, some propose that the courts adopt a ‘multi-fiduciary model’. One particular academic who is in favour of this approach is Professor Greenfield. He proposes that managers owe fiduciary obligations to all of the constituencies, including

\textsuperscript{135} “Millon, “Crisis”, supra note 117 at 1379.
\textsuperscript{137} “Millon, “Communitarianism”, supra note 38 at 4.
shareholders, non-shareholders and the community at large.\footnote{138}{Greenfield, \emph{supra} note 37 at 148.} A multi-fiduciary model would expand corporate law’s beneficiaries of decision-making and provide a legal framework that protects non-shareholders from harm, regardless of whether they have bargained for this protection or not.\footnote{139}{“Millon, “Communitarianism”, \emph{supra} note 38 at 13.} This model may be criticized for the creation of certain rights and duties that may have not been agreed to by the parties.\footnote{140}{Millon, \emph{ibid.} at 12.} However, it may be necessary for corporate law to meet minimal standards of fairness and justice by ensuring that all stakeholders are protected equally, despite the fact that the parties did not agree to these terms.

Other communitarians, such as Professor Millon, take a different approach. He proposes that managers do not owe their fiduciary duties to any particular stakeholder. Rather, they should pursue profit-maximizing strategies that complement both shareholder and non-shareholder interests, and where there is a conflict managers should compensate non-shareholders for their losses suffered.\footnote{141}{Millon, \emph{ibid.}.} It appears this model of fiduciary duties shares a closer resemblance to the approach taken by our courts presently, than the multi-fiduciary model proposed by Professor Greenfield.

Notwithstanding these differences, most proponents of communitarianism would opt for law reform to guarantee the protection of constituencies’ interests. These communitarian desires to ensure there is fair consideration and treatment of all stakeholders appears to be consistent with our jurisprudence to date. Since the Supreme Court of Canada currently finds that managers should owe their fiduciary duties to the corporation only and not to its shareholders, decisions can now reflect the best interests
of non-shareholders. By affording managers’ with a wide discretion to consider the welfare of multiple stakeholders, the courts in Canada have accomplished at least some of the communitarian goals of corporate governance.

The rationales I have offered in this Part provide some justification for why the judiciary has granted a wide discretion for managers’ fiduciary duties. In particular, I suggested that the court relied upon the business judgment rule, and also, on the various communitarian proposals. Recall, however, that the main purpose behind the court’s broad definition for ‘best interests of the corporation’ and for adopting a wide managerial discretion was to offer protection to the multiple constituencies. If these rationales were indeed relied upon by the court, it should follow that the interests of stakeholders would be regarded in managerial decisions. However, a closer examination reveals that these rationales do not accomplish this end. Rather, they appear to be problematic for reasons that I have reserved for the next part of my paper.

\[142\] BCE, supra note 67 at para 66.
IV. Are these Rationales Problematic?

In this section, I will argue that the rationales I offered previously are problematic, and therefore, should not form the court’s basis for implementing a wide managerial discretion. Since these rationales are found to be troublesome, I will argue that a wide discretion for managers’ fiduciary duties should not be adopted. Following this discussion, I will offer additional reasons, more generally, to support my assertion that a wide managerial discretion is problematic. In the final section of this Part, I will attempt to reconcile the different views between contractarianism and communitarianism for purposes of my recommendation.

a) Business Judgment Rule – Problematic?

As mentioned previously, there are two distinct managerial duties set out in the CBCA. Under section 122 (1)(a), we are concerned with the fiduciary duty of directors, or sometimes referred to as their duty of loyalty.143 On the other hand, section 122(1)(b) sets out the expected standard for their duty of care.144 The factual aspects of the circumstances surrounding the conduct of the manager is critical under section 122(1)(b), whereas the subjective motivation of the manager is the main focus of the fiduciary duty found under section 122(1)(a).145 Since these duties are concerned over different aspects of managerial decisions, distinct standards should be used to measure the conduct. As such, the duty of loyalty, or as I refer to it as the fiduciary duty, is typically measured by

143 See CBCA, supra note 2 and accompanying text.
144 See CBCA, supra note 4 and accompanying text.
145 Peoples, supra note 63 at para 63.
an objective-subjective standard. Meanwhile, the duty of care is measured objectively because of its focus on the factual elements surrounding a decision.

Seeing that the duty of care is measured by an objective standard, it would be appropriate to invoke the business judgment rule when determining whether or not this duty has been met. This is because, with the duty of care, the court is assessing only the procedural and contextual elements of the decision or conduct. When examining this duty, courts should place deference in the hands of managers and allow them to govern freely. As a result, it would be appropriate to afford managers with a wide discretion, through the business judgment rule, so they can select from various procedures to conduct their business efficiently.

Moreover, the business judgment rule should apply to the duty of care because there are other non-legal sources that could discipline managerial conduct. For instance, if the court mistakenly defers to the decisions of management, the presence of market controls will motivate managers to perform their duties properly. Additionally, the concern over whom the duty of care is owed to is generally not an important one. This is because when the content of the duty is examined, the deference afforded by the business judgment rule will almost always apply, unless there is evidence to suggest the manager acted with gross negligence. In other words, if the courts grant managers a broad discretion to perform their duty of care, it does not matter whom this duty is owed to, but what is important is that managers acted reasonably.

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146 Fiesel, *supra* note 44 at 71.
147 Iacobucci, *supra* note 93 at 403.
148 Iacobucci, *ibid.* at 404.
On the other hand, the duty of loyalty is focused more on the substantive elements of managerial conduct. When the court is reviewing these aspects of the decision to establish whether there has been a breach, it would be more prudent to hold managers to a higher standard because of the subjective factors that need to be reviewed. Managerial fiduciary duties should be examined under a narrow discretion, and not under the more deferential standard of the business judgment rule, to ensure that the substantive elements of the decision have been examined thoroughly by the courts.

Furthermore, in situations where there is an alleged violation of fiduciary duty, the judiciary cannot afford to invoke the business judgment rule improperly because breaches of this sort have far more reaching consequences than breaches of duty of care. It is often said that the court should analyze violations of duty of loyalty more strictly because they are often tainted with managerial self-interest.\textsuperscript{149} Typically, breaches of fiduciary duties will cause more harm to the firm and to its constituencies, as a result of managers engaging in transactions where there has been a conflict of interest or where they have gained a personal benefit. Therefore, the degree of liability for violation of a substantive error should be higher than one that involves merely a procedural error. Consistent with this reasoning, Delaware legislation was amended to permit corporations “to eliminate or limit personal liability of directors” for damages resulting from violations of duty of care but not for breaches of fiduciary duty.\textsuperscript{150}

\begin{footnotes}
\item[149] “Easterbrook & Fischel, Economic Structure, supra note 22 at 103.
\item[150] Brennan, supra note 98 at 321. This author states that personal liability can only be eliminated or limited for directors and not for the officers of a corporation.
\end{footnotes}
Another concern with the courts applying the business judgment rule to managers’ fiduciary duties is that this may encourage managerial self-interest. If managers were aware that their substantive decisions would not be scrutinized regularly, they would be more inclined to pursue conduct that runs contrary to the corporations’ best interests. Moreover, applying the business judgment rule to fiduciary duties is problematic because it lowers the standard that should be applied to situations where there may be managerial self-interests or conflicts. For instance, where shareholders may seek to challenge a particular decision involving a conflict of interest, managers should not be afforded protection from the business judgment rule in these types of situations.

One of the comforting facets about our Canadian corporate law is that there are certain circumstances where courts have consistently held managers to a high standard for their fiduciary duties. For instance, courts have found that managers are not to place themselves in a situation where their fiduciary duties may possibly conflict with their own interests. Furthermore, managers are not to derive any profits through their position by investing in corporate opportunities that were intended to belong to the corporation. The statutory fiduciary duty expects managers to act in good faith with a view to the best interests of the corporation. Thus, the courts should hold managers to this high standard when determining whether they have met their duties under section 122(1)(a), rather than deferring to their conduct under the business judgment rule.

151 Iacobucci, supra note 93 at 405.
152 “Millon, “Redefining Corporate”, supra note 58 at 251.
153 Harris et al., supra note 101 at 375. For more on the topic of self-dealing transactions, see the discussion beginning on page 376.
154 Harris et al., ibid. at 375. For more on the topic of corporate opportunities, see the discussion beginning on page 386.
As discussed, this legal rule provides the courts with a flexible standard to measure managerial duties. By applying this principle to fiduciary duties, the court is relaxing the strict standard that should be used to measure the substantive components of managers’ decisions. The business judgment rule was not intended to protect managers who act in bad faith or with dishonesty, but rather, was aimed at determining whether managers have exercised reasonable judgment and have taken the appropriate steps in their decision-making. Furthermore, the adoption of a deferential standard for evaluating fiduciary duties is problematic for several policy reasons.

Firstly, if courts eagerly invoke the business judgment rule, they may find that compliance with the duty of care will be sufficient to relieve managers from their duty of loyalty. If the courts combine the separate duties together and subject them to the business judgment rule, there would be no need to evaluate them separately. In essence, the business judgment rule “fuses the duty of care and the duty of loyalty”. As a result, this leads to the finding that fulfillment of the duty of care suggests that managers have also carried out their fiduciary obligations. Managers, aware of this fact, may be more inclined to engage in self-promoting conduct. Not to mention, investors may be reluctant to invest in the firm and may take their investment elsewhere to a less managerial-friendly jurisdiction. Secondly, there is a policy concern that the business judgment rule will encourage courts to evaluate only the procedural aspects of managers’ decisions. In other words, the court will only examine decisions based on whether

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155 Priest, supra note 3 at 31.
156 Harris et al, supra note 101 at 342.
157 Fiesel, supra note 44 at 69.
158 Brennan, supra note 98 at 325.
159 MacIntosh, Jeffrey, “Business Judgment Rule” (Lecture, University of Toronto, March 2009).
certain procedures have been met. This is problematic because constituencies depend on the judiciary for protection from the harmful substantive decisions of corporations and their managers.

Thus far, I have provided several reasons for why the application of the business judgment rule to managers’ fiduciary duties is problematic. If the court’s main objective is to expand the range of beneficiaries that can benefit from fiduciary duties, deferring to the business judgment of managers will not accomplish this goal. A manager’s decision to prioritize the interests of some stakeholders over others is a substantive matter that should not be routinely deferred to by the court. Rather, the judiciary should step in and scrutinize decisions often, in order to ensure that managers are taking into account the interests of multiple constituencies. Accordingly then, the business judgment rule should not apply to managerial fiduciary duties.

I suggested earlier that the court selected a wide discretion for fiduciary duties because this was consistent with communitarian views. However, a closer look at these various communitarian proposals reveals they are also problematic, and therefore, should not be relied upon by the court to justify their adoption of a broad discretion for managers’ fiduciary duties.

b) Communitarianism – Problematic?

The granting of a wide discretion that enables managers to focus more on communal and social goals, as proposed by communitarians, neglects the fact a corporation is situated in a business setting. In my perspective, communitarianism underestimates the importance of the economic reality that surrounds all corporations. When the focus is on social values, and only on things such as fairness, justice and
equality, it will be difficult for the corporation to prosper to its full capacity. Furthermore, most individuals would invite the economic success of corporations present in their community. In fact, a survey conducted by the Canadian Democracy and Corporate Accountability Commission found that seventy two percent of Canadians expected that corporations would make profits when conducting business. Accordingly, the economic status of the firm is an important element that must be given some consideration in corporate decision-making.

It is important for a corporation to be economically successful because this will have a direct impact on the welfare of corporate constituencies and the society at large. Certainly, if the firm was profitable or if the goods and services offered were competitive with other companies’ products, both non-shareholders and shareholders would reap the benefits. The more efficient and profitable a corporation is, the greater the likelihood it will remain in business, which in turn, means more stakeholders will continue to have a stake in the firm. Therefore, it is important for managers to consider the economic and efficiency aspects of the business when performing their fiduciary duties. To ensure this occurs, the court should limit their discretionary powers and require managers to consider these factors.

However, some communitarians have questioned whether efficiency should be the only normative criterion for the functioning of corporations. Although, efficiency may not be the sole criterion to consider, it remains an important one. The ability for a

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160 Janis Sarra, “Oversight, Hindsight, and Foresight: Canadian Corporate Governance through the lens of Global Capital markets” in Janis Sarra, Corporate Governance in Global Capital Markets (Vancouver: UBC Press, 2003) at 70. The results of this survey also revealed that the majority of the Canadians surveyed wanted corporations to accept a broader sense of accountability that extended beyond profit maximization.

corporation to conduct its business efficiently remains instrumental for its longevity and sustainability over time. The more proficient a corporation is, the greater the likelihood it can survive competition in the various markets. It may be, that to fully meet social values, we may be required to displace the efficiency and profitability goals of corporations. However, ignoring these goals outright can be damaging to the overall welfare of the firm, as I have discussed.

Perhaps then, the more appropriate framework should consist of managers focusing equally on the social and economic goals of a corporation. In other words, reforming corporate law to promote social goals must also consider the profit maximization strategies of the firm. Otherwise without sustainability, the corporation would be unable to offer stakeholders and society much benefit over a long period of time. Yet, one academic has express his concern that fixation on sustainability may be detrimental to the public good.\(^\text{162}\) Perhaps, this is a valid assertion if sustainability ultimately costs the corporation its social values. For instance, where there may be conflict between profit and social values, money and financial wealth is important to a corporation, but only, after justice, fairness, equality and fulfillment of human rights have all been met.\(^\text{163}\) Though if possible, we should encourage firms to meet both their economic and social demands, since meeting these goals jointly will help firms achieve long-term prosperity.\(^\text{164}\)

For that reason, the measurement of overall firm value should take into account the social and economic factors of a firm. If a corporation can provide both social and

\(^{162}\) Greenfield, supra note 37 at 130.

\(^{163}\) Greenfield, ibid. at 133.

\(^{164}\) Greenfield, ibid.
economic fairness to the stakeholders, it will have a high corporate value.\textsuperscript{165} Professor Greenfield argues that fair distribution of the corporate surplus will eventually turn to a benefit for the firm over the long-term, because workers will work harder, become more productive and will be more loyal to managers if they were compensated for their efforts fairly.\textsuperscript{166} This argument acknowledges that economic wealth is a necessary component for the long-term success of a corporation. Rightfully so, Professor Greenfield opts for a model that incorporates both economic and social fairness. In a similar manner, it would be wise to impose this model onto fiduciary duties and require managers to consider both these factors in all of their decisions. Presently, the wide discretion awarded to management for their fiduciary duties may not accomplish this goal, since there is a possibility that managers will consider neither of these factors.

Communitarians have also emphasized the importance of having trust present in the relationships among corporate stakeholders. This argument is troublesome because it mistakenly rests on the assumption that investors will mutually share this same trust. Shareholders may be reluctant to invest their capital where there are no managerial assurances to accompany their investment. Without proper procedural and contractual protections in place, investors will feel they have limited legal recourse. Likewise, non-shareholders will also want to be assured, by way of legal protection, that they will be compensated for their human capital investment. Trust, in the form of wide discretionary powers, will likely deter both investors and stakeholders from investing their capital.

\textsuperscript{165} Greenfield, \textit{ibid.} at 144.
\textsuperscript{166} Greenfield, \textit{ibid.}
I have argued that various communitarian proposals are problematic. I suggested for a firm to be prosperous, it is necessary for managers to consider both economic and social goals equally in their decisions. In turn, this will lead to more constituencies benefiting from the long-term success of the corporation. Communitarians have also awarded managers with a great deal of trust to make decisions presumably in the best interests of the constituencies. Yet this trust, in the form of wide discretionary powers, is problematic because managers are left free to disregard the interests of all stakeholders. Similarly, a wide discretion by way of applying the business judgment rule also poses problems for constituencies, since substantive decisions that may harm their welfare will often be judicially deferred to. If the court’s main objective is to protect these individuals from corporate harm, managers need to be given stricter guidelines to perform their fiduciary duties. Perhaps then, it would be more logical for the law to limit the discretionary powers currently granted to managers. However, it may be helpful to consider other reasons for why a broad discretion for fiduciary duties is problematic more generally.

c) Wide discretion is problematic generally

In the same manner that communitarians seek law reform to protect the interests of non-shareholders, it appears the Supreme Court of Canada has also moved in this direction. Yet, the court’s broad definition offered for ‘best interests of the corporation’ does not reach this intended goal. Instead, several problems arise when managers are granted with this wide discretion to perform their fiduciary duties. Let us examine some of these issues.
We impose fiduciary duties on managers because, like other business individuals, they may be tempted to engage in conduct that falls to their own benefit.\textsuperscript{167} The imposition of a fiduciary duty is necessary to control the negative effects resulting from their natural business drive and ambition.\textsuperscript{168} When managers are granted with broad discretionary powers to engage in corporate conduct, it is likely they will serve only their interests.\textsuperscript{169} The legal uncertainty of who should benefit from their fiduciary duties invites managers to engage in improper and self-dealing conduct. Since managers are not specifically accountable to any particular constituency, it is conceivable they may pursue their own interests through the disguise of acting in the ‘best interests of the corporation’.

When managers are free to determine what it means to act in the ‘best interests of the corporation’, there is an apprehension that the interests of stakeholders will be neglected in corporate decision-making. In cases where there is managerial self-dealing, this becomes even more apparent. To address this problem, some communitarians have suggested that a ‘multi-fiduciary’ model be implemented. By doing so, managers will owe their fiduciary duties to every constituency which, in turn, will make it more difficult for them to neglect the various interests. Consistent with this proposal, there has been an argument advanced suggesting that a large number of stakeholders who benefit from managers’ fiduciary duties will make it tougher for them to self-deal.\textsuperscript{170} This is because each stakeholder will have a personal interest in monitoring any managerial conflict of

\textsuperscript{167} Mark Vincent Ellis, \textit{Corporate and Commercial Fiduciary Duties} (Toronto: Thomson Canada Limited, 1995) at 15-2.
\textsuperscript{168} Ellis, \textit{ibid}.
\textsuperscript{169} Hansmann & Kraakman, \textit{supra} note 27 at 444.
\textsuperscript{170} Greenfield, \textit{supra} note 37 at 139.
Although this argument appears somewhat convincing, it ignores the reality that having ‘too many masters’ poses serious problems of accountability, since managers must balance the multiple interests. The lack of accountability to stakeholders in a ‘multi-fiduciary’ model leads to managerial self-dealing where no interests, apart from those of managers, will be regarded.

Another common instance involving self-dealing by managers is when they expropriate funds through transfer pricing. Managers do this by setting up independent corporations in which they own personally, and then, purchase assets from the company they run at below market price. As a result of the fraudulent transfer of assets, stakeholders will suffer through the diminished value of the firm. The wide discretion that is granted to managers allows them to engage in practices, such as transfer pricing, which ultimately causes more harm than benefit to the overall welfare of the corporation. The interests of both shareholders and non-shareholders will likely be ignored, rather than protected, in situations where managers are in pursuit of their own interests. In view of all this, it is clear that wide discretionary powers awarded to managers is problematic, because it allows them to pursue their own interests while managing the affairs of the corporation.

In addition, a broad discretion awarded for managerial fiduciary duties is troublesome because it encourages courts and management to revert back to adopting the shareholder primacy norm. Recall that the vague and permissive language of the CBCA

171 Greenfield, *ibid.*
174 Shleifer & Vishny, *ibid.* at 753.
permits the courts to modify what it means to act in the ‘best interests of the corporation’. The lack of a clearly defined fiduciary duty for managers enables the judiciary and management to ignore the interests of constituencies and possibly revert back to prioritizing the interests of shareholders. This is a major concern because the effects of shareholder profit-maximizing strategies can be detrimental to the welfare of constituencies if their interests are disregarded. Without providing managers with a precise duty, it may be that acting in the ‘best interests of the corporation’ will simply mean that shareholders are the primary stakeholders and that the interests of others can be taken into account on a random basis only. For this reason, it is important to formulate a more precise fiduciary duty for management.

As mentioned earlier, the communitarian ‘multi-fiduciary’ approach is problematic as a result of the practical challenges managers will face when carrying out their duties under this model. In a similar manner, the wide discretion that is currently afforded to managers will also result in difficulties for them, since there will be an abundance of competing interests they will need to balance in their decision-making. The law as it currently stands is problematic because an open-ended discretion for fiduciary duties “would not offer any specific guidance on how management is to act in particular situations in which conflicting demands can be made”. With corporate decisions, it is conceivable that the various interests of stakeholders will not converge. For instance, shareholders would likely opt for a riskier investment to be taken by managers in order to

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175 Borok, supra note 73 at 134.
176 Borok, ibid. at 135.
maximize their profits. While, employees and creditors of a corporation would likely support a more conservative investment since these individuals have a stake in the firm’s assets that are paid out prior to any payment of shareholders’ dividends. If the court continues to grant wide discretionary powers to managers to consider all of the various interests, there will be ‘too many masters’ to whom them must satisfy and be held accountable.

As predicted, the court has already begun to contradict itself with respect to managerial duties. Recently, the Supreme Court in BCE demonstrated their reluctance to take a position on whether it would be mandatory for managers to consider the interests of various constituencies. At one instance, the court found that managers may look to the interests of shareholders, employees, creditors, consumers, governments and the environment, when determining what is in the best interests of the corporation. However, the court later found that managers may be obliged to consider the best interests of corporate stakeholders. It appears that our Supreme Court has not been clear on the issue of whose interests ought to be protected by managers.

The current law in Canada demonstrates how the courts currently struggle with providing an appropriate framework to management. If managers were required to take into account all of the different corporate interests, it would be foreseeable that they would be in constant breaches of their duties. However, there have been arguments advanced, surprisingly from contractarians, to suggest that the ‘too many masters’ dilemma may be unproblematic and therefore unwarranted.

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178 Iacobucci, supra note 93 at 401.
179 Iacobucci, ibid.
180 BCE, supra note 67 at para 40.
181 BCE, ibid. at para 66.
Although it may be challenging for managers to be accountable to multiple constituencies, one scholar has argued that this concern has been overstated.\(^{182}\) Corporations issue multiple classes of common and preferred shares frequently, and yet, managers have always been able to balance the diverging interests between these different classes of shareholders.\(^{183}\) This is no different than the situation where we have conflicting interests between shareholders and non-shareholders of a firm. Furthermore, managers balance a number of obligations in their life regularly, some arising from corporate law and others from the markets.\(^{184}\) It is reasonable to expect managers to be able to balance these various areas of their lives simultaneously.

It was also suggested that, in some instances, the duty to maximize the sum value of the firm by considering the interests of several constituencies makes all investors better off, relative to having a duty owed only to the shareholders.\(^ {185}\) Professor Iacobucci found that in an ideal world, managers should maximize both the value of shareholders and creditors of a firm because this will enhance the overall value of the corporation, which would then be in everyone’s best interests.\(^ {186}\) He acknowledges that this may be difficult to achieve in practice, but nevertheless, expresses his desire for managers to consider the interests of several constituencies when performing their fiduciary duties. All of this illustrates that, despite the ‘too many masters’ and accountability problems

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\(^{183}\) Macey, ibid.
\(^{184}\) Greenfield, supra note 37 at 139.
\(^{185}\) Iacobucci, supra note 93 at 401.
\(^{186}\) Iacobucci, ibid. at 402.
that may come with a wide managerial discretion, balancing the interests among various stakeholders may be more superior than adopting a shareholder primacy model.

To sum up thus far, I have shown that adopting a wide discretion for managers’ fiduciary duties poses several problems generally. In particular, the absence of a clear guideline for fiduciary duties allows managers to pursue their own interests over those of the corporation and its constituencies. Also, there is a possibility that the courts and management will return to embracing the shareholder primacy norm. Finally, a large managerial discretion may lead to a lack of accountability to stakeholders as a result of the ‘too many masters’ dilemma, despite what some scholars have suggested. For all these reasons, it appears evident the court’s choice for adopting a wide discretion is problematic. Whether the court did, in fact, rely on the rationales I have provided for in my earlier discussion (the business judgment rule and communitarianism) cannot be stated with absolute certainty. Though, whatever the rationale for doing so may be, a broad managerial discretion poses serious problems that call for immediate legal reform.

Accordingly, the law requires amendments in order to clarify the role it has in protecting the legal rights of constituencies. To achieve this, the legislature and the courts need to implement a more defined locus for managers’ fiduciary duties. Rather than allowing managers a wide discretion for their decision-making, Parliament should clearly delineate the duties of managers in the CBCA. However, prior to offering my complete proposal, it may be useful to provide a contractarian perspective of managers’ fiduciary duties to see whether this approach can be reconciled with communitarian views for purposes of my recommendation.
d) Contractarianism and Communitarianism: Can these views be reconciled?

Based on the literature review discussed in Part I, it is undeniable these schools possess very different perspectives on whom managers should owe their fiduciary duties to. When I offer some of my arguments in hopes of reconciling the two leading theories on corporate governance, I am simply expressing my desire to find a middle ground that serves both the needs of contractarians and communitarians concurrently. Of course, by no means am I attempting to force the views of one school of thought onto the other. I am simply pointing out the fact there are similarities, between the two approaches, that can be joined for purposes of my recommendation.

In my view, contractarians would opt for a narrower fiduciary duty than what the Supreme Court in *Peoples* and *BCE* has adopted. According to this school, the purpose of managerial fiduciary duties is to accommodate the goal of profit maximization. As such, shareholders who are residual claimants should be granted with fiduciary duties and be permitted to opt out of them as they choose. When shareholders opt out, the remaining constituencies will be permitted to bargain for the inclusion of these fiduciary duties in their contracts. To contractarians, the ends or purpose of corporate law is to maximize shareholder profits. Meanwhile, communitarians believe that managers should increase corporate profits, but only, if done so in a “responsibly and moral” manner. Communitarians suggest that the ends of corporate fiduciary law should be wide enough so managers can serve the interests of multiple constituencies.

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188 Macey, *ibid*.
189 “Mitchell, *Corporate Irresponsibility, supra* note 127 at 3.
Despite their diverging views on what the ends of corporate law should be, contractarians and communitarians would both agree that the means by which managerial decision-making takes place should be sufficiently broad to enable managers to act freely. Generally, the phrase ‘best interests of the corporation’ should be vague because it is impossible to specify in advance what managers should do when certain situations arise.\footnote{Millon, “Communitarianism”, supra note 38 at 3.} Contractarians believe that since shareholders’ investments are sunk into the corporation’s capital, it would be necessary to provide managers with wide discretionary powers to induce profitable investments.\footnote{Shleifer & Vishny, supra note 173 at 751.} Similarly, communitarians would support a regime that affords managers with greater freedom to take into account the various corporate interests. It appears then, that both schools would likely support a broad discretion for the means by which managers perform their fiduciary duties, despite their different reasons for doing so. Interestingly, however, there is some evidence to suggest that contractarians and communitarians may encourage a wide discretion based on the same rationales.

Take for instance whether you are a shareholder or non-shareholder, it is assumed you will give up control rights over your assets by placing them in the hands of managers. Stakeholders believe they will capture greater profits as a collective whole “if they give up control to a decision-making hierarchy, than if they attempted to write detailed contracts with the other participants”.\footnote{Blair & Stout, supra note 47 at 278.} On the other hand, if a particular stakeholder were given control rights over the corporate assets, the remaining constituencies would be reluctant to invest in the firm because they may fear that the
controlling stakeholder would pursue only their interests.\textsuperscript{193} Therefore, if both contractarians and communitarians would like to see managers increase the overall corporate value, it would be best to support a flexible approach that assists them with this goal. Perhaps then, it would be good to continue affording managers with wide discretionary powers. Yet, as demonstrated throughout my paper, the function of this broad discretion will not achieve the underlying purpose of corporate law, whether it is to maximize profits for shareholders or to protect the welfare of non-shareholders.

Some contractarians have responded by suggesting that it does not matter that a wide discretion is problematic because fiduciary duties alone will fail to adequately control managerial behaviour. There are various market mechanisms, existing outside of fiduciary duties, that prevent managers from making decisions that are not in the best interests of the corporation, such as the managerial labour markets, the market for corporate control and the product market.\textsuperscript{194} However, these alternative mechanisms that are intended to discipline managers may not protect shareholders if there is no control over when they will be triggered or how they will affect managers. Fiduciary duties, on the other hand, may be used to monitor managerial conduct under a legal standard and on a more predictable basis.

The court’s adoption of a wide discretion may result in very little, if any, regard to shareholders’ interests. Fearing that shareholder welfare could become lost in this wide managerial discretion, it would be in the best interests of contractarians to seek state intervention. For communitarians, a wide discretion is also troublesome because

\textsuperscript{193} Blair & Stout, \textit{ibid.} at 272.
\textsuperscript{194} \textquote{Easterbrook & Fischel, \textit{Economic Structure}, supra note 22 at 91.}
managers may disregard the welfare of non-shareholder constituencies in order to pursue their own interests. Clearly then, it would be beneficial for both schools to adopt recommendations intended to restrict the discretionary powers granted to managers.

The judiciary has already demonstrated a willingness to narrow the law in certain circumstances. For instance, the court stated that a proposed plan of arrangement must enhance the best interests of the corporation as an ongoing-concern to receive court approval and this standard “may be narrower than the best interests of the corporation test that defines the fiduciary duty of directors under section 122 of the CBCA”.¹⁹⁵ Currently, the law allows complainants to seek a remedy only after there has been a breach of fiduciary duties. It would be more suitable for the legislature and the courts to adopt a preventative approach, in order to defend the rights of constituencies. Perhaps, the first step is to provide clearer statutory authority that protects the rights of certain stakeholders, such as the employees and shareholders of a firm.

¹⁹⁵ BCE, supra note 67 at para 145.
V. Recommendations

Adopting a wide discretion for fiduciary duties is problematic for the many reasons I discussed earlier. Most notably, managers will not give sufficient regard to the welfare of constituencies in their decision-making. In order to assure adequate protection of the most vulnerable stakeholders, I suggest it is necessary to amend our corporate law. In this Part of my paper, I offer my recommendation for statutory reform, which I believe is consistent with both contractarianism and communitarianism.

a) Taking the Interests of Employees and Shareholders into Consideration

The current law on fiduciary duties affords managers with a broad discretion to determine what it means to act in the ‘best interests of the corporation’. Rather than having courts and managers assess each situation on an individual basis, I recommend it would be more prudent to define these boundaries in advance. By doing so, managers will also be held more accountable for their decision-making. Without changes to the corporate legislation, a wide discretion for determining who should benefit from managerial decisions may “likely serve only to entrench management at the expense of both shareholders and workers”. 196

In view of this fact, I recommend that the legislation be amended to require that managers take into account the interests of particular stakeholders. The CBCA should continue to state that managers have a fiduciary duty to act in the best interests of the corporation as a whole, but in making decisions, they must consider the welfare of both shareholders and employees of the firm. With respect to the other remaining corporate

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196 Singer, supra note 136 at 3.
constituencies, managers may, but are not obliged to, consider their interests. Arguably, this proposal finds a middle ground between contractarianism and communitarianism.

The obvious question that comes to mind is, ‘why employees and shareholders’ and not other constituencies. Let us begin by examining the characteristics that differentiate employees from the other constituencies. Employees are more vulnerable to corporate risks than others because they typically lack the financial resources necessary to protect themselves adequately.\footnote{Poonam Puri & Tuvia Borok, “Employees as Corporate Stakeholders” (2002) 8 Journal of Corporate Citizenship 49 at 54.} In turn, they become economically dependent upon their corporate employer and place their full trust in managers to conduct affairs to their best interests.\footnote{Marleen A. O’Connor, “Restructuring the Corporation’s Nexus of Contracts: Reorganizing a fiduciary duty to protect displaced workers” (1991) 69 N.C.L. Rev. 1189 at 1252.} This is most apparent in situations where the corporation is experiencing an economic transition or crisis because employees are faced with the possibility of losing their jobs.\footnote{Singer, supra note 136 at 5.} In addition, employees have less bargaining power than other constituencies because they are not able to shift their relationship around and diversify investments in the same manner as others.\footnote{Puri & Borok, supra note 197 at 51.} They lack the relevant information and educational resources to have contracts drafted sufficiently well to protect their interests, whereas other stakeholders, such as creditors and suppliers, have greater access to these resources.\footnote{Puri & Borok, ibid. at 54.}

Other constituencies enter into more short-term relationships with the corporation, generally involving less time and effort. For instance, suppliers and customers typically enter into contracts with the corporation for a single purpose and once the obligations...
have been met under the agreement, the relationship between the parties ceases. Since employees contribute significant investments of their time and human capital in the firm over a long period of time, it seems logical to extend greater protection to this particular stakeholder group.\textsuperscript{202} Moreover, other constituencies are not as dependent on managers, as employees are. For example, local communities are able to turn to their elected representatives in the government, through the political process, to address any harm caused by the corporation.\textsuperscript{203} Employees, on the other hand, must seek redress directly from their corporate employer and managers. Interestingly, some scholars have argued that an exception exists for creditors in circumstances where the corporation is truly insolvent.\textsuperscript{204} Nonetheless, it is time to turn our minds to why shareholders’ interests should also be regarded by managers in their decision-making.

It is undeniable that shareholders should be given strong protection as a result of their invested capital that is sunk into the firm.\textsuperscript{205} Contractarians have suggested that protection should be afforded to shareholders because, as residual claimants, they bear the highest risks since they receive profits only after all other claims have been paid.\textsuperscript{206} Accordingly, shareholders have the greatest incentives to monitor the conduct of managers and to ensure they are maximizing corporate profits.\textsuperscript{207} For these reasons, managers ought to consider the welfare of shareholders in their decision-making. Besides, the recognition of shareholders’ interests would not be a difficult step for the

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\textsuperscript{202} O’Connor, \textit{supra} note 198 at 1252. \\
\textsuperscript{203} “Macey, “Economic Analysis”, \textit{supra} note 182 at 42. \\
\textsuperscript{205} Shleifer & Vishny, \textit{supra} note 173 at 751. \\
\textsuperscript{206} “Easterbrook & Fischel, \textit{Economic Structure, supra} note 22 at 91. \\
\textsuperscript{207} Easterbrook & Fischel, \textit{ibid}. 
\end{flushright}
courts to acknowledge, since they have traditionally adhered to a shareholder primacy model. Overall speaking, both employees and shareholders, as a result of their vulnerable positions in the firm, warrant greater protection from managerial decision-making. The reality is, that without both shareholder capital investment and employee human capital, a corporation cannot be successful.\textsuperscript{208}

b) Should a Fiduciary Duty be owed to Employees and Shareholders?

Although, I have argued that it should be mandatory for management to regard the interests of both employees and shareholders when performing their fiduciary duties, some scholars have gone beyond this to recommend that managers should owe a fiduciary duty directly to these stakeholders. For instance, according to the economic theory of implicit labour contract, employees should be afforded with fiduciary duties. This theory states that employees will agree to work for less than the full value of their input, with the implicit understanding they are to receive some form of job security and higher compensation in the future.\textsuperscript{209} The human capital and time they have dedicated to the firm cannot always be reduced to explicit contractual terms. As such, these efforts should be recognized as implicit terms and understandings in the contract between the employees and the firm.\textsuperscript{210} Since workers face large transaction costs when forced to contract for all their implicit terms, imposing fiduciary duties would help fill in the gaps and lower these costs for employees.\textsuperscript{211} Therefore, according to the economic theory of

\textsuperscript{208} Puri & Borok, \textit{supra} note 197 at 53.
\textsuperscript{209} “Millon, “Redefining Corporate”, \textit{supra} note 58 at 234. Also see footnote 198 for the article by Marleen O’Connor who is a strong adherent of the economic theory of implicit labour contract.
\textsuperscript{210} Greenfield, \textit{supra} note 37 at 63.
\textsuperscript{211} Greenfield, \textit{ibid.}
implicit labour contract, the imposition of a fiduciary duty is necessary before the firm can realistically protect the rights of employees.

Another scholar has suggested that fiduciary duties are even more important and necessary in the employee-management relationship than in the shareholder-management relationship. Unlike shareholders, where their risks are protected by limited liability, workers suffer from unlimited risk due to their long-term investments of time and human capital in the firm. The fact that employees sell their labour to typically one employer at a time, for an unknown period, provides yet another convincing reason to recognize that a fiduciary duty ought to exist.

Moreover, it has been argued that employees should be granted with protection through fiduciary duties because they enter into long-term relationships with management. An association over an extended period of time will generally give rise to expectations of loyalty that may not be present in short-term relationships. By and large, it was suggested that employees’ interests should be protected first and foremost, because a firm could not succeed without a dedicated workforce who truly believes their hard efforts will be recognized. For all the reasons above, it has been argued that a fiduciary duty ought to be owed specifically to employees.

With respect to shareholders, contractarians have suggested they be the sole beneficiaries of fiduciary duties. They argue that since contractual and market devices

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212 Greenfield, *ibid.*
217 “Bainbridge, *Corporation Law, supra* note 31 at 258.
operate imperfectly at times, it would be appropriate for courts to enforce fiduciary duties.218 Unlike the other constituencies, the relationship between shareholders and managers consists of an “open-ended bargain”.219 As such, the legal system invented fiduciary duties to fill in these unspecified terms of shareholders’ contracts, with assurances that managers will maximize profits.220 It has also been suggested that, in order to lower agency costs, it may be in the best interests of the firm “if a single constituency with homogeneous interests is designated to be the exclusive beneficiary of the managers’ allegiance, than if the managers’ allegiance is dispersed among numerous constituencies”.221 Since all shareholders in a firm expect managers to maximize their profits, it could be said they share homogeneous interests as a single constituency.

On the other hand, other constituencies, such as employees, tend to possess different interests among them, despite the fact they belong to the same stakeholder group. Yet, there are at least some interests that are commonly shared among employees, making it perhaps possible to appoint them as a single constituency with similar interests. For instance, most workers believe they should be treated fairly and reasonably, especially in the context of wages and job security. Nevertheless, I have presented arguments from various scholars who have argued for a fiduciary duty to be owed to either the shareholders or employees of the firm. However, like most recommendations

218 Henry N. Butler & Larry E. Ribstein, “Opting out of Fiduciary Duties: A response to the anti-contractarians” (1990) 65 Wash. L. Rev. 1 at 29. These authors suggest that certain market controls, such as the market for corporate control and managerial market, may be ineffective at times, in which case it would be more appropriate to have fiduciary duties and allow for a judicial remedy.
219 “Macey, “Economic Analysis”, supra note 182 at 41. This author suggests that non-shareholders do not have an open-ended bargain with managers since their interests are clearly laid out in the contract itself, such as in an employment contract, collective bargaining agreement or a bond indenture.
220 Macey, ibid. at 28.
in the realm of corporate fiduciary law, these proposals have been heavily criticized, and rightfully so, in the academic literature.

Critics have opposed the idea of recognizing a fiduciary duty being owed to employees on the basis that the agreement between an employee and corporate employer is contractual in nature, and therefore, should not give rise to a fiduciary relationship.\textsuperscript{222} However, this reasoning may be troublesome because it neglects the fact that shareholders also enter into contractual relations with the firm, and yet, it is commonly believed they should be afforded with fiduciary duties. In other words, if there can be a fiduciary duty owed to shareholders, then the fact that employees’ interests are contractual in nature should not impede the recognition of a duty owed to them. Nonetheless, it remains undeniable that employees’ interests in the firm are contractual in character, given that their employment terms are clearly set out in the contract. As such, employees’ interests ought to be protected through the law of contracts, as opposed to fiduciary law principles, since it will be easier for workers to obtain a remedy for breaches of explicit contractual terms, than for breaches of fiduciary duties.

Furthermore, it has been argued that the interests of employees can be adequately protected through other legal mechanisms such as labour law, pension law, health and safety law.\textsuperscript{223} The protection of employees through legislation, rather than through fiduciary law, results in a superior cost-benefit calculation to the firm.\textsuperscript{224} Corporations

\textsuperscript{222} When I refer to ‘corporate employer’, I am also referring to ‘managers’ for the purpose of my discussion on fiduciary duties. When I speak of a fiduciary duty being owed by the corporation to employees or shareholders, I am also referring to the fact that a fiduciary duty ought to be owed by managers to these stakeholders as well. In essence, I will be using the terms ‘corporate employer’ synonymously with ‘managers’.

\textsuperscript{223} Haansmann & Kraakman, \textit{supra} note 27 at 442.

are able to address issues, such as employees’ wages and jobs, with greater certainty by combining collective bargaining laws with plant closing legislation, than through the judicial enforcement of fiduciary principles.²²⁵ Yet, some communitarians have argued that these forms of legislation enable the corporation to escape from owing rights under the implicit contracts they have with the workers.²²⁶ Although this may be true, I question whether these implicit promises cannot be addressed under a more general legal duty as I have proposed, rather than through fiduciary law. Even more, the majority of employment issues that arise in corporate settings may already be covered under our current legislations, and therefore, can be addressed sufficiently without turning to fiduciary principles.

Moreover, some scholars have argued that amending the law to recognize a fiduciary duty in the employee-management relationship would cause greater harm than benefit to the interests of employees.²²⁷ For instance, as a result of this newly imposed fiduciary duty, employers would lose bargaining power which, in turn, compels them to reduce the wages of employees or even hire fewer workers to compensate for their loss.²²⁸ Furthermore, transaction costs may increase if a fiduciary duty was imposed because managers would experience hardship from balancing the various interests. High transaction costs in a corporation would certainly diminish the overall value of the firm, which then affects the individual stakeholders’ welfare. Hence, the creation of a fiduciary duty owed specifically to employees is unnecessary and may even harm their interests in the end.

²²⁵ MacIntosh, ibid.
²²⁶ Singer, supra note 136 at 5. An example of such right may be job security.
²²⁷ “Macey, “Economic Analysis”, supra note 182 at 37.
²²⁸ Macey, ibid.
With respect to shareholders, some scholars have argued that they should not be the exclusive beneficiaries of fiduciary duties because the corporation is made up of a network of stakeholders who have each invested integral parts in the firm.\textsuperscript{229} The very fact that shareholders could be the sole beneficiaries contradicts the contractarian view that a firm is merely a nexus of contracts, with no stakeholder having priori rights over the other.\textsuperscript{230} In attempting to reconcile this problem, contractarians suggest that fiduciary duties are simply contractual terms and therefore waivable by shareholders at any time.\textsuperscript{231} Yet, if this is the case, the argument for affording shareholders with fiduciary obligations is weakened, since these duties appear not to be important or necessary if they can be contracted out so easily. Furthermore, if fiduciary duties are contractual in nature, it should follow that in a nexus of contracts model all stakeholders should be equally entitled to contract for these duties. Hence, the assertion that shareholders should be the exclusive beneficiaries of managerial fiduciary duties appears to be weak.

Furthermore, it has been suggested that shareholders may not be the residual claimants, if legally they are not entitled to receive any profits “unless and until the board of directors decides that they should receive it”.\textsuperscript{232} Interestingly, one contractarian acknowledged that if shareholders were granted complete control over managerial decision-making, managers would likely adopt strategies that transfer wealth from stakeholders to shareholders, which in turn diminishes the overall corporate value.\textsuperscript{233}

\begin{footnotesize}
\textsuperscript{229} Puri & Borok, \textit{supra} note 197 at 59.
\textsuperscript{230} “Macey, “Fiduciary Duties”, \textit{supra} note 187 at 1268.
\textsuperscript{231} Macey, \textit{ibid.} at 1281.
\textsuperscript{232} Stout, \textit{supra} note 50 at 1194.
\textsuperscript{233} “Macey, “Economic Analysis”, \textit{supra} note 182 at 30. However, Macey does argue that if fiduciary duties are owed to non-shareholders, we will see the problem of wealth being transferred from shareholders to these other constituencies. Therefore, he remains loyal to contractarianism.
\end{footnotesize}
More importantly, implicit promises and understandings may be reneged upon if the law affords shareholders with an exclusive fiduciary duty.\textsuperscript{234} For all these reasons, managers should not owe their fiduciary duties directly to the shareholders of the firm.

Although various scholars have recommended that managers owe their fiduciary duties specifically to either the shareholders or employees, I have presented several arguments to reject both these views. In order to protect the overall welfare of the firm, I believe that managers should owe their fiduciary duties strictly to the corporation, but that in making decisions, they must take into account the interests and welfare of employees and shareholders.

In theory, it would be ideal if managers were able to regard the interests of all stakeholders who could be affected by corporate conduct. In trying to meet this goal, several states in America have adopted constituency statutes that permit management to regard the interests of multiple non-shareholder constituencies in their decisions.\textsuperscript{235} These constituency statutes resemble the current fiduciary duty provision under the \textit{CBCA}, in the regard, that both authorities suggest adopting a broad discretion for managers’ duties. Not surprisingly, these statutes have been criticized for offering only vague guidance on how managers should exercise their powers.\textsuperscript{236} These statutes have been regarded as benefiting only the managers of the firm and not the particular stakeholders they were intended to benefit.\textsuperscript{237} In order for constituency statutes to prove

\begin{footnotes}
\item[234] “Lee, “Monism Pluralism”, \textit{supra} note 221 at 14.
\item[235] “Millon, “Redefining Corporate”, \textit{supra} note 58 at 225.
\item[236] Millon, \textit{ibid.} at 243.
\item[237] “Macey, “Economic Analysis”, \textit{supra} note 182 at 26.
\end{footnotes}
beneficial for non-shareholders, “they must impose requirements on management that extend beyond minimal requirements”. ²³⁸

On a practical level, it is quite challenging for managers to be held accountable to all of the constituencies. Not to mention, this imprecise legal standard would certainly result in vast and costly litigation commenced by multiple stakeholders. ²³⁹ The second best solution then, is to provide those most in need of protection with greater security over their interests. I have argued that employees and shareholders merit this protection, in the form of a narrow managerial discretion that can only be accomplished through statutory reform.

c) Recommendation for Statutory Reform

Currently, the law does not provide adequate protection for the interests of employees and shareholders, as a result of the wide discretion being afforded to managerial duties. Seeing that managers owe their fiduciary duties to only the corporate entity, it is possible they will neglect the interests of employees and shareholders in their decisions. For this reason, there must be legal duties imposed statutorily, which make it obligatory for managers to regard the interests of these particular stakeholders.

Of course, my recommendation is not without concerns. An obvious one is that it may be difficult for managers to consider both the interests of shareholders and employees as they often conflict with one another. However, in almost any situation, the interests of any two stakeholders in the firm will likely diverge. Having to balance

²³⁸ “Millon, “Redefining Corporate”, supra note 58 at 265.
²³⁹ MacIntosh, supra note 224 at 428.
between the interests of only shareholders and employees will be a much less challenging task, than what is currently demanded from managers at common law. Where possible, managers should aim to make decisions, which satisfy both stakeholders.

If conflicts between employees and shareholders cannot be resolved, however, employees ought to be compensated by the firm for their harm suffered. This would entail the application of a ‘Pareto standard’ in the regard that compensation must be given to a stakeholder who is impacted by managerial decisions. For instance, a corporation who chooses to relocate a business, in order to protect the economic interests of shareholders, should be ordered to pay the workers adequate wages in lieu of termination. In relation to shareholders, managers should not be permitted to make decisions that significantly harm their interests because, unlike the employees, it would not be possible to compensate them for their losses suffered. This is because any form of compensation offered to shareholders would be taken from the surplus of the firm, which assumingly, they would already be entitled to. The concern that shareholders and employees may have dissimilar interests can be adequately addressed under my proposal.

There is a further concern that among the employees, there will be heterogeneous interests that will make it difficult for managers to balance. In addressing this issue, I propose that managers separate the employees into different groups based on their position in the firm. Non-managerial employees should be separated from the managerial workers of the firm because it can be assumed these two groups of employees will have

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240 See O’Connor, supra note 198 at 1254. Professor O’Connor maintains that when employees are compensated for harm caused by managerial decisions, it is important to also keep in mind the interests of shareholders.  
241 MacIntosh, supra note 224 at 429.  
242 O’Connor, supra note 198 at 1254.
different interests. For instance, in contrast to the high-level managers, most non-managerial employees typically engage in more labour-intensive conduct, are less skilled and therefore tend to have a greater need for job security.\(^{243}\) Rather than having to consider a multitude of workers’ interests at one time, it will only be necessary for managers to balance their decision-making between two groups of employees. Where managers will make decisions in favour of one group over the other, the ‘Pareto standard’ could be applied to offer compensation to the remaining distressed group of workers. Thus, the fact there may be heterogeneous interests among employees does not appear to be a serious threat.

Another issue with my proposal is that it may limit the ability for shareholders and employees to obtain a judicial remedy for breaches of fiduciary duties. For instance, if managers must consider the welfare of these stakeholders in accordance with the new statutory provision, the ability for either a shareholder or employee to bring a derivative action against them will diminish.\(^{244}\) This is because their rights will be clearly laid out under the new statutory provisions. In other words, since employees and shareholders are owed specific legal rights under the new provision, it will be difficult for them to bring an action on behalf of the corporation, as required under a derivative action.\(^{245}\) However, with that being said, my recommendation will make it easier for shareholders and employees to seek an award under an oppression remedy or personal action, for all they

\(^{241}\) O’Connor, ibid. at 1214.
\(^{242}\) Puri & Borok, supra note 197 at 58. Professor Puri and Tuvia Borok argue that employees and shareholders will find it challenging to seek a remedy under both the derivative action and oppression remedy. My view differentiates from theirs because I believe with the new proposal it will be easier for stakeholders to succeed under an action for an oppression remedy.
\(^{243}\) See CBCA, supra note 2, s.239 (1). Section 239 of the CBCA sets out the requirement for a derivative action.
will need to show is that management disregarded their interests.\textsuperscript{246} In essence, the wording of my proposed provision will be consistent with what is already found under the oppression remedy in the \textit{CBCA}. The concern that my proposal will restrict the ability for these stakeholders to obtain a judicial remedy under the oppression remedy is unsubstantiated.

Despite the concerns raised, my proposal for statutory reform offers a more precise legal framework that benefits shareholders and employees of a firm. My recommendations will ensure, at the very least, the interests and welfare of both these stakeholders will be regarded. This is not to say that managers could not consider the interests of other constituencies. In fact, they could. However, managers are only obliged to consider the welfare of employees and shareholders. The interests of other constituencies may be taken into account on a discretion basis, and only, to the extent they do not conflict with the interests of these two groups. My proposal for law reform does not diverge much from the current approach at common law.

Currently, the law encourages managers to consider the best interests of a number of stakeholders but, as argued earlier, there is the likelihood they will regard no interest but their own. My recommendation will help prevent this from occurring since managers must now take into account the welfare of both shareholders and employees in every decision they make. These proposed legal rights will be mandatory, and as such, cannot be waived by either shareholder or employee. The fact these rights cannot be waived acts as a form of insurance to ensure these interests are protected in managerial decisions. These recommended rights are not contractual in nature, but rather, are granted to

\begin{footnote}
\textsuperscript{246} See \textit{CBCA, ibid.}, s.241 (2)(c).
\end{footnote}
shareholders and employees as statutory rights. My proposal allows these constituencies to continue to rely on any contractual rights they may already be entitled to under their corporate contracts.

In determining whom managers ought to owe their duties to, I recommend there be statutory reform to require that managers consider the welfare of employees and shareholders in all of their decisions. This statutory legal duty, that I propose, is quite different from the imposition of a fiduciary duty. To be certain, managers should owe their fiduciary duties to only the corporate entity and not to any particular stakeholder. As argued, a wide discretion for managerial fiduciary duties is problematic because it fails to afford sufficient protection to those constituencies who are most vulnerable to corporate harm. Therefore, law reform is necessary to rectify this important problem.

d) Other Recommendations

Returning to my earlier discussion on the applicability of the business judgment rule, I recommend that this principle not apply in situations where there is an alleged breach of fiduciary duties. There is a concern that a wide application of this principle will have the effect of relieving managers of their duties and may create a greater risk for managerial self-dealing to occur. The fiduciary duty is concerned with the substantive components of managers’ decisions, and therefore, should not be deferred to in the same manner as their duty of care. Consequently, the business judgment rule should only be applied in cases where the managers’ duty of care is being questioned.

Although I have argued that the law is the preferred route to ensure protection of shareholder and employee interests, there may be other mechanisms that combined with
legislative reform may prove more successful. For instance, it has been suggested that “there also needs to be extra-legal, ethical, social and economic pressures” in order for corporate law reform to be valuable.\footnote{Janet Dine, \textit{The Governance of Corporate Groups} (Cambridge: Cambridge University Press, 2000) at 55.} If the economy created new jobs for the displaced employees or if there were state policies encouraging workers to make the transition into a new economy, it would be unnecessary for the over-regulation of corporate law.\footnote{Singer, \textit{supra} note 136 at 9.}

Furthermore, one scholar has advanced the suggestion that a corporation could conduct its affairs in a way that reflects the religious views of society or managers themselves.\footnote{Lyman Johnson, “Faith and Faithfulness in Corporate Theory” (2006) 56 Cath. U. L. Rev. 1 at 3.} This approach would be based on a voluntary framework that encourages managers to seek guidance through their own faith on how to conduct business faithfully and loyally.\footnote{Johnson, \textit{ibid.} at 6.} However, the danger with this approach is that it encourages a large managerial discretion, to which I have already argued is problematic. Regardless whether or not these recommendations are promising, it remains that corporate law requires statutory amendments to clarify the role it has in protecting the legal rights of particular stakeholders.
VI. Conclusion

a) Concluding Remarks

Following an overview of the leading corporate governance models, I suggested the courts have traditionally adopted the shareholder primacy model. There is evidence to suggest, however, that the judiciary is accepting a more communitarian approach to identifying the beneficiaries of managers’ fiduciary duties. In particular, the Supreme Court of Canada, in both *Peoples* and *BCE*, allowed managers to consider a broader range of stakeholder interests. However, notwithstanding this shift in corporate governance, the court’s open-ended definition for ‘the best interests of the corporation’ continues to be vague and offers little guidance for managerial conduct.

In view of this, I considered some rationales that may account for why the courts have adopted such a wide discretion for the locus of managers’ fiduciary duties. I offered two rationales. Firstly, the courts’ actions appear to be consistent with the business judgment rule, and secondly, adopting a wide discretion seems compatible with communitarian views. Following my analysis, however, I found that these rationales were problematic. The wide discretion afforded to management combined with the court’s application of the business judgment rule, will enable managers to engage in self-dealing and relieve them of their duty of loyalty more easily. Furthermore, I found that some of the communitarian proposals contained incoherencies that ultimately caused greater harm than benefit to the overall welfare of the firm.

Whether the court did, in fact, rely on the rationales I have provided for in my paper is unimportant. However, what remains significant is that we address the adverse effects on stakeholders’ welfare from adopting a wide interpretation for ‘best interests of
the corporation’. Granting managers with the freedom to select the beneficiaries of their fiduciary duties can result in situations of managerial self-dealing, restoration of the shareholder primacy norm and accountability issues. In offering my recommendations, I suggested a proposal that can be applied universally to the two competing theories on corporate governance. Accordingly, I attempted to reconcile the different views of contractarians and communitarians, in the context of managerial fiduciary duties.

I demonstrated that ultimately both contractarians and communitarians should opt for a framework that ensures the protection of a particular stakeholder. For contractarians, it would be desirable for shareholders’ interests to be regarded. On the other hand, communitarians would opt for a legislative framework that guarantees that the protection of all stakeholders’ interests. However, as I have already suggested, this approach poses problems of accountability. Consequently then, the second best solution for communitarians would be to accept a proposal for the protection of one stakeholder. I recommended that employees, being more vulnerable and dependent on the corporation than other constituencies, should be afforded with this benefit.

Ultimately, I concluded that the legislature ought to make amendments to the fiduciary duty provisions in the CBCA. By requiring managers to consider the interests of employees and shareholders, the corporate bar and academia can obtain comfort in knowing that, at the very least, the interests of those particular stakeholders are being regarded. Of course, managers can take into account the interests of others if it will be appropriate to do so. This will ultimately depend on the facts of the case. However, my position remains clear - managers must and may not simply take into account the interests of employees and shareholders when participating in corporate decision-making.
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