INDETERMINACY AND THE CANADIAN SUPREME COURT'S APPROACH TO CORPORATE FIDUCIARY DUTIES

Edward Iacobucci*

I. INTRODUCTION

In what almost amounts to a flurry of corporate law activity at the Supreme Court of Canada, the court decided its second major case on directors’ fiduciary duties, *BCE Inc. (Arrangement relatif à) (Re)*, only four years after another major case, *Peoples Department Stores Inc. (Trustee of) v. Wise.* BCE involves a range of issues, including the scope of the oppression remedy and the proper test for fairness under plans of arrangement. I focus in this article on the court’s treatment of directors’ fiduciary duties. In my view, the court’s opinion in *BCE* was consistent with the foundational *Peoples* case, but there are some significant flaws in the framework that the cases jointly establish.

There is much to commend in the court’s handling of *BCE.* Most importantly, the court deserves praise for how it disposed of the case before it. *BCE* resulted from a successful challenge to the largest leveraged buy-out in history at the Quebec Court of Appeal. For the Supreme Court to have had a meaningful impact on the outcome of the case itself, it was required to hear the case on an expedited basis, and to render a decision in very short order. It granted leave, expedited the hearing and rendered a decision within the compressed timeframe the acquisition required to go forward. Moreover, the court reached the right decision. It rejected the approach of the Quebec Court of Appeal that would have relied on some not entirely clear combination of fiduciary duties, the oppression remedy and judicial review of plans of arrangement to allow sophisticated creditors to rewrite extensive contracts in a manner that prevented a clearly wealth-increasing transaction to go ahead. In assessing the

---

* The author wishes to thank Jeremy Fraiberg and Frank Iacobucci for helpful comments and conversations, as well as participants at the University of Toronto Faculty of Law's *BCE* Roundtable.

3. That the deal eventually failed on its own accord is beside the point.

---

232
court's performance in this case, whatever shortcomings I identify in this comment must be read in light of these very significant strengths.

That said, there are some important flaws in the court's approach in BCE. Section II identifies the fundamental problem with the court's recent jurisprudence on directors' fiduciary duties: the duty to the "corporation" that the court describes is indeterminate. Section III discusses the consequences of this indeterminacy. Section III in some sense qualifies the analysis of Section II, concluding that even a flawed conception of the fiduciary duty is unlikely to have a major impact on corporate life, though it may have some undesirable effects. Section IV in turn qualifies the analysis of Section III, concluding that one context where an indeterminate duty matters is one at the core of the court's analysis in BCE: the fiduciary duties of directors in takeover settings. Section IV observes that while the court was correct to hold that "Revlon" duties to maximize shareholder value in a takeover setting are not the law in Canada, at least since Peoples, the court made some basic errors in its analysis of the subject.

The conclusion from this article is that BCE is a mixed bag: the court appropriately rejected the Quebec Court of Appeal's very troublesome analysis, but left standing some basic flaws in Canadian law on directors' duties.

II. INDETERMINACY

Imagine that you are a bus driver. You are instructed to drive a number of passengers from City A to City B. You are told that there are at least two groups of passengers. One subset wants to take a scenic, hilly route. Another group of passengers gets motion sickness very easily and prefers a flat, boring route. Suppose that you do not have a specific contract telling you what route to take. You are puzzled over which route to take: scenic and potentially nauseating, or boring and benign? You are told that your conduct is governed by a fiduciary duty. Seeking guidance there, you are told that you have a fiduciary duty to act in the best interests of the bus. BCE and Peoples establish that boards of directors have a duty to act in the interests of a fictional being. This is, as this section discusses, as useful a piece of guidance to directors as the duty to act in the interests of a motor vehicle is to the bus driver.

Citing the takeover case from 1972, Teck v. Millar, the essence of

---

the Supreme Court’s approach to fiduciary duty is found in the following passage from Peoples:

We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

The various shifts in interest 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 [Canada Business Corporations Act] CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.6

In *BCE*, the Court of Appeal, though never crystal clear, apparently found favour with creditors’ objections that their extra-contractual interests were improperly ignored by the board of *BCE* in its decision to enter into a transaction that would result in much greater leverage and apparent economic losses to creditors.7 The Court of Appeal appeared to infer from the *Peoples* case an obligation on the part of directors to consider different stakeholder interests, including those of the creditors. The Supreme Court in *BCE* rejected the idea that directors have an obligation to promote stakeholder welfare, but confirmed that directors have the discretion to consider stakeholders. For example, the court stated that, “[i]n *Peoples Department Stores*, this court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders”.8 In discussing the relationship between the oppression remedy and the fiduciary duty, the court further stated:

The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to

---

7. *BCE Inc. (Arrangement relatif à) (Re)*, [2008] R.J.Q. 1298, 43 B.L.R. (4th) 157 (C.A.). It is sometimes argued that the creditors in *BCE* did not actually lose anything given that BCE and Bell, which had issued the bonds, continued to owe the creditors the same amount. But if the risk of default has increased dramatically, the creditors have lost something in expected terms, which is the only sensible basis for determining economic losses.
individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectations of stakeholders is simply that the directors act in the best interests of the corporation.

These passages are in some sense very clear: directors owe a fiduciary duty to act in the best interests of the corporation and not in the interests of any given stakeholder or subset of stakeholders. Any reasonable expectation held by a stakeholder must be qualified by recognition that directors have a duty to act in the best interests of the corporation. The problem is that this duty is itself indeterminate. The corporation is a legal fiction that serves as a nexus for stakeholders seeking to enter into contractual or quasi-contractual relations with one another. There are a host of interactions between stakeholders and the corporation. To name a few, shareholders and lenders provide capital in exchange for dividends and interest payments; employees provide labour in exchange for wages; suppliers provide inputs in exchange for payment; and customers get goods and services in exchange for payment. The corporation serves as the intermediary between the stakeholders allowing each to incur obligations to one another indirectly through the corporation itself. Legal personality provides an invaluable contractual tool that would be otherwise unavailable. But to speak of the legal fiction that is the corporation as having “best interests” is nonsensical. A legal fiction does not have welfare gains or losses that we care about. Rather there are a host of natural persons that interact with the corporation who have preferences, interests and welfare concerns that they care about as a descriptive matter, and society ought to care about as a normative matter. To say that directors must act in the best

9. Ibid., at para. 66.
10. While it is clear, as I discuss further below, that directors do not need to account for stakeholder interests in the substance of their decisions, there is some ambiguity in BCE whether directors must or may consider stakeholders as a procedural matter.
interests of the corporation offers no more guidance to corporate directors than to instruct the bus driver in the above example that she must act in the best interests of a bus; it is the stakeholders, and the passengers, that we care about, not a fictional person or a motor vehicle.

An illustration of this conceptual confusion is found in the BCE opinion's distinction between the interests of the corporation and the interests of stakeholders. As noted above, the court stated that where there is a conflict between the interests of the corporation and a stakeholder, the interests of the corporation prevail. The court also observed that "conflicts may arise between the interests of stakeholders inter se and between stakeholders and the corporation". But there is no such thing as a conflict between stakeholders and the corporation. The only persons who have an interest in the corporation are stakeholders; the corporation itself cannot have interests given its existence as a legal construct. Thus there can only be conflicts between stakeholders. To speak of a conflict between stakeholders and the corporation is meaningless.

If stakeholder interests were aligned, then the indeterminacy in the court's approach would be of little importance: if all stakeholders benefit identically from a certain action, then the directors should presumably do this action. But stakeholder interests are not always aligned (there is a reason why the bus in the above metaphor has passengers with different preferences). Creditors, for example, prefer caution to risk, since they are not looking to maximize firm value but only to be paid a fixed amount, while shareholders realize the upside of growth and will have a greater appetite for risky behaviour. Employees might prefer policies that maximize employment, which may or may not result in greater value for shareholders. In some, perhaps many, instances, these conflicts will be of secondary importance. It is clear, for example, that offering benefits to employees that go beyond their strict contractual rights may be good for shareholder value by promoting employee morale. But for the fiduciary duty to offer a meaningful guide to behaviour, it must offer some indication of what to do in the presence of a true conflict.

12. BCE, supra, footnote 1, at para. 66.
13. Ibid., at para. 81.
14. In Hutton v. West Cork Railway Co. (1883), 23 Ch. D. 654 (C.A.), the court observed that taking employees on a picnic was permissible as long as it served the ends of the company (shareholders): "The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."
The admonition to act in the best interests of a fictional being fails in this respect.

It might be suggested that when the court refers to a duty to the “corporation” it has in mind some aggregate welfare of all the stakeholders. In my view, this aggregation conception, while coherent and theoretically determinate, is not found in the court’s opinions in Peoples or BCE. In accepting the idea of a conflict between stakeholders as a group and the corporation, the court rejects a necessary relationship between the “best interests of the corporation” and aggregate stakeholder well-being. Moreover, in Peoples, the court considered the possibility that the best interests of the corporation require the maximization of aggregate value. The court rejected the view, holding that other factors “may be relevant” without specifying what these other factors are.

Adding to the confusion, the court stated that “[t]he corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly.” While the first clause might suggest the existence of a coherent interpretation of s. 122, namely that the duty to the corporation is a duty to act in the best interests of shareholders, the second clause undermines such a conclusion. As the court elaborated, fairness depends on reasonable expectations, and “the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation”. Thus, the court’s conclusion that the corporation and shareholders are entitled to maximize profit and share value as long as they are fair to stakeholders can be read to say that the corporation and shareholders are entitled to maximize profit and share value as long as it is in the best interests of the corporation to do so. The court makes explicit the idea that maximizing profit may be in the best interests of the corporation, but not that it is necessarily so.

The Supreme Court has created an indeterminate duty rather than one that is merely difficult to apply. It would be hard to say as an empirical matter whether a certain act complied with alternative views of fiduciary duty, such as the view that directors must act in the best interests of shareholders, or must act to increase the aggregate value of the corporation to stakeholders as a whole. But even if there would be difficulty in determining compliance with a well-defined duty, these problems would not be conceptual. Information

16. Ibid., at para. 64.
17. Ibid., at para. 66.
problems may influence the structure of enforcement of the duty, but parties would at least know the underlying goals. What the court has done is to create a duty that fails to offer guidance to directors and enforcers alike.

There is a qualification to this conclusion, and one that comes with its own set of problems. There is one dimension along which the court was very clear about directors’ duties. The court stated that the fiduciary duty varies with the situation at hand, but “at a minimum, it requires the directors to ensure that the corporation meets its statutory obligations”. Taken literally, by requiring the directors to “ensure” compliance with statutes, the court seemingly established a breach of fiduciary duty per se whenever the corporation runs afoul of a statutory obligation. There are problems of internal coherence and overdeterrence from such an approach. On the first point, it may not always be good for corporate stakeholders, or society as a whole, always to “ensure” statutory compliance. For example, suppose that there is a question about the breadth of a patent for a widget. Suppose that there is a 10% probability that a corporation producing a certain product, a gidget, will be found to have infringed the patent-holder’s statutory rights. Finally, suppose that in the 90% probable state of the world in which there is no infringement, production of the gidget leaves society better off because of greater competition between the products, and all stakeholders of the corporation (employees, shareholders, creditors, etc.) are also better off. On balance, producing the gidget is in the best interests of the corporation on any reasonable conception of that phrase. But according to the court, directors must “ensure” compliance with the statute. According to the court, then, the fiduciary duty requires directors to act in the best interests of the corporation but also requires compliance with a statute and thus requires the directors in the example not to act in any

18. In Iacobucci, supra, footnote 15, I stress the distinction between conceptual indeterminacy and empirical uncertainty, though this may not be clear from the court’s citation of the work in Peoples. As the court observes, I note that in a world of perfect enforcement, the duty ought to be construed to be one to maximize the value of the corporation. I (but not the court) go on to say, however, that since judges are in no position to determine such broad value impacts of given decisions, a narrower duty to shareholders is appropriate; maximizing their welfare will typically be good for other stakeholders as well. Thus, empirical uncertainty may influence the content and application of the duty, but it can be managed in a way that conceptual indeterminacy cannot.


reasonable conception of the best interests of the corporation. This is internally inconsistent.

Perhaps the court, notwithstanding their observation that directors must “ensure” compliance, only had in mind that directors take reasonable care to ensure compliance with statutes. There would, however, remain a potential problem even with this more permissive approach. Directors of many corporations have only attenuated financial stakes in their corporations. In a widely held public corporation, for example, directors may own no shares or bonds in the corporation. Suppose, as in the above example, that the corporation expects to realize profits from engaging in activity that may or may not comply with a statute. The director’s personal cost-benefit analysis is the following: if there is statutory compliance, other people (e.g., the shareholders) benefit; if there is non-compliance, the director personally is vulnerable to a fiduciary duty suit seeking to recover whatever penalties the corporation incurred as a result of non-compliance. There will be a bias toward excessive caution, particularly when one considers the risk-aversion of the director. The problem of over-deterrence is particularly acute given the limitations in s. 124(3)(a) of the CBCA on indemnification for breaches of the duty to act in the best interests of the corporation, which breaches of a statute could establish on the court’s analysis. In sum, the duty to ensure compliance with statutes is misconceived.

It is not altogether clear how the court arrived at its view of fiduciary duty. The court in BCE was appropriately following the precedent in Peoples, but the basis for the approach in Peoples is not self-evident. The court states in Peoples that:

This appeal does not relate to the non-statutory duty directors owe to shareholders. It is concerned only with the statutory duties owed under the CBCA. 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.”

The reference of the court to the “non-statutory duty directors owe to shareholders” is puzzling. Section 122 of the CBCA describes entirely the duties of loyalty and care that directors owe. Indeed, as the Peoples opinion acknowledges in its discussion of the purely objective nature of the duty of care, the statute explicitly departed from important elements of conventional common law duties,

22. Peoples, supra, footnote 2, at para. 42.
including the subjective perspective on the duty of care. The court in 

BCE sensibly avoided reference to non-statutory duties.

Setting that aside, the court appears to conclude that the duty is owed to the corporation and not stakeholders from the straightforward language of s. 122 that speaks only of a duty to act in the best interests of the corporation. For example, when considering whether duties might shift in insolvency, Peoples states that “[t]he various shifts in interest 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.”

While it is fair to conclude that s. 122 is unwavering in its focus on the best interests of the corporation, the problem is that the “best interests of the corporation” offers no guidance, as discussed. It is entirely acceptable, indeed necessary, to interpret a statute with an indefinite meaning so as to give it definite meaning. The BCE opinion, working with precedent, does just that when it bases the otherwise vague and indeterminate “unfairness” analysis required by the statutory oppression remedy on “reasonable expectations”, and moreover offers particular guideposts for the inquiry into reasonable expectations. It would have been open to the Peoples court to maintain a consistent objective, the best interests of the corporation, while recognizing that giving meaning to this otherwise indeterminate expression may depend on particular circumstances, such as insolvency.

The statute by its own indeterminacy does not preclude interpretations of s. 122 that give meaningful guidance on the content of the duty. The case law the court cites illustrates this point. The court cites Teck v. Millar for the proposition that directors may consider non-shareholder interests in fulfilling their fiduciary duty. Teck in turn cites Parke v. Daily News Ltd. with approval. Two observations follow from this acknowledgement of Parke in Teck. First, Parke stands for the proposition that directors have a duty to act in the best interests of the shareholders. There is therefore ambiguity in Teck about whether directors can consider other stakeholders in light of the objective of maximizing shareholder value, or whether directors can consider other stakeholders even at the expense of shareholder value. It is confusing for the court in Peoples to cite Parke, even indirectly, with approval given that

---

23. Ibid., at para. 43.
Peoples and now BCE expressly disavow any special status for shareholders.

Second, Parke offers an excellent illustration of the principle that one could accept that directors have a duty to act in the best interests of the corporation, and also accept an interpretation of this to mean that directors have a duty to act in the best interests of shareholders. Parke states,

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 as a proposition of law was cited to me; I know of none, and in my judgment such is not the law. In Greehalgh 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.

Precedent, cited with approval by Peoples, clearly contemplates a duty to the corporation implying a duty to shareholders. There is no need to read s. 122 as requiring the duty to the corporation to remain undefined.

To summarize, the approach that the court has adopted to the fiduciary duty is indeterminate: there are no “corporate best interests” to look out for, but rather a range of competing stakeholder interests. Without considering here the important follow-on question of how best specifically to interpret s. 122, whether it should be read as a duty to shareholders or something else, suffice it to say that the court’s interpretation is flawed in that it fails to offer meaningful guidance to market participants or adjudicators.

III. DOES INDETERMINACY MATTER?

Having expressed disappointment in the content of the court’s approach to fiduciary duty in Section II, this section turns to a related
issue: does the duty’s indeterminacy matter? Fortunately, the answer, in a nutshell, is, “Not much.” For this the BCE court deserves credit, as this section explains. However, as the section also explains, indeterminacy does create some practical problems.

In the absence of a material conflict of interest, the director’s decision is subject only to very deferential review under the business judgment rule. Peoples cites the following passage from Maple Leaf Foods Inc. v. Schneider Corp. to describe judicial scrutiny of decision-making in the absence of a conflict of interest: “The court looks to see that the directors have made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board’s determination.”

Business judgment deference gives corporate decision-makers wide discretion to make decisions that may in fact advance the interests of one group of stakeholders over another regardless of the precise formulation of the fiduciary duty. This undermines the practical importance of that formulation.

For example, suppose that the court had held that directors have a duty to act in the best interests of shareholders. A question arises whether a particular plant in a small town of dubious profitability should stay open. If a board wished to keep the plant open, fiduciary duties would not present a significant practical obstacle. As long as directors were not self-dealing, nor were there another kind of conflict of interest, the decision about the plant would be protected by the business judgment rule. And given that business decisions are an art, not a science (which is one of the justifications for the business judgment rule), there would be ample scope to make decisions within a range of reasonableness. A plant of dubious profitability could be kept open even under a shareholder primacy rule for any of the following reasons (among others): the plant’s lack of profitability is perceived to be temporary; shareholder-wealth-increasing employee morale in other plants requires the plants to stay open; there is good (i.e., profitable) publicity from keeping the plant open; etc. With the business judgment rule in place, directors can act in pursuit of stakeholder interests facing little practical constraint under s. 122 no matter what the formulation of the duty.

The argument can be put in the converse. If a director does have a


29. See Iacobucci (2003), supra, footnote 15.
conflict of interest, such as in a self-dealing transaction, courts will engage closely with the process and substance behind the decision. Whether the fiduciary duty is framed as one owed to shareholders exclusively or a broader range of stakeholders, all stakeholders would object to a self-enriching conflict transaction in which a director engages. From this perspective as well, whether the duty is to shareholders or others is of little moment.\(^{30}\)

Of course, it is worth appreciating that the duty under s. 122 was in danger of becoming of overwhelming importance under the approach of the Quebec Court of Appeal in \(\textit{BCE}\).\(^{31}\) In essence, the Court of Appeal appeared to treat consideration of particular stakeholder interests, in this case creditor interests, as \textit{mandatory} under s. 122. As the Supreme Court rightly notes, the Court of Appeal appeared to take two different approaches: under one, it would have been necessary for the directors explicitly to consider bondholder interests under their fiduciary duty; under another, it would have been necessary for the directors to make a substantive decision that reflected creditor interests. The second approach represents a radical departure from fiduciary law, even under the broad, stakeholder-oriented approach in \textit{Peoples}. But by holding that in substance directors have only a duty to act in the interests of the corporation and not any particular stakeholder, \(\textit{BCE}\) precludes directors from being \textit{required} to make a decision that substantively advances the interests of creditors (or any other stakeholder, for that matter).

There is ambiguity in the \(\textit{BCE}\) decision about the first approach of the Court of Appeal, which leads to some practical concern. It is not entirely clear whether directors have an obligation to consider as a procedural matter the interests of stakeholders even if there is no substantive obligation to act in their interests. In my view, the better view is found in the relatively clear statement the court makes: “In \textit{Peoples Department Stores}, this Court found that although directors \textit{must} consider the best interests of the corporation, it may also be appropriate, although \textit{not} \textit{mandatory}, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders.”\(^{32}\)

In addition to the clear statement in \(\textit{BCE}\) about \textit{Peoples} that directors \textit{may} (not \textit{must}) consider stakeholders, there is practical reason to prefer the “\textit{may consider}” standard. As the court

\(^{30}\) There are qualifications to this unity of opposition to self-dealing where, for example, there is a controlling shareholder. For discussion, see Iacobucci (2003), \textit{ibid}.

\(^{31}\) \textit{Supra}, footnote 1.

\(^{32}\) \textit{BCE, supra}, footnote 1, at para. 39.
appreciates, there are a host of stakeholders that are affected by
corporate activity. It would be unwieldy at best for a court to attempt
to enforce strictly an obligation on directors to consider all relevant
stakeholders. And it would be inappropriate and inconsistent with
the business judgment rule for courts to decide on their own which
subset of stakeholders must be considered in any given case. The
“must consider” standard would invite excessive caution on the part
of boards as they, perhaps disingenuously, “consider” any
conceivable stakeholder interest solely for the point of reducing the
risk of judicial intrusion.

Notwithstanding the wisdom of the “may” not “must consider”
approach, BCE does contain statements about the duty to consider
that are somewhat unclear. It is worthwhile repeating the following
passage where the court related fiduciary duties and oppression:33

The fact that the conduct of the directors is often at the centre of oppressions
actions might seem to suggest that directors are under a direct duty to
individual stakeholders who may be affected by a corporate decision.
Directors, acting in the best interests of the corporation, may be obliged to
consider the impact of their decisions on corporate stakeholders, such as the
debentureholders in these appeals. This is what we mean when we speak of a
director being required to act in the best interests of the corporation viewed
as a good corporate citizen. However, the directors owe a fiduciary duty to
the corporation, and only to the corporation.

What, exactly, is meant by the statement that “Directors, acting in
the best interests of the corporation, may be obliged to consider the
impact of their decisions on corporate stakeholders . . .”? When does
this obligation arise? Will courts strictly enforce it? The fundamental
problem in answering these questions is that the “best interests of the
corporation” does not have meaning, which necessarily obscures
whatever obligations follow from this objective.

The better reading of BCE, in my view, is that there is not an
obligation on boards to consider all relevant stakeholders. Rather,
boards can exercise their business judgment about what interests are
relevant to the “best interests of the corporation” as they see it
(including stakeholders with potentially relevant “reasonable
expectations” about board decisions), and consider those interests
in fulfilling their fiduciary duty. Even if I am wrong about this and
boards must consider all or some stakeholders as matter of their
fiduciary duty, business judgment rule protection would continue to
protect from judicial scrutiny the actual substantive decisions that the
board makes. While the “must consider” approach would be
inappropriate, the business judgment rule would ensure that

33. Ibid., at para. 66.
boards that prefer in the end to act to maximize shareholder and/or creditor and/or employee etc. value would be able to do so, just as the business judgment rule allows directors such freedom under traditional shareholder primacy. Even the most intrusive reading of the Supreme Court’s decision in BCE allows considerable directorial freedom in substance, which undermines the practical importance of the fiduciary duty’s incoherence. But one practical implication of the duty’s indeterminacy is that there is some uncertainty about the bounds of the procedural duty to consider stakeholder interests.

In addition to the troublesome “may/must consider” ambiguity about procedural obligations, there are some other practical drawbacks of the court’s indeterminate formulation of corporate fiduciary duties. The first point turns on the expressive function of law. Law may sometimes influence by expressing a social preference without resorting to sticks or carrots to induce a certain kind of behaviour. It is an empirical question, but it is reasonable to suppose that there are a number of directors who, even if freed from the shackles of potential liability, would seek to do what the law asked of them. That is, they are eager to do the “right thing” if simply told what the right thing is. Such a hortatory function of the fiduciary duty is lost under the current formulation in Peoples and BCE. Being told to act in the best interests of the corporation, not stakeholders, is not guidance. It is not that it is ill-conceived guidance, but rather it is not guidance at all. A director seeking concrete advice on what her duty requires will be as well off as the bus driver with competing passenger interests being told to act in the best interests of the bus. Thus, even if legal enforcement of corporate fiduciary duty is relatively toothless under any formulation because of the business judgement rule, the rule may matter in influencing directors who in good faith simply seek to fulfil their statutory duties.

There is another sense in which the fiduciary duty matters in practice: the formulation of the fiduciary duty has implications for determining who is permitted to sue for its breach.34 Fiduciary duties are owed to the corporation. But since those accused of breaching these duties are frequently those in control of the corporation, the CBCA and other Canadian corporate statutes contemplate derivative actions in which stakeholders, following certain conditions precedent, are permitted to launch an action in the name of the corporation. Section 238 of the CBCA sets out that security-holders, and “proper persons” in the view of a court, are permitted to seek leave to bring actions on behalf of the corporation. Similarly,

34. Iacobucci (2003), supra, footnote 15.
security-holders and "proper persons" may apply for an oppression remedy, which can be ordered in the face of a wrong to the corporation as a whole, such as a fiduciary duty breach.\footnote{See, e.g., Sparling v. Javelin International Ltd., [1986] R.J.Q. 1073 (S.C.), var'd [1992] R.J.Q. 11, 43 Q.A.C. 16 (C.A.), leave to appeal to S.C.C. refused 53 Q.A.C. 169n.}

The content of the fiduciary duty has implications, or at least should have implications, for a court’s evaluation of a particular stakeholder’s claim to be a “complainant” pursuant to the derivative action or oppression remedy with respect to an alleged breach of fiduciary duty. If the duty were defined narrowly as in Parke to be a duty to act in the best interests of shareholders, then the court ought to take a narrow approach to allowing other stakeholders, such as creditors, to act as complainants under these procedures: as in other areas of law, the right to sue is assigned to those with a stake in the litigation. In contrast, under BCE and Peoples, there is or ought to be greater scope to qualify as a complainant under the derivative action or the oppression remedy. The duty to the corporation may entail consideration of employees, customers, suppliers, government and the environment, to name a few, so it is natural to conclude that these parties ought to be considered to be potential claimants under the derivative action or the oppression remedy: they potentially have the something at stake under fiduciary duty.

Support for the conclusion that the procedure should follow substance is found in the Supreme Court’s approach to procedure for the duty of care in Peoples and BCE. In Peoples, the court noted that the statutory duty of care in s. 122(1)(b) does not explicitly name a beneficiary of the duty. In determining that creditors had a cause of action for breach of the duty, the court turned to provincial procedure, in that case art. 1457 of the Civil Code of Quebec, which creates a cause of action where one person does not abide by the “rules of conduct” and causes damages to another. Given that the substance of the statutory duty of care does not exclude a duty to creditors, and given that they could be harmed by negligence, the court concluded that procedure and substance together imply that creditors do have the right to bring a duty of care suit.

Peoples did not address the cause of action that may or may not be available to creditors in other jurisdictions that do not have Art. 1457 of the C.C.Q. This was, and continues to be, unfortunate. In BCE, the court returned to this question in passing, noting that s. 122(1)(b) does not itself provide a foundation for claims, while also suggesting that Canada v. Saskatchewan Wheat Pool\footnote{See, e.g., Sparling v. Javelin International Ltd., [1986] R.J.Q. 1073 (S.C.), var’d [1992] R.J.Q. 11, 43 Q.A.C. 16 (C.A.), leave to appeal to S.C.C. refused 53 Q.A.C. 169n.} implies that “courts may
take [s. 122(1)(b)] into account as to the standard of behaviour that should reasonably be expected”. 37 It is unfortunate that the court was not definitive on the matter, but two points are reasonably inferred from the court’s discussion. First, since Peoples seems to suggest that the duty of care is likely in substance owed to creditors, the court is likely to find that a procedural right to creditors to enforce this duty follows. This is certainly true in Quebec — the only residual confusion elsewhere arises to the extent that the C.C.Q. was used not just for procedure, but also in part to ground the substantive duty owed to creditors. The second point from Peoples is of greater relevance to this article: since the fiduciary duty to the corporation comprehends attention to the interests of a range of stakeholders, derivative action and oppression remedy procedures ought to be receptive to claims by a range of stakeholders.

A wider range of potential complainants about fiduciary misconduct logically follows from the expansion of the nature of the duty itself, but raises potential concerns. Even if business judgment rule protection shields disinterested directors from liability for their substantive decisions, the threat of litigation is itself a concern to managers for a number of reasons, including the costs of fighting the litigation, potential reputational costs, and the risk of judicial error; the latter is sharply illustrated by the wrong-headed approach of the Court of Appeal in BCE itself. Moreover, litigation risk is magnified if BCE is interpreted (inappropriately) to hold that directors “must” (rather than “may”) consider all relevant stakeholders. In short, the risk of litigation is likely to be greater under the BCE/Peoples approach with a wide range of potential claimants, and a wide range of potential substantive complaints, than under the Parke adoption of shareholder primacy. And there are potential problems when sharply different interests have a possible influence over management because of the threat of litigation. Managers will face conflicting influences that could threaten the coherence of their approach. 38 I do not wish to overstate the problems that result from allowing parties with disparate interests to launch probably unsuccessful lawsuits, but indeterminacy risks the expansion of litigation uncertainty that could have detrimental effects.

37. BCE, supra, footnote 1, at para. 44.
38. There is a reason, for example, that cooperative organizations rarely exist, and when they do they tend to arise where there are homogeneous owner/users. See Henry Hansmann, The Ownership of Enterprise (Cambridge, MA, Harvard University Press, 1996).
In sum, for the most part, the corporate fiduciary duty’s indeterminacy is not important given the business judgment rule. But there is uncertainty whether boards must or may consider stakeholders, concern about the lost expressive function of an indeterminate duty, and concern about the range of potential claimants who may plausibly perceive themselves to be “proper persons” and thus complainants under the derivative action or oppression remedy.

There is one other area, takeovers, in which the court’s indeterminate approach matters in practice. Given the range of issues that arise in discussing this subject, I devote the next section to it.

IV. TAKEOVERS AND FIDUCIARY DUTIES

In this section, I focus on a particular application of directors’ fiduciary duties that has been the subject of several cases and reams of commentary: how should directors act in takeover settings? This section analyzes directors’ duties in the context of takeovers and how the court’s approach in BCE qualifies the conclusion that indeterminacy is of relatively little practical importance.

BCE involved a takeover. Some have suggested that the catholic approach to the “best interests of the corporation” that the court took in Peoples does not apply in the takeover setting. There is some justification in principle for treating takeovers as distinct, as I discuss below. But Peoples left little room for context-specific shareholder primacy under the fiduciary duty. Recall the following passage cited above:39

The various shifts in interest that naturally occur as a corporation’s fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(a) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders. This statement is clear: economic circumstances change, but the duty to the corporation, not stakeholders, does not. It would be difficult to reconcile this statement with a rule that provides that in takeover settings directors owe fiduciary duties to shareholders not other stakeholders.

In BCE, the court did not accept that a duty to shareholders exists in a takeover setting; however, it reached this conclusion in a confusing way. In particular, its reference to Revlon was framed oddly. The court reported that it had been argued before it that the “Revlon line’
of cases from Delaware support the principle that where the interests of shareholders conflict with the interests of creditors, the interests of shareholders should prevail." The court concluded that:

What is clear is that the Revlon line of cases has not displaced the fundamental rule that the duty of directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces.

The court then cited an excerpt from former Delaware Supreme Court Justice Veasey in an academic journal, including the following: "There are times, of course, when the focus is directly on the interests of the stockholders [i.e., as in Revlon]. But, in general, the directors owe fiduciary duties to the corporation, not to the stockholders." The court's discussion of Revlon raises the following reactions. First, Revlon is not primarily about shareholder-creditor conflicts. Second, the Unocal/Revlon emphasis on shareholder primacy is not exceptional in Delaware law. Third, Unocal and Revlon are exceptional not for their emphasis on shareholder primacy, but rather for their relatively close scrutiny of managerial decision-making in takeover settings.

The first point is that it was peculiar for the court to frame Unocal and Revlon as being about shareholder-creditor conflicts. Shareholder-creditor tensions were incidental to the core issue in these cases, which is how much freedom directors have in making decisions that affect the outcome of takeover bids. In Unocal, a hostile bidder sought control of a target corporation in part through a two-tiered bid in which the back-end consideration would consist in large part of high-yield, risky bonds. The board sought to resist this bid and decided to make a self-tender offer which would exclude the hostile bidder's participation. The relationship between creditors and shareholders was not an issue before the court, but rather the

40. In *BCE*, supra, footnote 1, at para. 86, the court cited Revlon, supra, footnote 4, and *Unocal Corp. v. Mesa Petroleum*, 493 A.2d 946 (Del. S.C. 1985) as being in the "Revlon line of cases".
41. *BCE*, supra, footnote 1, at para. 85.
42. *BCE*, ibid., at para. 87.
43. E. Norman Veasey with Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments" (2005), 153 U. Pa. L. Rev. 1399 at p. 1431. Emphasis in original. Reference to Revlon in square brackets was added by the Supreme Court, but refers to a footnote in original citing Revlon case.
45. *Supra*, footnote 41.
central question was whether directors had the discretion to make the discriminatory self-tender and thus deter the hostile bidder.

In Revlon, a board responded to a hostile bid by seeking out a friendly alternative bidder for the target. The board favoured the friendly bidder over the other in part, the board said, because the friendly bid better protected creditor value. The Delaware court rejected the board’s actions, stressing that the board could not play favourites in an auction of the company. One aspect of this favouritism, but only one among several, was ostensibly preferring a bid that supported creditor value. Shareholder-creditor relations were incidental to the central matter of the court’s disapproval of the board’s biased auction.

Thus, Revlon and Unocal were not centrally about shareholder-creditor conflicts, contrary to the court’s suggestion. The second point that follows from the court’s discussion is also about what Revlon and Unocal are not: they ought not to be considered as exceptional with respect to shareholder primacy.

The first question to be answered here is analytical: why would there be a reason to shift to shareholder primacy in the takeover setting when there is a different rule ordinarily? At best, there is no reason to conclude that shareholders should suddenly matter, and that other stakeholders should suddenly recede in importance, when a takeover bid arises. Shareholders in publicly traded companies (the subject of tender offers) can sell their shares at any time and will always be concerned about getting value for their shares — why should the takeover setting change corporate objectives? Indeed, there is reason to suppose that, at least in some cases, takeovers present a significant risk of harm to non-shareholder stakeholders, like employees facing job cuts, or creditors (as in BCE) facing increased risk. If one took a stakeholder approach to the “best interests of the corporation” generally, it would be odd to abandon it just when other stakeholders may be particularly vulnerable.

Moreover, as a doctrinal matter, the opinions in Unocal and Revlon themselves do not suggest that their focus on shareholder welfare is exceptional. In analyzing the board’s duties in Unocal, the court stated: “In the board’s exercise of corporate power to forestall a takeover bid our analysis begins with the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation’s stockholders.”46 There is no discussion about why this objective is exceptional; it is simply the starting point. Admittedly, subsequently on the same page the court alluded to the

46. Ibid., at p. 455.
possibility of a stakeholder-oriented approach to evaluating directorial conduct. In analyzing a takeover bid’s effect on the “corporate enterprise”, the court observes that directors may consider such concerns as: “inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally) ...”.

One interpretation of this passage is that *Unocal* is consistent with the *Peoples/BCE* stakeholder approach to the corporation’s best interests in takeover contests, which would help explain why the Canadian Supreme Court quoted this passage in *BCE*.47 But in a passage not cited by the Supreme Court in *BCE*, such an interpretation was rejected in *Revlon*, which stressed shareholder primacy. The court in *Revlon* was confronted, as noted above, by directors claiming to have favoured one bidder over another in part out of respect for creditor interests. The court rejected their acts, making the following clear statement about shareholder primacy:

The *Revlon* court clearly confines the scope of consideration of broader stakeholder interests: it is simply a means to the end of shareholder value.

There is nothing exceptional, despite the Supreme Court’s insinuation to the contrary, about the *Unocal/Revlon* emphasis on shareholders. *Unocal* takes shareholder primacy as a starting point; *Revlon*, without discussion of the exceptionality of the rule, confirms that consideration of other stakeholders is appropriate only to the extent that it advances shareholder welfare. The third point for consideration, however, is that *Revlon* and *Unocal* are exceptional in their *application* of that principle. While in most contexts directors may exercise discretion in making decisions that are protected from judicial scrutiny by the business judgment rule, *Unocal* and then *Revlon* establish that the business judgment rule does not presumptively apply in the context of a hostile takeover bid. It does

47. *BCE*, supra, footnote 1, at para. 86.
not make sense to change corporate objectives in the context of a takeover bid, and *Unocal/Revlon* do not do so. But it may make sense to be less trusting of directors’ discretion in a takeover context, and *Unocal/Revlon* are.

*Unocal* requires directors who take actions to resist a takeover bid to show that the bid poses a danger to corporate policy and effectiveness, and that their reaction is reasonable in relation to the threat. The onus is on directors to prove the threat and to prove that their reaction was proportionate. This contrasts with the business judgment rule, which in Delaware is explicitly framed as a presumption of the honesty, good faith and care of directors.49 *Revlon* holds that if the sale of a company becomes inevitable, directors have a duty to auction the company in pursuit of the highest possible price for shareholders; they do not have business judgment protection for decisions that favour one bidder over another.

It is helpful to examine two reasons why *Unocal/Revlon* depart from the ordinary business judgment rule. First, the cases recognize a potential conflict of interest between directors and shareholders that does not arise in the ordinary course. As *Unocal* famously put it, in the context of considering a takeover bid, “Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.”50 This “enhanced scrutiny” recognizes that directors may be out to protect their jobs rather than the shareholders in resisting a bid and compels them to justify any defensive measures.

Another reason for close scrutiny of directors’ decisions is stressed in *Revlon*. The (traditional) goal of the board is to maximize shareholder wealth. In the ordinary course this may well involve consideration of other stakeholder interests as a means to this end. For example, directors may choose to pay unpromised bonuses to employees in order to boost morale and future profit; or directors may choose to confer unbargained-for benefits on consumers to

---

49. The presumptive nature of the business judgment rule got lost when imported into Canada to the point where Canadian cases purport to apply the “business judgment rule” without resolving on whom the onus lies (see, e.g., *Maple Leaf Foods Inc. v. Schneider Corp.*, supra, footnote 28). But the placement of the onus of proof is integral to the Delaware business judgment rule. In *BCE* the court frowns on the use of the “business judgment test” in arrangement proceedings because of the potential conceptual confusion with the “business judgment rule”. *A fortiori* adopting the term “business judgment rule” in Canada without adopting the actual business judgment rule is a mistake, in my view.

50. *Unocal*, supra, footnote 41, at p. 954.
boost reputation and future profits. But where all shares are being sold and the only question is at what price, these other possible motivations for stakeholder consideration are not present (at least with respect to existing shareholders). Courts are thus better able to evaluate directors’ decision-making: in an auction, they must seek the highest price for shares. This too supports closer judicial scrutiny of directors’ decisions.

*Unocal* and *Revlon* jointly establish that the straightforward business judgment rule does not apply in the takeover context. These cases suggest that courts will not reflexively defer to directors in carrying out their (unexceptional) mandate to maximize shareholder value. Takeovers are different not in their requirement of shareholder value maximization, but in their evaluation of directors’ conduct in pursuit of this aim.

What implications does this analysis have for *BCE*? In *BCE*, *Revlon* was invoked to justify a directors’ decision to maximize shareholder value. In Delaware, such a decision does not require justification. It is only because directors might *not* seek to maximize shareholder value that *Revlon* or *Unocal* are relevant. The decision of the directors in the present case voluntarily to put their corporation up for sale in a fair auction would be uncontroversial in Delaware. In contrast, in Canada *Peoples* and now *BCE* establish that there is never a duty directly to shareholders, rendering this aspect of *Revlon/Unocal* inapplicable.

On the other hand, what is truly exceptional about *Revlon/Unocal*, the intermediate scrutiny standard, could conceivably apply no matter what objective directors must pursue under their fiduciary duty. Thus, in principle, the “omnipresent spectre of self-interest” could motivate stricter scrutiny of a board’s decision-making in the face of a hostile takeover bid, for example. Consideration of this possibility raises an important sense in which the indeterminacy of the court’s fiduciary duty has practical implications: under *Peoples* and *BCE* courts would be unable to scrutinize carefully directorial conduct in a takeover (or any other) setting. This is because close scrutiny cannot reveal violations of an indeterminate duty. By what metric would courts measure a board’s adherence to their fiduciary duty in resisting a hostile bid, for example? Hostile bidders seek control in order to change the status quo. Some stakeholders will be harmed by a change in the status quo. Boards therefore can always plausibly defend against a claim of a fiduciary breach by claiming that their actions were in the “best interests of the corporation” as they understood them. Indeed, given the Supreme Court’s acceptance in
of the concept of a conflict between "stakeholders" as a group and the corporation itself, it is at least possible that the court would accept an argument that defending against a bid that would be good for all stakeholders was in the best interests of the corporation.

Indeterminate directors' fiduciary duties fail to guide directors, give rise to possible litigation by a variety of stakeholders, and furthermore effectively preclude close scrutiny of directorial decision-making in the takeover setting.

V. CONCLUSION

I have outlined how I believe the court in BCE fails to articulate a determinate fiduciary duty. Fortunately this decision has relatively limited, but not zero, practical importance. I conclude with the following two points.

First, much of what the court does in BCE was required by the decision in Peoples. The fundamental problem is the undefined duty to the corporation that Peoples creates. While there are some flaws in the reasoning of the court in BCE, much of its opinion was constrained by recent, and therefore very unlikely to be overturned, precedent.

Second, the focus of my concern about the courts' decisions on fiduciary law is its indeterminacy. Much ink has been spilled over the optimal approach to fiduciary law generally. While I am sympathetic to the view that duties should be owed to shareholders, this view is beside the point for present purposes. No matter what one's view on the particulars, it is difficult to defend a fiduciary duty that fails to guide either directors or courts.

"Reproduced from Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48 Canadian Business Law Journal 232, by permission of Thomson Reuters Canada Limited."

51. See, e.g., Stakeholder Symposium, supra, footnote 27.