A RUDDERLESS REGIME:
THE UNITED KINGDOM’S “ENLIGHTENED SHAREHOLDER VALUE” AS A MODEL FOR THE DUTY OF LOYALTY IN CANADA

by

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This paper argues that the despite the apparent rejection of the shareholder primacy model by the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v. Wise* and *BCE Inc. v. 1976 Debentureholders*, there is a strong tradition of shareholder primacy in Canada that has persisted in jurisprudence and legislative materials. The dislodging of shareholder primacy as the guiding force in directors’ duties is discordant with this tradition and *per incuriam*. As such, at the moment, the duty of loyalty of directors to the corporation is adrift, lacking substantive guidance from the Supreme Court. This guidance, this paper argues, can be found in the “enlightened shareholder value” model embodied in s. 172 of the United Kingdom’s *Companies Act 2006* which holds to shareholder primacy while exhorting directors to adopt an inclusive approach to the interests of non-shareholder stakeholders.
“A man without a goal is like a ship without a rudder” – Thomas Carlyle

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I. Introduction

The duty of loyalty of directors in Canada is in an uncertain state. Following the Supreme Court of Canada’s decision in *Peoples Department Stores Inc. (Trustee of) v. Wise*¹ (“*Peoples*”) and *BCE Inc. v. 1976 Debentureholders*² (“*BCE*”), directors face a nebulous set of obligations which have incited a flurry of conjecture from corporate law academics and practitioners alike in an attempt to parse the Supreme Court’s decisions into a functional, coherent model of directors’ duties. As much as the Supreme Court’s initial decision to overturn the Quebec Court of Appeal’s order to prohibit the leveraged buyout of BCE Inc. was applauded by corporate law firms,³ its subsequently released reasons received a tepid response. Some commentators were cautious in their evaluation, citing possible future difficulties for the definition of directors’ duties.⁴ Others were less equivocal as they marked the decision as a confirmation of “the radical re-definition of directors’ duties begun in the *Peoples* case.”⁵ Largely, as the Supreme Court in *BCE* explicitly rejected the rule of shareholder primacy as elucidated in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*⁶ ("*Revlon*"), commentators questioned how directors would resolve conflicting stakeholder interests given that, to borrow from the *BCE* judgment, “[i]n considering what is in the best interests of the corporation, directors may look to the

¹ [2004] 3 S.C.R. 461 [*Peoples*].
² 2008 SCC 69, [2008] 3 S.C.R. 560 [*BCE*].
³ The expediency with which the Supreme Court dealt with the bondholder matter improved its reputation in the business community for adjudicating real-time commercial disputes. See Derek DeCloet, “A victory for sanity, capitalism and common sense,” *Globe and Mail* (June 21, 2008); Al Hudec, “BCE and the lessons learned,” *Globe and Mail* (December 2, 2008).
⁴ See Robert E. Miles, “Acting in the Best Interests of the Corporation: To Whom Is This Duty Owed by Canadian Directors? The Supreme Court of Canada in the BCE Case Clarifies the Duty” (2009) 24 B.F.L.R. 601 at 618: “In conclusion, the Supreme Court in *BCE* refined the principles relating to the fiduciary duties of directors of Canadian companies to act in the best interests of a corporation. However, since there are still some conflicting principles which will make it difficult for directors in some circumstances to favour one group of stakeholders over another, it will remain for future judicial decisions to refine these concepts further, and provide more practical guidance to directors on how to act in the best interest of the corporation.”
⁵ Jeffrey G. MacIntosh, "BCE and Directors' Duties: A Fork in the Road" (2009) 15 Corp. Fin. 1 at 16.
interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions.”

The Supreme Court’s broadening of the range of interests relevant to a board of directors’ consideration is reminiscent of the stakeholders and imperatives listed s. 172 the UK’s Companies Act 2006 ("Companies Act") which directors should “have regard to.” As s. 172 still propounds the shareholder primacy model, however, there is a possibility that Canada can draw lessons from the UK’s regime of directors’ duties given its tradition of shareholder primacy prior to Peoples and BCE. In the UK, the Company Law Review Steering Group (“CLRSG”) was charged with undertaking a legislative review process which led to the proposal of the draft legislation which codified the duties of directors. Justice Mary Arden, a member of the CLRSG, stated that s. 172 exhorts directors “to genuinely take the relevant matters into account” in order to reconnect “the corporate vehicle with the society in which it operates.” This review process was aimed specifically at effecting “a behavioural change in directorial decisions after the short-term perceptions that appeared to prevail in recent years.” However, while the Supreme Court in BCE rejected the strict shareholder primacy model of directors’ duties, the CLRSG did not, propounding instead an “enlightened shareholder value” (“ESV”) which values “focused, comprehensive, competitive business decision making within robust, objective professional standards and flexible, but pertinent, accountability.” This model maintains that “the statement

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7 BCE, supra note 2 at para. 40.
8 2006, c. 46 [Companies Act].
of duties should include a duty of loyalty which is shareholder-oriented but inclusive.”¹² Therein the UK model differs from the Canadian and holds the strongest possibility for instruction.

This paper will argue that while Peoples and BCE have obfuscated directors’ duties and rejected shareholder primacy, the decisions contradict the tradition of shareholder primacy in Canada. This paper will further argue that the current regime of directors’ duties most closely resembles the ESV model as established at s. 172 of the Companies Act. Part II will establish the grounds for a comparative law analysis which will examine the extent to which legal transfers in corporate law are possible between the two jurisdictions. Part III will establish the argument that shareholder primacy was the law in Canada from the time of the drafting of the corporate statutes up until the Peoples decision by evaluating the Dickerson Committee’s legislative reform project, the pertinent case law, and the treatment of the oppression remedy, as well as argue that the decisions in Peoples and BCE were per incuriam. Part IV will introduce the ESV model through the CLRSG’s discussion papers and highlight the process by which it settled on the ESV model as the guiding principle for the duties of directors. Part V will evaluate the constituent elements of the ESV model by examining both the shareholder primacy and stakeholder models of directors’ duties and suggesting possibilities for its implementation. Part VI will conclude.

II. Applying Comparative Corporate Law

A. Framing the Comparative Analysis

To effectively form a sound basis for drawing parallels between the Canadian and UK regimes of directors’ duties, any account must establish a reasonable foundation in comparative

¹² Developing the Framework, ibid at 28.
The construction of a comparative corporate governance analysis is potentially fraught with both basic and nuanced difficulties which must be effectively defined and addressed at the outset of the account before drawing any meaningful conclusions. This imperative stems both from the fact that the practice of comparative law in general demands a high level of methodological rigour and that comparative corporate governance in particular deals with the byzantine and nebulous concept of corporate governance which requires definitional precision. Such is the complexity of accounting for the nuances in law of respective jurisdictions that the danger of under-inclusiveness or cursory treatment of salient distinctions threatens to undermine the credibility of any comparative analysis. More importantly, the wealth of potential lessons which can be drawn from such analyses would be lost. As such, the parameters of a comparative corporate governance account must be strictly delineated to parse through both the morass of comparative law and the relevant aspects of corporate governance.

The definition of goals will guide the development of a coherent methodology for the comparative account. In the present case, the elucidation and comparison of Canadian and UK regimes of directors’ duties is being undertaken to evaluate whether the ESV model as adopted in the UK can be used in Canada. The goal established, the concomitant comparative model must develop an argument which evaluates the feasibility of drawing lessons from the UK for Canada by defining, investigating, and evaluating pertinent lines of comparison. This will ultimately

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13 Commentators rarely undertake discussions of the theoretical implications of comparative corporate law when attempting to draw practical lessons from other jurisdictions as they will often simply assume a sound basis for comparison. See e.g. Brian R. Cheffins, “Corporate Governance in the United Kingdom: Lessons for Canada” (1997) 28 Can. Bus. L.J. 69.

14 This is one of, if not the, central preoccupation of comparative law theorists. For a survey of the traditional pitfalls in the field. See William Ewald, “Comparative Jurisprudence (I): What Was It Like to Try a Rat?” (1994-1995) 143 U. Pa L. Rev. 1961. For an early but seminal account of the possibility of legal transfers (or “transplants”) see Alan Watson, Legal Transplants: An Approach to Comparative Law (Edinburgh: Scottish Academic Press, 1974).

establish the foundation for a sound transplant or transfer of UK corporate law principles to the Canadian regime of directors’ duties.

The initial justification for a legal transplant can be drawn from the functionalist notion that legal systems face the same types of questions at given points in their development. Konrad Zweigert and Hein Kotz hold this as a fundamental principle of the comparative exercise, stating that “the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.”16 The duties of directors are one such perennial issue which is a staple of the corporate form. Given that the UK and Canada face the same issue of properly defining directors’ duties and implementing a structure which ensures their fulfillment, one must question whether the solution of one will solve the problem of the other. In comparative law this is discussed as a “transplant” or “transfer” which is a charged metaphor in comparative law. As opposed to the more mechanical connotations of “diffusion” or “impact” of foreign legal concepts, the term “legal transplants” evokes an image of organic interdependence which necessarily influences the methodology of the comparative exercise.17 The medical permutation of the metaphor is particularly apt in this regard. In his seminal account of legal transplants, Watson illustrates the analogy:

A successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body, just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection.18

Instead of describing the interaction of the home system with the foreign legal concept in static, instrumental terms, the language of the comparative account must reflect the vision of law as an

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interdependent system. This necessitates a description which goes beyond the discrete qualities of both the legal system and the foreign legal artefact; the comparative account must contemplate how each functions, what the basis of the supposed congruity is, and whether the transplant will be successful.

B. The Feasibility of Comparing Corporate Legal Regimes

The viability of legal transfers can be determined by accounting for and evaluating the characteristics of the respective communities to which the legal regimes under comparison belong. Cotterrell proposes a conceptual framework for legal borrowing which draws on four types of communities: instrumental community, traditional community, community of belief, and affective community. He suggests that “[t]he idea of law as embedded, in some sense, in relations of community may help...in clarifying parameters of legal transplantation; that is, the range of circumstances and variables that present themselves when transfers of law between societies are considered sociologically.”

While the characterization of community does not immediately appear to bear on the transfer of conceptions of directors’ duties between national legal systems, identifying the type of community in which this issue is embedded will aid in determining the amenability of the regime to legal transfer.

As opposed to affective communities which are characterized by “relations of intimacy, privacy and uncalculated concern often (but not exclusively) associated in some degree with family life,” corporate governance is rooted in the instrumental communities formed by business

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relationships and driven by economic considerations.\textsuperscript{20} This increases the possibilities of success for a transfer:

...[M]ore loosely connected with a people’s past and therefore more easily copied is the law of personal property, notably that of commercial goods, and consequently most of the law of contracts. These fungible provinces of law, which are controlled by economic interests rather than national customs or sentiments, have at all times offered the readiest seed ground for a reception.\textsuperscript{21}

This contention by Levy is sound but must be tempered by contingent factors if it is to be applied to specific legal transfers. While instrumental communities are motivated by economic efficiency and practicality, no community is divorced from affective ties. According to Eisenberg, “[e]ven conduct that could be explained on instrumental grounds often has a moral dimension whose explanatory power cannot safely be ignored.”\textsuperscript{22} This moral dimension can be a hurdle to effective legal transfers when other instrumental elements are aligned, especially when that moral dimension is endemic to a single national system. The inquiry into the moral and social foundations of corporate law as a basis for comparison between systems, however, does not further the goals of the comparative enterprise and would be an unnecessarily extensive investigation. The question of where one halts one’s inquiry in comparative analysis is a perennial problem but can be answered through reasoned justification.

It is trite to say that the duties of directors have a moral dimension, but in the instant case this dimension should not be cast in such a manner as to be destructive to the comparative enterprise as the moral and social dimensions of directors’ duties are common across systems. Eisenberg cites the social norm of loyalty as a key determinant of board behaviour that animates

\begin{itemize}
  \item \textsuperscript{20} Roger Cotterrell, “Is There a Logic of Legal Transplants?” in David Nelken and Johannes Feest (eds.), \textit{Adapting Legal Cultures} (Oxford: Hart Publishing, 2001) at 82.
  \item \textsuperscript{21} E. Levy, “The Reception of Highly Developed Legal Systems by Peoples of Different Cultures,” (1950) 25 Wash. L. Rev. 233 at 244.
\end{itemize}
the duties under corporate statutes. This norm can be observed in both Canada and the UK, as can the reputational costs of obligational norms:

The long-term costs of nonadherence involve loss of reputation, including diminished esteem, public shame (as opposed to feeling ashamed), and disdain. The long-term benefits of adherence involve enhanced reputation, including increased esteem, public recognition, and social acceptance. As shown by Eric Posner, adherence and nonadherence to obligational norms have signaling effects. Adherence to norms signals that one is a cooperator. Nonadherence signals that one is not. An actor who develops a reputation as a cooperator may derive substantial benefits from the cooperation of others. An actor who develops a reputation as a noncooperator may not.

These norms underlie the actions of all directors, whether they come from Canada or the UK, and are reflected in the law. According to Eisenberg, “[j]ust as the law can add to the force of an obligational norm by throwing its support to the norm, so it can reduce the force of an obligational norm by withdrawing support.” The force of moral imperatives is thus reflected in legal language and contemplated in instrumental communities supposedly devoid of affective ties. As such, Eisenberg’s moral dimension of the instrumental community as defined by Levy is not fatal to the comparative analysis which can proceed on a sound basis.

Directors’ duties are thus a viable area for comparison between jurisdictions. This is not to say that the approach of one jurisdiction will necessarily congrue with another, but that the issues which corporate law face are common amongst jurisdictions which have shared conceptions of structure, goals, and values. In the case of Canada and the UK, the common thread of shareholder primacy is one strong link.

24 Ibid. at 1260.
25 Ibid. at 1256-1257.
III. Shareholder Primacy in Canada

A. The Duty of Loyalty

The CBCA phrases the fiduciary duty of directors to the corporation as follows:

122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation;\(^{26}\)

Although the simplicity of the statement has confounded boards and courts alike in their search for specific instructions in the exercise of their duties, the simplicity of the directive exhorts boards to call upon their skill and experience to devise the optimal course for the corporation at large.\(^{27}\) This simplicity is deliberate as the statute on its face does not explicitly privilege shareholders, creditors, or any other stakeholder above another.\(^ {28}\) Yet, the lack of guidance is unsatisfying as directors will often face conflicting interests among stakeholders but are unable to turn to the law for definitive answers. In his comment to the BCE case, Professor Edward Iacobucci states “[n]o matter one’s view on the particulars, it is difficult to defend a fiduciary duty that fails to guide either directors or courts.”\(^ {29}\)

\(^{26}\) *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(a) [*CBCA*].

\(^{27}\) The Canadian Centre for Ethics and Corporate Policy suggested that the section be amended to include the following:

Subject to subsection 122(1), in discharging his or her duties pursuant to this act, every director or officer of the corporation shall be entitled to give consideration to the interests of those who are affected by the corporation’s actions (including the corporation’s customers, employees, lenders, shareholders, suppliers and the communities in which it operates) in assessing any action or activity of the corporation. Such entitlement does not create any duties owed by any such director or officer to any person or entity to consider or afford any particular weight to such interest.


B. The Dickerson Committee

The path to the current instantiation of the duty of loyalty in Canada began (to the degree to which one can pinpoint the “beginning” of a legal regime) with the legislative reform project undertaken by the Dickerson Committee. The federal government appointed the committee in 1967 to undertake the first reform of corporate law in Canada since 1934. The committee eventually published its findings and draft provisions in its report: *Proposals for a New Business Corporations Law for Canada* in 1971.30 In commenting on the draft provisions of the *CBCA*,31 the committee stated that “[i]n so far as the general duty of loyalty and good faith is concerned, this section is simply an attempt to distill the effect of a mass of case law illustrating the fiduciary principles governing the position of directors.”32 The committee did not attempt to manipulate the course of development in the area:

No attempt has been made in s. 9.19(1)(a) to give precision to the notion of “the best interests of the corporation”. We agree with the view taken by Professor Gower in his Draft Ghana Companies Code, that “on the whole...it is probably better to leave the law to develop in the hands of the judges.”

31 S. 9.19(1) of the Dickerson Committee’s draft provisions of the *CBCA* do not differ in substance from s. 122(1) of the current *CBCA*:

9.19(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall
(a) act honestly and in good faith with a view to the best interests of the corporation, and
(b) exercise the care, diligence and skill of a reasonably prudent person.

See *ibid.* at p. 74.
32 *Ibid.* at p. 81. This emphasis on simply codifying existing case law is also explicitly stated in the CLSRC’s report. See *Developing the Framework, supra* note 11 at 21.
33 *Dickerson Report, supra* note 30 at p. 81. In the preface to the commentary on the draft articles at page iii, Dickerson cites the Ghana Report as it also employed the approach of publishing draft articles with corresponding commentary as opposed to other means of presentation. It also appears to have drawn on its legal reform methodology as well. See Commission of Enquiry into the Working and Administration of the Present Company Law, *Final report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana* (Accra: Govt. Printer, 1961).
Although the Dickerson Committee does not expressly instruct directors to equate “the best interests of the corporation” with the interests of shareholders, commentators have debated whether shareholder primacy underlay the presumptions of this critical legislative document. Robert Yalden suggests that that Dickerson Committee had no particular model of the corporation in mind and was more concerned with the functionality of the proposed legislation:

Again, while it might be tempting to suggest that their approach was rooted in a clear vision that holds that shareholders are residual claimants and that other groups can protect themselves contractually, in fact the Dickerson Committee’s response was not grounded in a commitment to any one theory of the firm, but was instead focussed on practical concerns.  

Yalden is trying to evade admitting that the Dickerson Committee might have adopted the contractarian “theory of the firm” which holds that the corporation is a “nexus of contracts” and that shareholders are the residual claimants. The corollary of the contractarian model dictates that a board “requires the imposition of a statutory duty to act in the interests of shareholders” in view of their status as residual claimants. In his response to Yalden, Professor Jeffrey MacIntosh concedes that while the Dickerson’s Committee’s report does not explicitly endorse the shareholder primacy view of the corporation, he does believe that “the shareholder primacy view necessarily underlies the report:

The best evidence of this is the sheer number of paragraphs (and sections in the draft legislation) that deal with shareholder rights — not those of creditors, employees, the public at large, or other constituencies. Other than articles, pronouns and the like, the word “shareholder” is almost certainly the most frequently used word in the report.

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MacIntosh also points out that “the Dickerson Report indicates that the committee considered, but explicitly rejected the idea that non-shareholder constituencies, such as employees, creditors, etc., should have a role in selecting directors.” This would also favour the Dickerson Committee’s tacit assumption of the shareholder primacy view.

Although MacIntosh points out that their recommendation of a statutory oppression remedy “adds to the fiduciary duties of directors,” he argues that the Dickerson Committee’s adoption and expansion of the oppression remedy was designed to redress the deficiencies in the common law which failed to protect minority shareholders, not all relevant stakeholders. The Dickerson Committee’s primary misstep was in its proposed definition of “complainant” which applied to standing under both the oppression remedy and the statutory derivative action. The definition accords standing to a wide, if not indeterminate, class of stakeholders, from security holders to “any other person who, in the discretion of a court, is a proper person to make an application under this Part.” The Dickerson Committee had included this expansive definition to address a shortcoming in the English oppression remedy which allowed only registered shareholders to bring an oppression action, thus excluding shareholders who received their shares by operation of law if the directors refused to effect the registration necessary to change the beneficial ownership. However, instead of precisely addressing this point, the Committee

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39 Under the CBCA, “complainant” means (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates, (b) a director or an officer or a former director or officer of a corporation or any of its affiliates, (c) the Director, or (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part. See R.S.C 1985, c. C-44, s. 238.
40 CBCA, supra note 26 at s. 238.
threw open the gates to a wide class of potential complainants, although their intention remained
to only allow shareholders the protection of the oppression remedy:

No special reference is made in the definition “complainant” to legal
representatives of a deceased shareholder, notwithstanding the express
recommendation to that effect by the Jenkins Committee, since we think it
better, rather than attempt to list all the persons who might acquire ownership of
shares by operation of law, to give the court discretion to determine who is a
proper person to make an application.\footnote{41}

The Committee’s original intention to protect minority shareholders through an expansion of the
definition of “claimant” was defeated by the latitude which they gave the courts in granting
standing under the oppression remedy. While they intended or perhaps assumed that directors
would be guided by the shareholder primacy model, they failed to make that explicit, causing
confusion amongst the courts and diluting the content of shareholder primacy.

C. Canadian Jurisprudence and the Tradition of Shareholder Primacy

It was in 	extit{Peoples} that the Supreme Court addressed the question of whether the “interests
of the corporation” was synonymous with the interests of shareholders, a question which had not
been authoritatively addressed prior to that point.\footnote{42} Two cases cited in the judgement bear
elaboration as they highlight the tensions at play. One was 	extit{Teck Corp. Ltd. v. Millar}.\footnote{43} The
plaintiffs in 	extit{Teck} sued the directors of Afton Mines Ltd. for breach of their fiduciary duties
following an issuance of shares to a friendly third party which blocked a bid for control of Afton.
The B.C. Supreme Court rejected the view that directors were violating their duties in
considering the interests of other stakeholders in addition to those of shareholders:

\footnotesize
\begin{itemize}
\item \footnote{41} Dickerson Report, supra note 30 at para. 480.
L.J. 212 at 212.
\end{itemize}
A classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the 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. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.

I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company’s shareholders in order to confer a benefit on its employees: Parke v. Daily News Ltd., [1962] Ch. 927. But if they observe a decent respect for other interests lying beyond those of the company’s shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.\footnote{Ibid. at pp. 962-63. As much as the company in Parke was winding up, this does detract from the validity of the shareholder primacy claim as. Iacobucci states that “[t]he relevance of the winding-up is only that there can be no benefit in the future to shareholders from a conferral of un-bargained for benefits on employees now.” See Edward Iacobucci, “Indeterminacy and the Canadian Supreme Court’s Approach to Corporate Fiduciary Duties” (2010) 48 Can. Bus. L.J. 232 at footnote 26.}

The other case cited in relation to the “best interests of the corporation” and cited by the court in Teck was Parke v. Daily News Ltd.\footnote{Teck, supra note 43 at p. 314.} which asserted that the interests of the company should be understood to be the interests of the shareholders. The case involved a plan by the board to apply the net proceeds from the sale of a newspaper to the benefit of staff and pensioners. The shareholders brought suit and were successful as Bowman J. found the use of funds to fall outside the interests of the company:

The view that directors, in having regard, to the question what is in the best interests of their company, are entitled to take into account the interests of the employees, irrespective of any consequential benefit to the company, is one which may be widely held...But no authority to support that proposition of law was cited to me; I know of none, and in my judgment there is no such law. In Greelagh v. Arderne Cinemas Ltd. Lord Evershed M.R. said, in a different context, that the benefit of the company meant the benefit of the shareholders as a general body, and in my opinion that is equally true in a case such as the present.\footnote{[1962] 1 Ch. 927 (Ch. D.). [Parke]}
Bowman J. also cites Lord Bowen’s infamous quotation from *Hutton v. West Cork Railroad* that “the law does not state that there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company,” highlighting his acknowledgment of the relevance of other interests but the paramountcy of the interests of the company itself, which he sees as being the synonymous with those of the shareholders. However, *Parke* has been only been cited once in a case involving directors’ duties, that case involving a cooperative, not a corporation. Although the message of *Parke* is clear, it has not been widely sounded.

While the pedigree of the case law in this area is unclear, the preponderance of evidence favours “the best interests of the corporation” being read as those of the shareholders. The issue is heavily mooted. Surveying the academic literature on the subject, Lee states that “authors have relied on either *Teck* or *Parke* and ignored or dismissed the other.” In examining *Teck*, as much as Berger J.’s rejection of shareholder primacy is resolute, MacIntosh and Gray have asserted that his comments were “merely *obiter dictum*” and not cited in other cases other than in further *obiter dicta*. Moreover, the facts of *Teck* do not belie a genuine conflict between the interests of shareholders and other stakeholders. As such, *Teck*’s should not hold a prominent position in the canon Canadian stakeholder cases due mostly to its difficulty of convincing application to the debate surrounding directors’ duties. Moreover, courts have adopted the logic of the thin but

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47 (1883), 23 Ch. D. 654 (C.A.) at p. 672.
50 Jeffrey G. MacIntosh, “The End of Corporate Existence: Should Boards Act as Mediating Hierarchs?: A Comment on Yalden” (2002) *The Corporation in the 21st Century: Ninth Queen’s Annual Business Law Symposium*. See also W. Gray, “*Peoples v. Wise* and *Dylex*: Identifying Stakeholder Interests Upon or Near Insolvency – Stasis or Pragmatism?” (2003), 39 C.B.L.J. 242 at p. 243, note 3 where the author states that “employees, suppliers, customers and the community at large...except for a statement in *obiter* as to employees by Berger J. in [*Teck*], have never received express judicial or statutory recognition in Canada...”
persistent line of cases cited leading to Parke, one example being in Palmer v. Carling O'Keefe Breweries of Canada Ltd. where Southey J. stated: “Mr. Heintzman explained that the ‘company as a whole’ means, as I noted his submission, ‘all of the shareholders, taking no one sectional interest to prevail over the others’. In my opinion, that is an accurate statement of the law.”

Yalden has come out against this reading of “the best interests of the corporation” by citing Berger J.’s holding in Teck favourably, claiming that “Justice Berger set out a proposition that has become something of touchstone for Canadian fiduciary law stating that directors ought to be allowed to consider who is seeking control and why.”

Yalden states that Teck “has been cited with approval on numerous occasions” and points to Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd. as a prime example. As much as this case does cite Teck favourably, Lee points out that it does not cite the portions which would support Yalden’s position:

...Olympia & York contains no reference at all to Berger J.’s dictum or to his expansive conception of the best interests of the corporation. To be sure, the Divisional Court in Olympia & York did cite Teck, but it quoted from a different part of Berger J.’s opinion, and it relies on Teck in connection with a finding that the directors had not violated their duties by resisting a hostile takeover they believed was contrary to the shareholders’ interests. Olympia & York cannot, therefore, plausibly be interpreted as an endorsement of Berger J.’s broad conception of the interests of the corporation.

Moreover, the court in Olympia explicitly states that “[i]t is the directors' duty to take all reasonable steps to maximize value for all shareholders.” The reliance on Teck in Canadian case law is a questionable support for a stakeholder approach to the best interests of the


56 Olympia, supra note 54 at para. 67.
corporation and a weak argument against the view that shareholder value maximization is the proper guide for directors.

Moving closer to present day, shareholder primacy persists. While the court in Peoples and BCE ostensibly expanded the fiduciary duty to an ambiguous degree, some of the commentary questioning the decision has resulted from the fact that other Canadian courts have made more assertive and well-supported statements about the place of shareholder primacy in the guiding of directors’ decisions:

The Court of Appeal’s decision [in BCE] raised considerable uncertainty as to the scope of directors’ duties in a change of control transaction. This was because cases decided in Ontario, such as Maple Leaf Foods Inc. v. Schneider Corp., and CW Shareholdings v. WIC Western International Communications Ltd. had previously found that when dealing with change of control transactions, a board of directors is obligated to seek the best value reasonably available to shareholders in the circumstances.

In Maple Leaf, the Ontario Court of Appeal drew on the Delaware holding in Paramount Communications v. QVC Network Inc. to assert that directors are obligated to seek out the best result for shareholders:

The more recent Paramount decision in the United States, supra, at 43-45 has recast the obligation of directors when there is a bid for change of control as an obligation to seek the best value reasonably available to shareholders in the circumstances. This is a more flexible standard, which recognizes that the particular circumstances are important in determining the best transaction available, and that a board is not limited to considering only the amount of cash or consideration involved as would be the case with an auction...There is no single blueprint that directors must follow. (emphasis added)

59 Jeremy D. Fraiberg, “Fiduciary Outs and Maximizing Shareholder Value Following BCE” (2010) 48 Can. Bus. L.J. 213 at 214-215. Fraiberg’s focus on directors’ duties in the context of change of control transactions does not detract from the value of his observation for directors’ duties generally: “The various shifts in interests that naturally occur as a corporation’s fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(a) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation.” Peoples, supra note 1 at para. 43.
60 637 A.2d 34 at 45 (Del. 1994).
61 Maple Leaf, supra note 57 at 62.
While the *Maple Leaf* court emphasizes that *Revlon* and other Delaware cases are not binding in Ontario, it concedes that “they can, however, offer some guidance.”\(^\text{62}\) However, the decision in *Maple Leaf* states that although “non-financial considerations have a role to play in determining the best transaction available in the circumstances, here it was conceded that the court should only have regard to financial considerations.”\(^\text{63}\) This supports the view that although directors will inevitably consider the range of implications of their decisions on various corporate constituents, the financial impact of their decision is determinative.

The paramountcy of shareholder interests was similarly upheld by the Supreme Court in *Hercules Managements Ltd. v. Ernst & Young* where the court held that the corporation was to be understood as “all shareholders as a group.”\(^\text{64}\) In that case, individual shareholders brought a personal action against the company’s auditor for an allegedly negligent audit report. In finding that there was no genuine issue for trial, the Supreme Court quoted the judgment in *Caparo Industries plc v. Dickman*:

The shareholders of a company have a collective interest in the company’s proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company’s finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company’s affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders . . . will be recouped by a claim against the auditor in the name of the company, not by individual shareholders.\(^\text{65}\) (emphasis added by Supreme Court)


\(^{63}\) *Maple Leaf, ibid* at para. 39. In the same paragraph, the court cites the fact that the target company in the case still held other interests in pivotal regard when weighing bids: “Apart from financial criteria, Maple Leaf did not meet the Family’s expressed concern about the effect of a change of control on the continuity of employment for Schneider’s employees, the welfare of suppliers, and the relationship with its customers, whereas Smithfield did.” However, the court held that only financial arguments would hold sway.


While the Supreme Court comes out unequivocally in favour of the shareholder primacy approach in *Hercules*, there is no mention of it in either *Peoples* or *BCE*. These divergent tracks are similarly seen in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* which was decided three years after *Peoples* and only weeks before BCE was put in play by the Ontario Teachers Pension Plan. The Ontario Court of Appeal in *Ventas* stated that there is “no doubt that the directors of a corporation that is the target of a take-over bid have a fiduciary duty to maximize shareholder value in the process.” Moore points out that, despite the fact that *Ventas* came out after *Peoples*, the court still held to shareholder primacy:

> It is perhaps indicative of the lack of guidance provided by the court’s formulation of the fiduciary duty in *Peoples* that the Ontario Court of Appeal could state as a proposition without doubt that the fiduciary obligations of directors require them to take steps to maximize shareholder value in the context of a takeover bid.  

The case law shows that the shareholder primacy persisted strongly right up until *Peoples* and *BCE*, and sometimes even after it. The pervasiveness of the model in Canada is further bolstered by an examination of the treatment of the oppression remedy.

### D. The Telling Treatment of the Oppression Remedy

While an evaluation of what constitutes “the best interests of the corporation” will yield insight into the fiduciary duty and inform the degree to which shareholder primacy underlies the duty, a similar investigation into the oppression remedy shows that shareholder primacy occupies

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66 MacIntosh the fact that the Supreme Court has stated that it is not bound by its own decisions as support that the court did not intend to overturn *Hercules* in *Peoples* and *BCE*, but rather that the decisions were *per incuriam* and open to be overturned in future decisions of the court. See Jeffrey G. MacIntosh, “BCE and the Peoples' Corporate Law: Learning to Live on Quicksand” (2010) 48 Can. Bus. L.J. 255 at 258.

67 (2007), 222 O.A.C. 102, 29 B.L.R. (4th) 312 (C.A.) [*Ventas*].

68 *Ventas*, ibid at para. 53.

an equally prominent place. The oppression remedy was designed for a “complainant” to bring
an action for any conduct by the corporation “that is oppressive or unfairly prejudicial to or that
unfairly disregards the interests of any security holder, creditor, director or officer.”70 In
assessing the challenges brought under the fiduciary duty during change of control transactions,
some commentators have suggested that “the oppression remedy may in fact be better suited for
grounding complaints relating to the sale process than the fiduciary duty.”71 Delaware
commentators have called the fiduciary duty “the bluntest of tools” to deal with the conduct of
directors in takeovers.72 Even the court in BCE seemingly merges the fiduciary duty and the
oppression remedy:

However, this case does involve the fiduciary duty of the directors to the
corporation, and particularly the “fair treatment” component of this duty, which,
as will be seen, is fundamental to the reasonable expectations of stakeholders
claiming an oppression remedy.73

While the fiduciary duty and the oppression remedy are distinct under the CBCA and establish
different thresholds for liability,74 the BCE court’s confusion of the two indicates that their
parallel existence has proven problematic. MacIntosh highlights this tension:

While there may be good substantive reasons for finding a coherent way to unite
the two into a single liability, that is for Parliament, and not the courts to do. It
simply is not appropriate as a matter of statutory interpretation to conflate the
meaning of one with the other, particularly given the stark differences in both
drafting and function.75

This conflation of the fiduciary duty with the oppression remedy and the former’s expansion are
especially egregious when one considers that the oppression remedy was originally drafted to

70 CBCA, supra note 26 at s. 241. See the definition of complainant at s. 238 and at footnote 39 above.
273 at 281.
73 BCE, supra note 2 at para. 36.
Bus. L.J. 255 at 261-263.
75 Ibid. at 262.
The oppression remedy was originally derived from s. 210 of the UK *Companies Act 1948*. In citing the section and the recommendations of the Jenkins Report, the Dickerson Committee established the intended interpretation of the oppression remedy:

On summing up the standards set out in s. 19.04, it is difficult to improve on the frequently quoted interpretation of the meaning of s. 210 made by Lord Cooper in *Elder v. Elder and Watson Ltd.* [1952] SC 49 at p. 55: “...the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely”. The “fair treatment” in *BCE* and “fair dealing” in *Elder v. Elder and Watson Ltd.* have different connotations. While the first is used in reference to the reasonable expectations of all stakeholders, the second is used strictly for shareholders. The Dickerson Committee never intended for the oppression remedy to be put to the use it was *BCE* but rather saw it being a protection for minority shareholders to address the deficiencies in the common law.

Despite the wide use to which the oppression remedy had been put in Canada, the evidence emanating from the case law shows that courts have been loathe to interfere with board decisions which increase share value:

In both *CW Shareholdings* and *Pente*, where complainants lost, the court analyzed the directors’ fiduciary duties to determine whether the case for oppression had been made. It appears that the courts were reluctant to interfere, particularly when it was established that the relevant takeovers were wealth-enhancing transactions for the public shareholders that ultimately caused resources to flow to their most highly valued use.

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78 *Dickerson Report*, supra note 30 at para. 485.
79 Stephanie Ben-Ishai and Poonam Puri, “The Canadian Oppression Remedy Judicially Considered: 1995-2001” (2004) 30 Queen’s L.J. 79 at 96. The reference to resources flowing “to their most highly valued use” reflects the view of the authors that maximizing share value profits other stakeholders as well.
While the study by Stephanie Ben-Ishai and Poonam Puri acknowledges that “the oppression remedy allows for recognition and protection of interests other than wealth maximization in relation to corporations,” their research revealed that “where the conduct can be framed as a value-maximizing transaction for the corporation and its shareholders, the oppression action involving a widely held corporation is more likely to fail.” The evidence indicates that, although shareholder primacy is supposedly not the law, a decision favouring shareholders that will fail from an oppression challenge by other stakeholders.

E. Peoples, BCE and the Questionable Rejection of Shareholder Primacy

Given the case for shareholder primacy in Canadian corporate law from the Dickerson Report onwards, the holdings in Peoples and BCE represent a disjoint in the evolution of Canadian directors’ duties as they enforce the claim not only that the best interests of the corporation should not be equated with those of the shareholders, but that “it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.” One critic described the effect of the two cases as follows:

The net effect of Peoples and BCE is to convert corporate fiduciary duties from a sword that can be wielded by the owners to control managers’ conduct into a shield that protects managers from effective monitoring. This may be good news for directors and officers concerned about exposure to legal liability, not for the efficacy of our corporate law.

82 Peoples, supra note 1 at 42.
MacIntosh has suggested that BCE might increase the possibilities of liability for directors as the “absence of any determinate goal post, coupled with the fact that shareholder concerns rank no higher than those of any other constituency, is an invitation for judges to indulge their individual ‘constituency preferences’ in reviewing corporate conduct.”

What this comment demonstrates is the pervasive lack of certainty that now surrounds the liability of directors in Canada. Based on a review of the cases, how the courts arrived at this point is as mysterious as the precedent it set.

The inception of this uncertainty lies with the holding Peoples. It was there that the court saw fit to expand the breadth of directors’ duties:

Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the “best interests of the corporation” should be read not simply as the “best interests of the shareholders”. From an economic perspective, the “best interests of the corporation” means the maximization of the value of the corporation...

However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation.

MacIntosh points out the weak footing of this statement as it is based “on a single obiter dictum found in a lone trial court holding,” relying on an invocation of Teck. This supposedly “long recognized” principle that directors may consider other interests is at best an empty suggestion (as directors may consider many factors, but must only consider the best interests of the corporation) or at worst a vague imperative. The latter reading is suggested by the BCE court which adopts a mandatory language in its description of the duties of directors:

The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the

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84 Jeffrey G. MacIntosh, "BCE and Directors' Duties: A Fork in the Road" (2009) 15 Corp. Fin. 1 at 7.
85 Peoples, supra note 1 at 42.
circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation’s duties as a responsible corporate citizen.\textsuperscript{87}

The mention of fairness imports an oppression remedy analysis into the fiduciary duty as “[f]air treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to ‘reasonably expect’.\textsuperscript{88} If the court did in fact intend this, then the mandatory consideration and equitable treatment of all stakeholders becomes a part of the fiduciary duty of directors to act in “the best interests of the corporation.”\textsuperscript{89} MacIntosh has suggested that \textit{Peoples} and \textit{BCE} are \textit{per incuriam}, citing \textit{Peoples} reliance on \textit{Teck} and \textit{BCE} failure to challenge it.\textsuperscript{90} However, whether one wants to call it loose interpretation or judicial activism, the Supreme Court is attempting to redirect the corporate mandate. The UK’s ESV model might be where it is attempting to direct it.

\textbf{IV- ESV and the \textit{Companies Act}}

Given the tradition of shareholder primacy in Canada, it is worth examining the UK regime of directors’ duties as it has codified what seems to be suggested in Canadian legislation and case law. What emerges from the comparison is a more honest and directed account of directors’ duties which reflects a stated concern for stakeholder interests while maintaining shareholder primacy. Legislative reformers and commentators refer to this as the “enlightened shareholder value” model of directors’ duties.

\footnotesize
\begin{itemize}
\item \textsuperscript{87} \textit{BCE}, \textit{supra} note 2 at para. 82.
\item \textsuperscript{88} \textit{BCE}, \textit{ibid} at para. 64.
\item \textsuperscript{90} \textit{Ibid.} at 257.
\end{itemize}
A. The Duty to Promote the Success of the Company

While the *Companies Act* describes the general duties of directors in sections 171 to 177, section 170(1) stipulates that these duties “are owed by a director of a company to the company.”\(^{91}\) Although this is reminiscent of the Canadian duty of loyalty under section 122(1)(a) of the *CBCA*,\(^{92}\) section 172 of the *Companies Act* goes further in specifying instructions which guide directors under the heading “Duty to promote the success of the company:”

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

(a) the likely consequences of any decision in the long term,
(b) the interests of the company’s employees,
(c) the need to foster the company’s business relationships with suppliers, customers and others,
(d) the impact of the company’s operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.\(^{93}\)

This section was included as a response to the prevalent perception among directors that they had to give priority to the immediate returns of shareholders regardless of the impact on longer term value.\(^{94}\) According to Saleem Sheikh, “[t]he duty to promote the success of the company codifies the current law fiduciary duty imposed on a director, and enshrines in statute what is commonly referred to as the principle of ‘enlightened shareholder value’.”\(^{95}\) On its face, the section

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\(^{91}\) *Companies Act*, *supra* note 8 at s. 170-177.

\(^{92}\) *CBCA*, *supra* note 26 at s. 122(a). See Section * above.

\(^{93}\) *Companies Act*, *supra* note 8 at s. 172(1). Under UK nomenclature, “members” here are to be read as “shareholders.”

\(^{94}\) Luca Cerioni, “The Success of the Company in s. 172(1) of the UK Companies Act 2006: Towards an ‘Enlightened Directors’ Primacy?’” (2008) 4 O.L.R. at 9. As discussed in Part * below, the short-term/long-term distinction in corporate law is an inaccurate reflection of established financial precepts which seek to eliminate this distinction through valuation techniques.

embraces the shareholder primacy model while tempering it with a requirement to “have regard”
to other stakeholders. What this means precisely will be examined below.

For Canadian directors’ duties, the value of undertaking an examination into the UK legislation lies in the fact that UK jurists have delved into the theoretical underpinnings of both the shareholder primacy model and stakeholder approaches with a view to drafting a coherent set of directors’ duties. While there have not been any cases decided under s. 172 as of yet, the intention underlying the section can be gleaned from the preparatory documents. The course of this legislative reform gives context to the section and aids in understanding the goal of the new direction for the duties of directors.

B. The Genesis of the Companies Act

The current codified form of UK company law and directors’ duties was the result of a thorough law reform process which attempted “to preserve the substance of the existing law where it worked as well as to incorporate improvements in the light of the review process.” By the time the Companies Act came into force in October 2007, it had become the longest piece of legislation in British history, bringing about hundreds of changes affecting companies and their advisors. Most notably for present purposes, it established a set of directors’ duties which supplanted the previous fragmented regime comprised of regulatory and self-regulatory mechanisms which had been the traditional standard for directors in the UK. While the case law had established a set of fiduciary and common law duties, the broader system was unwieldy:

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96 As of July 2010, there have not been any reported cases dealing with s. 172 of the Companies Act.
99 Saleem Sheikh, A Guide to the Companies Act 2006 (London: Routledge Cavendish, 2008) at 371. While the Dickerson Committee was so condemning of the state of Canadian corporate law at the time of its reform as to call it “fragmented” and unclear, it did indicate that it sought to modernize the law as, according to them, “[t]he
[The legal effectiveness of the corporate governance system was hindered where directors were not fully appraised of their legal obligations owing to the fragmented nature of directors’ duties, which made it difficult for them to clearly find and understand the law that applied to them.]

Moreover, following the spectacular bankruptcies of British & Commonwealth Bank, BCCI, and the Maxwell Group in the early 1990s, the UK business community was forced to question their own management practices. “The latest buzzword for this concept,” wrote one commentator, “is corporate governance.”

The examination of directors’ duties was central in the movement to modernize UK company law. Led by the Labour Government, the Department of Trade and Industry (DTI) established a Company Law Review Steering Group (CLRSG) charged with providing recommendations for reforming all aspects of company law, the first set of recommendations being contained in the consultation document *Modern Company Law: For A Competitive Economy*. Amongst its numerous stated intentions, the project undertook to investigate whether directors’ duties should be codified and, if so, what the scope of the duties should be:

A wider issue for the review is whether directors’ duty to act in the interests of their company should be interpreted as meaning simply that they should act in the interests of the shareholders, or whether they should also take account of other interests, such as those of employees, creditors, customers, the environment, and the wider community. [...] The review hopes to stimulate wider discussions of such concerns to see if there is common ground on whether and how they need to be further addressed – whether they just represent

corporation law of Canada has been sadly neglected, the federal law most of all.” However, when discussing directors’ duties in particular, the Committee seemed more guarded in stating (when discussing codification of the duties) “[i]ts purpose is simply, and perhaps gratuitously, to give statutory support to principles that are as difficult to apply as they are well understood.” See *Dickerson Report*, supra note * at para. 6.


interesting philosophical ideas and ideals or whether they lead to concrete proposals that should be pursued.\textsuperscript{103}

This has been the pivotal question facing courts in Canada dealing with the scope of the duties of directors which was explicitly dealt with in \textit{Peoples} and \textit{BCE}, albeit unsatisfactorily. Following the publication of the initial consultation document, the CLRSG published a subsequent consultation document in March 2000 entitled \textit{Modern Company Law For A Competitive Economy: Developing The Framework}.\textsuperscript{104} This document addressed the issue of the scope of the duties of directors, rejecting the pluralist “stakeholder” perspective and adopting the endorsement and development of the ESV model which required directors to countenance “all the relationships on which the company depended and to the long-term, as well as the short term, implications of their actions, with a view to achieving company success for the benefit of shareholders as a whole.”\textsuperscript{105} The formulation of s. 172 reflects this goal, but leaves questions as to what degree and in what capacity UK directors should “have regard” to the interests of both the enumerated interests in s. 172 and any other which may become relevant.

\textbf{C. ESV and its Implementation in the \textit{Companies Act}}

The theory of the firm and view of the role of corporate law advocated by the CLRSG favoured the ESV model.\textsuperscript{106} In an attempt to establish a base for its subsequent work, the CLRSG formulated its view of the guiding principle of the role of company law:

\begin{quote}
[W]e regard the role of company law as to facilitate the exercise of effective business choices so as to maximise wealth and welfare, not only for participants, but for all affected by the operation of companies. In most circumstances the
\end{quote}

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\item[103] \textit{Modern Company Law: For A Competitive Economy} at 9.
\item[104] \textit{Developing the Framework}, supra note 11.
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best way of achieving this is to provide the means, and in particular the necessary information, for choices to be exercised and effective commercial relations established in a market economy, without public policy intervention. However such intervention may be necessary to preserve standards and secure the interests of those with economic relationships with the company and the interests of the wider community.\textsuperscript{107}

In accepting comments on its work in evaluating the state of company objectives in UK company law, the CLRSG found that although the shareholder model still commanded strong support, there was a call for tempering the model to countenance broader interests:

A very substantial majority of responses (in number and in weight) favoured retaining the basic rule that directors should operate companies for the benefit of members (ie normally shareholders). However there was also very strong support for the view that this needed to be framed in an “inclusive” way. There was concern that in many companies there was not sufficient appreciation (either by directors or by shareholders) of the importance of running businesses with a strategic, balanced view of the implications of decisions over time, with proper emphasis on the long term. Due recognition was also needed of the importance in modern business of fostering effective relationships over time, with employees, customers and suppliers, and in the community more widely.\textsuperscript{108}

These comments reflect a cautious attitude towards a strict application of the shareholder primacy model, an attitude which was echoed by the UK government in its response to the CLRSG’s report.\textsuperscript{109} The ESV model represented a viable alternative.

V. ESV Dissected

A. ESV in Theory

To trace the beginnings of the ESV model, one can go as far back as the debates which emerged in the 1930s surrounding the objective of the public company and the theory of the

\textsuperscript{107} Developing the Framework, supra note 11 at 8.
\textsuperscript{108} Developing the Framework, ibid at 10.
firm. The conflicting perspectives of Professors Adolf Berle and E. Merrick Dodd formed the two pillars of the debate. While Berle held that the directors of the modern public company should not have any responsibilities other than to the shareholders of the company, Dodd maintained that companies and their directors have a broader responsibility which encompasses the interests not only of shareholders, but employees, customers, and the public at large. Broadly, these two conflicting positions can be respectively characterized as the shareholder and the stakeholder models of corporate decision-making.

While the battleground between the two positions is well-worn, the ESV model attempts to unite them through a holistic but directed approach to the characterization of directors’ duties. While the ESV approach adheres to the principal tenets of the shareholder value maximization model, it exhorts directors to consider the interests of other stakeholders. Specifically, directors must act in the collective best interests of shareholders but with a view to fostering long-term relationships and promoting inclusiveness amongst stakeholders.

Fundamentally, the ESV model as embodied in s. 172 of the Companies Act is a nuanced reformulation of the classic Anglo-American corporate governance model of shareholder primacy, the nuance being that boards are now compelled to justify their decisions according to modified standards. Virginia Ho describes the goal of the section in the following terms:

The central elements of this "enlightened shareholder value" model then are (i) an explicit focus on long-term shareholder value as the goal of the corporation;

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112 E. Merrick Dodd, “For Whom are Corporate Managers Trustees?” (1932) 45 Harv. L. Rev. 1145.


(ii) a requirement that corporate directors and officers consider the effects of their decisions on the "extended stakeholder constituencies," financial and non-financial, that are referenced in Section 172, and (iii) a rejection of changes to the corporate decision-maker (i.e. the board with shareholder oversight) or the rules that give shareholders monitoring and enforcement rights not afforded other stakeholders.\footnote{Virginia Harper Ho, “Enlightened Shareholder Value”: Corporate Governance Beyond the Shareholder-Stakeholder Divide” at 20. Online: http:ssrn.com /abstract=1476116.}

The contention that ultimately the interests of the shareholder is determinative of corporate outcomes is supported by the fact that shareholders are the only corporate constituents allowed to elect directors, bring a derivative suit, and authorize interested transactions.\footnote{Companies Act, supra note 8, at arts. 188-223, 239 (various interested transactions requiring member approval), Part 11 (derivative claims by members).} The structure of UK corporate law suggests that the “success of the company” should be synonymous with the success of the shareholders. Ho argues, however, that the UK regime of directors’ duties compels directors to “justify their decisions in terms of stakeholder interests and to disclose risks impacting stakeholders.”\footnote{Virginia Harper Ho, “Enlightened Shareholder Value”: Corporate Governance Beyond the Shareholder-Stakeholder Divide” at 20. Online: http:ssrn.com /abstract=1476116.} While some commentators believe that this represents a departure for Britain from strict shareholder primacy,\footnote{“[A] British enlightened share value corporate governance system may be emerging to occupy a unique third position between the American shareholder wealth-maximizing position and the continental stakeholder model. As we interpret these developments, the U.K.’s goal appears to be to maintain its corporations’ financial accountability to a constituency of dispersed, independent shareholders while simultaneously using market forces to nudge companies in the direction of greater social responsibility.” Cynthia A. Williams & John M. Conley, “An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct” (2005) 38 Cornell Int'l L.J. 493 at 515-517.} it is more likely that the goal of increasing shareholder value will remain intact although the route to this goal might become more circuitous.

\textbf{B. Criticisms of the Shareholder Primacy Model}
While the shareholder value model has enjoyed wide acceptance among law professors and practitioners,\(^\text{119}\) the arguments of its critics have gained traction as commentators have begun to re-examine the responsibilities of the corporation. While some have criticized the model as being outmoded,\(^\text{120}\) the main line of argument against the shareholder value model has been that this emphasis on the maximization of shareholder wealth acts to the exclusion of long-term interests of the corporation and its contribution to broader social welfare.\(^\text{121}\) Moreover, this value-maximizing imperative can negatively impact other groups with vested interests in the company such as creditors, employees, or customers.\(^\text{122}\) The pursuit of shareholders wealth is anathema to communitarians who take a broader range of social values into consideration when evaluating the behaviour of corporations. To them, a company is an agglomeration of relationships of trust and interdependence with a distinct community of values and goals.\(^\text{123}\) To privilege one group over the other in this community would undermine the nature of the shared venture. However, Moore rightly points out that privileging one group over another does not constitute ignoring that other group:

To advocate for the shareholder primacy model is not to suggest that business corporations should be run without regard to the interests of non-shareholder constituencies. Quite the contrary, shareholder interests cannot be served without careful consideration of the interests of the non-shareholder constituencies on whom shareholder returns depend and whose legal claims


against the corporation rank ahead of the claims of shareholders who are merely the residual claimants.\textsuperscript{124}

While communitarians and pluralists might argue that the “shared venture” is inherent in corporate existence and dictates an equality of interests among stakeholders, they ignore the fact that the rights and obligations of most stakeholders are contractually defined and do not rely on a vague notion of “shared venture” to define their rights. Moreover, as Moore points out, share returns depend on the consideration of the interests of other stakeholders to maintain their value. To dismiss shareholder primacy as single-minded ignores business and financial realities which do take non-shareholder interests into consideration.

Another criticism of the shareholder primacy model is that shareholder value maximization heightens “short-term” value over “long-term” value. While legislators, practitioners, and commentators alike draw a distinction between the short-term and the long-term value of the company, this distinction may in fact be illusory. This distinction is made in both the UK and Canada. “The concern,” according to the UK legislative reform project, “is that current arrangements lead to directors neglecting the long term, often under (actual or perceived) misguided pressure from shareholders.”\textsuperscript{125} In a similar vein, the Supreme Court in \textit{BCE} stated that the fiduciary duty of directors “is not confined to short-term profit or share value.”\textsuperscript{126} This apprehension for the short term is due in part to the approach of some investment professionals:

Most investment professionals recognize that [discounted cash flow] analysis is the appropriate model for valuing financial assets, including equities. But they believe that estimating distant cash flows is too time-consuming, costly, and speculative to be useful. Because they have much less information about a company’s operations and prospects than insiders do, they tend to attach substantial weight to reported short-term performance. Short-term performance is particularly significant for younger companies, where expectations about

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\textsuperscript{125} Developing the Framework, supra note 11 at 35.
\textsuperscript{126} \textit{BCE}, supra note 2 at 38.
\end{flushleft}
future growth are much more sensitive to current performance, than for companies with established operating histories.\textsuperscript{127}

While a board might be condemned under both UK and Canadian corporate law for sacrificing long-term interests for short-term ones, boards and courts must be wary when they begin equating short-term profit with short-term share value. Financial theory posits discounted cash flow analysis (“DCF”) as the basis for share valuation as, amongst other things, it “provides detailed multi-period forecasts of cash flow (i.e. long-term focus).”\textsuperscript{128} As such, if efficient market theory holds, share value is a reflection of the long term value of the company. This is the belief held by market makers who use the assumptions underlying DCF to gauge company performance:

You have to have a long-term growth assumption in valuing the company...the danger is if you don’t have long-term perspective, then you can’t identify the companies which will be short-term winner in the sector. If you look at short term and find some companies expensive, and you ignore that, then you are on the risk of actually missing out which will be successful in the long term.\textsuperscript{129}

Given that the DCF model reflects both the long and short-term value of a company, directors should (and do) regard share price as a fair indicator of company performance and forecast of its value. However, they are often drawn into an obsession with short-terms earnings:

CEOs and other senior corporate executives concerned with their reputations and the company’s stock price also focus on reported short-term performance measures, particularly earnings. As a consequence, investment and corporate managers have a mutually reinforcing obsession with short-term performance, with earnings the most widely accepted metric.\textsuperscript{130}

\textsuperscript{129} Ibid.
This temptation to focus on increasing short-term earnings is what the courts and legislature in Canada and the UK are trying to discourage. However, given that a DCF approach to share valuation actually yields a gauge of a company’s performance beyond the short-term, a board’s pursuit of increasing share value is actually in line with the current regime in Canada and the UK which exhorts boards to look to the long-term interests of the company.

The criticisms of the stakeholder camp did not resonate in their entirety with those engaged in the UK legislative reform as the ESV model still maintains shareholder primacy as the guiding standard, but the exhortation to consider the listed stakeholders at s. 172 (even in a non-determinative way) indicates that the legislature wanted directors to consider a broad range of interests in deciding what is in the best interests of the shareholders. However, the CLRSG did not adopt the entirety of the stakeholder model into its recommendations as it found the approach unworkable.

C. Criticisms of the Stakeholder Model

While the CLRSG was clear that the shareholder value model should retain its primacy but be more inclusive, it was equally unequivocal about its rejection of the “pluralist” model of company objectives:

A similar substantial majority also strongly opposed directors being empowered, or obliged, to set interests of others above those of shareholders where wider interests required. The objections were largely those referred to in the Strategic Framework Consultation Document – in particular that this would impose a distributive economic role on directors in allocating the benefits and burdens of management of the company’s resources; that this role would be uncontrolled if left to directors in the form of a power or discretion; and that a similarly broad role would be imposed on the judges if the new arrangement took the form of an enforceable obligation conferring rights on all the interested parties to argue for their interests in court. Very few of those who did favour this “pluralist” approach favoured giving the various constituencies concerned such rights; this
confirmed our initial view that such enforceability was not a practicable way forward.\textsuperscript{131}

This stakeholder model suffers from a distinct foundational flaw: overbreadth. Under a strict application of this model, directors would be forced to contemplate an indeterminate category of stakeholders whose interests they would be bound to serve without a guiding hierarchy or criteria for success. This is also a central criticism of the \textit{BCE} decision.\textsuperscript{132} In the context of change of control transactions, directors could effectively reject any bid “by concocting some superficially plausible story that, while shareholders might benefit, some other constituency will be harmed.”\textsuperscript{133} Conversely, it would also create a risk of liability for decisions which would be considered reasonable under a strict shareholder primacy model.\textsuperscript{134} This tension would leave directors in a position of virtually complete discretion in the exercise of their powers but with the converse obligation of satisfying an amorphous set of interests. Such were the pitfalls of the stakeholder model’s application that the CLRSG did not even mention it by name in their report, instead hinting at it obliquely as the “pluralist” approach.

It is also inaccurate to characterize corporate decision-making as trapped in a zero-sum scenario where the gains of the shareholder arrive at the expense of other stakeholders. A case such as \textit{BCE} where the interests of two distinct groups of stakeholders were at odds is not typical as shareholder primacy will most often benefit other stakeholders. Roberta Romano finds that in the context of takeover bids, regulations drafted to incorporate other stakeholder interests into the deliberation process do not have the intended effect of protecting those other stakeholders:

\textsuperscript{131} \textit{Developing the Framework, supra} note 11 at 10.
\textsuperscript{133} Jeffrey G. MacIntosh, "BCE and Directors' Duties: A Fork in the Road" (2009) 15 Corp. Fin. 1 at 7.
\textsuperscript{134} \textit{Ibid.}
Policies intended to aid employees or the fisc (regulation introducing non-shareholder interests into the takeover decision and regulation by means of the tax code) simply extract wealth from shareholders and redistribute it to management because there is no evidence that takeovers systematically affect labour or the treasury adversely, while there is evidence of managerial job loss accompanying takeovers.\textsuperscript{135}

Romano’s study shows that when boards consider solely shareholder interests that the social benefits are higher while regulation introducing non-shareholder interests drives down share price and results in a loss of social benefit.\textsuperscript{136} This is the result of placing directors who are elected for their business acumen into distributive rather than profit-maximizing roles. Such is the danger of the stakeholder approach.

The CLRSG’s sound rejection of the stakeholder model was also grounded in their recognition that the incorporation of such an approach would be a traumatic exercise for UK company law given its historical traditions and current state. The CLRSG found that UK company would have to be “modified to include other objectives...so that a company is required to serve a wider range of interests, not subordinate to, or as a means of achieving shareholder value (as envisaged in the enlightened shareholder value view), but as valid in their own right.”\textsuperscript{137} Largely, the CLRSG found that the pluralist approach was not a viable model for the duties of UK directors.\textsuperscript{138} This would certainly hold as well in Canada.

\textbf{D. Evaluating the ESV model}

\begin{itemize}
\item \textsuperscript{135} Roberta Romano, “A Guide to Takeovers: Theory, Evidence and Regulation” (1992) 9 Yale Journal on Regulation 119 at 177. In this passage, Romano is also referring to the manipulation of corporate behaviour through tax legislation and the operation of deductions and penalties. In the 1980s, federal tax laws were put in place to try to discourage takeovers.
\item \textsuperscript{136} \textit{Ibid} at 180.
\item \textsuperscript{137} Modern Company Law for a Competitive Economy – The Strategic Framework (London, DTI, February 1999) URN 99/654 at pp. 36-37 [\textit{The Strategic Framework}].
\item \textsuperscript{138} \textit{Developing the Framework, supra} note 11 at 15.
\end{itemize}
In evaluating the respective benefits and flaws of the shareholder value and stakeholder models, the CLRSG found that the ESV model strikes a balance which draws on both approaches but also adheres to the trajectory of UK company law. If the ESV model is going to guide directors, then it must be evaluated on its own merits to determine what it would actually operate and whether it is a viable approach for directors’ duties.

To recall the text of s. 172 and the CLRSG reports, the main line of the recommendations remained fixed to the shareholder primacy model in that it obliged directors to “achieve the success of the company for the benefit of the shareholders by taking proper account of all the relevant considerations for that purpose.”139 This guides directors through the clear imperative of increasing shareholder value while simultaneously encouraging them to contemplate “relevant considerations.” The key step taken in these recommendations is offering further guidance to directors to take “a proper balanced view of the short and long term” and to consider “the need to sustain effective ongoing relationships with employees, customers, suppliers and others” as well as to “consider the impact of its operations on the community and the environment.”140 Keay parses the lines of argument surrounding the ESV model in the Companies Act down to its functional elements:

Arguably, the only enlightened element seems to be found in the recognition that directors may take into account material interests, namely those enumerated in s 172(1), if they wish and not be sued for doing so, but this is only provided that the action that they take promotes the success of the company for the benefit of the members as a whole. It must be noted that directors cannot pursue a course of action that might be good for all material interests, unless it ultimately benefits the members. So, this would appear to rule out the possibility of actions such as directors declining to dismiss employees, unless that would ultimately benefit shareholders.141

139 Developing the Framework, ibid at 12–14.
140 Ibid.
According to Keay, the ESV model as adopted in the UK encourages directors to consider all relevant interests in exercising their duties, but will scrutinize those decisions based on whether they serve the interests of shareholders. One might question, then, how this model either differs from the shareholder value model or even advances the discussion of directors’ duties. Professor Michael Jensen, however, offers the “value criterion” as a guiding the contemplation of relevant interest:

Indeed, it is a basic principle of enlightened value maximization that we cannot maximize the long-term market value of an organization if we ignore or mistreat any important constituency. We cannot create value without good relations with customers, employees, financial backers, suppliers, regulators, and communities. But having said that, we can now use the value criterion for choosing among those competing interests. I say “competing” interests because no constituency can be given full satisfaction if the firm is to flourish and survive. Moreover, we can be sure—again, apart from the possibility of externalities and monopoly power—that using this value criterion will result in making society as well off as it can be.142 (emphasis in original)

The CLRSG effectively acknowledged Jensen’s “value maximisation” theory in its reports.143 According to Jensen, the “enlightened value maximization uses much of the structure of stakeholder theory but accepts maximization of the longrun value of the firm as the criterion for making the requisite tradeoffs among its stakeholders.”144 Under this model, the value of a company is not derived solely from its equity, but rather “the sum of the values of all financial claims on the firm—debt, warrants, and preferred stock, as well as equity.”145 Taking this barometer of value into an analysis of the ESV model, one could qualify Keay’s argument that

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145 Ibid at 8. This formulation of company value is also in line with the EVA Momentum metric discussed below.
the final consideration in directors’ duties is that of share value by gauging the goal of the company as maximizing long-term value. As much as Jensen is optimistic about the possibility of infusing a shareholder primacy model with elements of stakeholder theory, the reality of the ESV model’s implementation is that it will in fact not use “much of the structure of stakeholder theory” but rather adhere to the shareholder primacy model with some procedural nuances borrowed from stakeholder theory. However, these nuances will change the process of corporate decision-making.

Although proponents of the strict shareholder primacy model rail against any expansion of the corporate mandate beyond shareholder wealth maximization, the ESV model does not admit as many of the criticisms as its detractors would allege. According to Hansmann and Kraakman, the fundamental goal of corporate law should be to increase long-term shareholder value. 146 MacIntosh highlights one of the difficulties of confusing corporate goals and diverting from the wealth maximization standard:

Because the standard gives no standing to corporate constituencies other than shareholders, neither managers nor courts need trade off the interests of competing constituencies in their deliberations. This minimizes both the cost and the frequency of litigation, and renders the standard more effective within the more limited sphere within which it operates. 147

MacIntosh also points that it is not only for reasons of simplicity but for reasons of efficiency that the shareholder primacy theory should prevail:

Of all the fiduciary standards considered here, the [shareholder wealth maximization model] accord managers the greatest freedom to make decisions unencumbered by the risk of clumsy ex post judicial intervention. This is because it draws the clearest line between decisions that breach the fiduciary duty and decisions that breach the duty of care. Under the rubric of the business

judgment rule, judges have shied away from imposing their own views of optimal investment and financing policy on managers.\(^{148}\)

The ESV model does not portend a deviation from shareholder primacy and all the awkward, inefficient reorientations that would accompany it, but it is rather an elucidation of a procedural concern for the interests of stakeholders. This could be recast as lip service or an empty papering of empty obligations, but the likely result of the implementation of the ESV model is that courts will demand an honest commitment from the board to stakeholders as they review the means by which corporate decisions are reached.

The definitive measure of a company’s success under the ESV model is qualified differently from that under the shareholder value model as it contemplates a greater variety of inputs from multiple sources. As s. 172 has not yet been interpreted by UK in an instructive way,\(^{149}\) those grappling with the exact parameters of the goal of the ESV model must cobble together various metrics from organizational models which cohere with the ESV. Ho advances two models largely consistent with the ESV model that could gauge success: Blair and Stout’s “team production” model and Jensen’s “enlightened stakeholder value” model.\(^{150}\) Under the “team production model,” firm value is measured through the joint output of all stakeholders, including shareholders, employees, creditors, communities, and all other relevant participants in the corporate undertaking.\(^{151}\) Under the Jensen model, “the change in the total long-term market value of the firm is the scorecard by which success is measured.”

Value creation does not mean responding to the day-to-day fluctuations in a firm’s value. The market is inevitably ignorant of many managerial actions and

\(^{148}\) Ibid at 457.


opportunities, at least in the short run. In those situations where the financial markets clearly do not have this private competitive information, directors and managers must resist the pressures of those markets while making every effort to communicate their expectations to investors.\(^{152}\)

Jensen’s emphasizes firm value above share value in his model as this is reflective of the broader measure of company success. Economists and financial analysts have even begun to formulate new ratios which take in numerous business inputs and measure performance across multiple business lines. For example, the Economic Value Added Momentum (EVA Momentum) is a measure of company performance centred on “value-based” financial management which “completely consolidates income efficiency, pricing power, business mix, asset management, profitable growth, and strategic retrenchment into one decisive score.”\(^{153}\) The result is a metric which contemplates the fullest possible set of financial and business considerations into the valuation of a business. The matching of ESV model imperatives with concomitant standards of success by both legal and financial actors allows companies to operationalize the model more effectively. But if the ESV model insists on the clear imperative of shareholder primacy but also demands a consideration of other stakeholders, the model begs the question of which stakeholders and to what degree.

**E. The ESV Model in Practice**

This is a byzantine task which the legislature itself has not even attempted to define. The courts have not proven much better. Yet, one has to attempt guidance. For example, in weighing


\(^{153}\) Bennett Stewart, “EVA Momentum: The One Ratio that Tells the Whole Story” (Spring 2009) 21 J. Appl. Corp. Fin. 74 at 78.
the interests of competing stakeholders, the stakeholder salience model proposed by Mitchell, Agle, and Wood provides guidance in the morass of competing interests:

We then propose that classes of stakeholders can be identified by their possession or attributed possession of one, two, or all three of the following attributes: (1) the stakeholder's power to influence the firm, (2) the legitimacy of the stakeholder's relationship with the firm, and (3) the urgency of the stakeholder's claim on the firm. This theory produces a comprehensive typology of stakeholders based on the normative assumption that these variables define the field of stakeholders: those entities to whom managers should pay attention.\textsuperscript{154}

If one were to put this metric of stakeholder salience to judges, one might see a pure exercise of judicial discretion. However, the business judgment rule would protect a process that reflected a reasonable consideration of the stakeholder interests at play; a court would not be permitted to substitute its judgment for that of the company. Barry Reiter points out that the focus of the courts has shifted from an evaluation of substance to one of process:

In recent years, the scrutiny by Canadian courts has shifted from the actual substance of the decision to the process and practices used by directors in making or reaching a decision. Not surprisingly, as a result of this new process-type emphasis, directors have been forced to adapt to ensure that they are fully informed of all the requirements, operations, and considerations that ultimately govern their corporate decision-making capacity.\textsuperscript{155}

This still begs the question of whose interests and to what degree directors must inform themselves in coming to a decision. In drawing from the \textit{BCE} judgement, a prediction could be that courts will apply this increased sensitivity to non-shareholder interests to the standards set out for an approval of a plan of arrangement under s. 192 of the \textit{CBCA}:

To approve a plan of arrangement as fair and reasonable, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement.


\textsuperscript{155} Barry Reiter, \textit{Directors’ Duties in Canada, 4\textsuperscript{th} edition} (Toronto: CCH Canada Ltd., 2009) at p. 59.
to the corporation’s continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups. Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan.156

While it would be incorrect to conflate an approval for a plan of arrangement with an application of the business judgment rule, the similar language of the two suggests that both corporations and courts have the evaluative infrastructure in place to countenance a wide range of legal and business imperatives. The shareholder primacy model still holds the main line of the corporate mandate, but the injection of consideration for stakeholder interests would not confound this system. The outcome of the directors’ decision can still (and most likely will) favour shareholders, but the route to that result will be longer and more circuitous. While this will increase transaction costs for all parties involved, the procedure would become institutionalized and the costs reduced over time. This does not excuse the enhanced burden on directors or the costs associated with it, but it highlights the reality that the necessity of any legislative or judicial change to an obligation will simply force a reallocation of corporate resources which will become an accepted and streamlined transaction cost over time.

VI. Conclusion

This paper has argued that despite its rejection in Peoples and BCE, the shareholder primacy model holds a central position in Canadian directors’ duties which has been unduly dislodged by the Supreme Court. However, while the argument that Peoples and BCE were per incuriam is convincing, the fact remains that the two cases represent the law in Canada at the moment.

156 BCE, supra note 2 at p. 2.
Moving forward, directors will be seeking a definitive and concrete guide to their exercise of the duty of loyalty. Given that the Supreme Court has failed in doing this, this paper suggests that the ESV model as embodied in s. 172 of the UK *Companies Act* should provide a viable guide to Canadian directors which reflects the tradition of shareholder primacy but respects stakeholder considerations propounded in *Peoples* and *BCE*. If the actual operation of the ESV model and Canadian directors’ duties post-*BCE* is to uphold the shareholder primacy model while coating it in a procedural concern for stakeholders, then the real result is simply that the courts are looking for directors to observe a process which respects relevant stakeholder interests through a coherent and defensible paper trail without detracting from the primary duty to shareholders.
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