BCE AND THE PEOPLES’ CORPORATE LAW:
LEARNING TO LIVE ON QUICKSAND

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I. INTRODUCTION

This article discusses two recent Supreme Court of Canada holdings: Peoples Department Stores Inc. (Trustee of) v. Wise\(^1\) and BCE Inc. (Arrangement relatif à) (Re).\(^2\) Although much of both decisions is per incuriam, obiter dictum, or both, these rulings have thrown the most basic principles of corporate law into a state of uncertainty and confusion. In my view, only legislative intervention (in particular, declaring that directors’ duties are owed to shareholders alone) can adequately address the difficulties that these rulings have created.\(^3\)

II. THE CONCEPTUAL INDETERMINACY OF THE SUPREME COURT’S STANDARD

The central question in BCE is no less than the central question in all of corporate law: to whom are directors’ duties owed? The Canada Business Corporations Act\(^4\) (CBCA) and cognate statutes state that directors (and officers) must “act honestly, in good faith, and in the best interests of the corporation”.\(^5\) How then, do we interpret the “best interests of the corporation”?

The traditional answer to this question in both English and Canadian common law, as well as both prior and contemporaneous federal statute law, is that “the corporation” means “the shareholders”.\(^6\) The Supreme Court, however, states that “the

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3. The issues discussed in this comment are more fully discussed in a longer article currently in preparation.
5. CBCA s. 122(1)(a) (emphasis added).
6. See MacIntosh, supra, footnote 3.
corporation” does not mean any particular stakeholder group, or even stakeholders as a group. Thus:

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 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.

The italicized parts highlight the extraordinary absence of any metric by which directors’ conduct can be planned or judged. What are the “relevant considerations”? What does it mean to act “as a responsible corporate citizen”? The Supreme Court appears to expect corporate directors, and judges ex post facto, to function as an enlightened breed of Philosopher Kings ardently and faithfully pursuing some elusive Aristotelian mean. I fully endorse Professor Iacobucci’s view that the Supreme Court’s standard is not merely vague, but devoid of substantive content. His clever and apt bus analogy amply demonstrates the conceptual aridity of the concept.

In fact, since directors are elected by shareholders alone (and are often shareholders themselves), I suspect that in most cases they will continue to operate much as they did before BCE, and maximize shareholder wealth. Nonetheless, the yardstick selected by the Supreme Court can only give dishonest directors more freedom to misbehave. Given that (i) directors’ decisions on what is in the best interests of the corporation are subject to the business judgment rule, and (ii) the objective that they are told to pursue has no intellectual anchor, it will not be difficult for wayward directors to cook up some plausible story that roughly fits the amorphous parameters established by the court.

7. See, e.g., paras. 37 and 66 of BCE, supra, footnote 2. See also Peoples, supra, footnote 1, at para. 43 (“The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.”)

8. BCE, supra, footnote 2, at para. 82 (emphasis added).


10. I would only add that in my view there is only one standard that is operationally coherent and normatively sound, and that is shareholder wealth maximization. Since I have written on this elsewhere, I will not repeat the arguments here. See Jeffrey G. MacIntosh, “The End of Corporate Existence: Should Boards Act as Mediating Hierarchies?” in A. Anand and W. Flanagan, eds., The Corporation in the 21st Century: Proceedings of the 9th Annual Queen’s Annual Business Law Symposium (Kingston: Queen’s Printer, 2002) at p. 276.

11. BCE, supra, footnote 2, at para. 40.
In addition, without any reliable metric to constrain them, the standard is an open invitation for both directors and judges to indulge their political preferences. While once again hard-nosed directors will rarely stray from the straight and narrow, the same cannot necessarily be said for judges, whose self-interest in no way constrains their political peregrinations.

III. PEOPLES AND BCE ARE PER INCURIAM

One of the truly remarkable aspects of Peoples is that the Supreme Court ignores a vast English and Canadian jurisprudence accepting shareholder primacy and bases its interpretation of s. 122(1)(a) of the CBCA on a single obiter dictum found in a lone trial court holding. In BCE, the Supreme Court compounds this error by accepting Peoples, without further analysis, as an authoritative statement of the law. Both decisions are thus per incuriam.

Indeed, there are a number of prior Supreme Court rulings that either directly, or by necessary implication, adopt the shareholder primacy view. The most recent of these is Hercules Managements Ltd. v. Ernst & Young. In Hercules, individual shareholders sought to hold the corporation’s auditor liable to them personally in respect of an allegedly negligent audit report. The Supreme Court held, on the basis of the principle in Foss v. Harbottle, that there was no genuine issue for trial. A negligently prepared audit report “will result in a wrong to the corporation”, which the court equated to “all shareholders as a group”. The court also endorsed Lord Bridge’s comments in Caparo Industries plc v. Dickman that:

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 auditors in the name of the company, not by individual shareholders.

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12. MacIntosh, supra, footnote 3.
14. Macintosh, supra, footnote 10 and MacIntosh, supra, footnote 3.
16. (1843), 2 Hare 461, 67 E.R. 189 (Ch.).
17. Hercules, supra, footnote 15, at para. 60.
18. Caparo Industries plc v. Dickman, [1990] 1 All E.R. 568 at p. 580, [1990] 2 W.L.R. 358 (H.L.) (emphasis added by the Supreme Court). Note that at the time Hercules was decided, neither the duty of loyalty nor the oppression jurisprudence was materially different from that which prevailed when Peoples and BCE were decided; nor was the Manitoba statute under which Hercules was decided...
The Supreme Court has held that it is not bound by its prior decisions. Nonetheless, in every case in which it has overruled its own prior precedent, it has done so only after anxious consideration.\(^ {19} \)

The failure to even mention *Hercules* (or other pertinent authority on point) shows that its decisions in *Peoples* and *BCE* were not deliberate reversals of *Hercules* and other relevant precedent, but were simply *per incuriam*. On this basis, the Supreme Court is free in subsequent cases to repudiate its holdings in *Peoples* and *BCE*.

Regrettably, an opportunity to do so may not arise for many years. Indeed, given the small number of corporate cases that the court hears, and the low probability that the same issues will be raised,\(^ {20} \) it may well be another generation before the issue is heard again. Thus, the real question is whether lower courts should follow *Peoples* and *BCE*. Unfortunately, there is little authority on whether lower courts are free to disregard *per incuriam* decisions of higher courts.\(^ {21} \) Whatever the answer to that question, however, it is likely that collegial deference will dissuade lower court judges from departing from *Peoples* and *BCE*. This merely emphasizes the need for a legislative response to the two decisions, making it clear that directors’ duties are owed to the shareholders.

**IV. “MUST”? OR “MAY”?**

One of the least satisfying aspects of *BCE* is the number of contradictory or inconsistent statements on various points of law.\(^ {22} \)

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\(^{20}\) Tactical considerations typically prompt counsel to argue their case from within the parameters of decided law, rather than asking the Supreme Court to reverse a prior decision. These considerations were at work in the *BCE* case. Despite *Peoples* being *per incuriam*, counsel for *BCE* refrained from the relatively high-risk strategy of questioning the correctness of the *Peoples* judgment, and opted instead to focus their arguments on convincing the court that the *BCE* directors had acted within the parameters of the *Peoples* holding.

\(^{21}\) See Macintosh, *supra*, footnote 3. The Supreme Court holding in *R. v. C.* (T.L.), [1994] 2 S.C.R. 1012, 117 D.L.R. (4th) 340 suggests that *per incuriam* cases may be disregarded, but it is not clear if this was meant to apply to the Supreme Court alone, or to all courts.

\(^{22}\) Even the central holding of the case — that shareholders have no privileged position *vis-à-vis* other corporate constituents in directors’ decision-making — is contradicted. In *BCE*, *supra*, footnote 2, at para. 64, the court stated: “The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly.” That suggests a sort of conditional shareholder primacy, in which directors are entitled to pursue
A key example arises in connection with the issue of whether directors may or must consider particular constituencies in particular situations. The following adopts the “may” view:

In 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.23

But later on the court switches gears and adopts the “must” view.24 Regrettably, the basis for this switch is unclear. One passage suggests that a duty to consider may arise out of the reasonable expectation of a particular constituency.25 Another states that “the content of this duty” will be “affected by the various interests at stake” judged against the factual context.26 This latter statement apparently posits a purely objective (but fact-based) basis for a duty to “consider”. Yet another passage states that “[t]he duty of directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders equitably and fairly”.27 The use of the word “equitably” suggests that the issue of fair treatment is not to be adjudicated in the abstract, but in view of each constituency’s treatment in relation to other constituencies. If so, this passage comprehends a mandatory consideration of all of the various interests at stake that arises independently of the factual background (although necessarily implemented with reference to that background).

In short, the vital issue of whether directors “may” or “must” consider particular constituencies is shrouded in mystery. Similarly, if they must, the basis upon which this duty arises is impenetrably murky. These contradictory passages render any attempt to encapsulate the Supreme Court’s reading of directors’ duties an exercise in futility.

V. WHAT IS OBITER? WHAT IS RATIO?

Both groups of debentureholders abandoned their cross-appeals on the oppression remedy at the Supreme Court hearing. Thus, the

shareholder wealth maximization, subject to the constraint of treating other constituencies fairly. That is at odds with the earlier quoted passages. See supra, footnotes 7 and 8 and accompanying text.

24. Ibid., at paras. 66, 82, 99, 102 and 104.
25. The court concluded that the debentureholders in BCE did in fact have a reasonable expectation that the directors would consider their interests. See BCE, ibid., at para. 102.
26. Ibid., at para. 99.
27. Ibid., at para. 82.
entire discussion of the oppression remedy in *BCE* is *obiter*. But must lower courts follow it anyway?

In my view, the answer is partly yes, and partly no. It is undoubtedly true that Supreme Court *obiter dicta* are to be accorded more weight than those of other courts. Nonetheless, in *R. v. Henry*, the Supreme Court expressly repudiated the view that lower courts must follow all of its *obiter dicta*. The court stated:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not “binding”...

In addition, in *R. v. Schwartz*, the Supreme Court has suggested

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28. Para. 30 of the *BCE* judgment, *ibid.*, erroneously states that “[t]he issues, briefly stated, are whether the Court of Appeal erred in dismissing the debentureholders’ s. 241 oppression claim and in overturning the Superior Court’s s. 192 approval of the plan of arrangement”. In fact, in their factums, both groups of debentureholders formally abandoned their oppression cross-appeals (a fact acknowledged in para. 48 of the judgment). The two issues argued in the factums and before the court were: (i) the scope of the directors’ fiduciary duty under s. 122(1)(a) of the *CBCA*, and (ii) the meaning of “fair and reasonable” in connection with a s. 192 arrangement. The Supreme Court justified its discussion of the oppression remedy by stating: “As certain aspects of [the debentureholders’] position are properly addressed within the context of an analysis of oppression under s. 241, we have considered them here” (at para. 48). Neither of these “certain aspects”, however, rescues the oppression discussion from being *obiter*. First, in their factums, both groups of debentureholders supported their s. 192 submissions by arguing: (i) that that which is oppressive is, *ipso facto*, not fair and reasonable in a s. 192 arrangement; (ii) on the facts, there was oppression; and (iii) therefore the arrangement was not fair and reasonable. These submissions did therefore invite the Supreme Court to examine the transaction from the standpoint of the oppression remedy. Nonetheless, on the facts, the Supreme Court concluded that there was *no* oppression. It further held that “the s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries”: *ibid.*, at para. 47. This renders the oppression discussion *obiter*, since it may safely be removed from the case in its entirety without in any way affecting the court’s holding in respect of s. 192.

Second, as discussed below, the Supreme Court examines the oppression jurisprudence with a view to informing the nature of the directors’ fiduciary duty under s. 122(1)(a). This conflation of the two provisions is not only novel — it is *per incuriam*. But in addition, since the point was not argued in the appeal, prior holdings of the Supreme Court suggest that it should be treated as the sort of *obiter dictum* that need not be followed by lower courts. See *R. v. Henry*, [2005] 3 S.C.R. 609, 260 D.L.R. (4th) 411; *R. v. Hyne*, *supra*, footnote 18; *R. v. Schwartz*, [1977] 1 S.C.R. 673, 67 D.L.R. (3d) 716.


that *obiter* relating to points of law that were not fully argued before the court should be accorded a less deferential status than those that were.

What, then, of *BCE*? It would be disingenuous to argue that the Supreme Court’s discussion of the oppression remedy was not “obviously intended for guidance”. In addition, submissions were made by all litigants in *BCE* on whether the debentureholders’ reasonable expectations were violated. Thus, the Supreme Court’s discussion of reasonable expectations appears to fall within the class of *obiter dicta* that lower courts should follow. None of the parties to the appeal, however, made submissions relating to any other aspect of the oppression remedy. Thus, the balance of the discussion appears to consist of *obiter dicta* of the variety that lower courts should not feel bound to follow.

VI. CONFLATING THE OPPRESSION REMEDY AND THE DUTY OF LOYALTY

In exploring the content of the directors’ duty of loyalty (the fiduciary duty), the court conflates the duty of loyalty and the oppression remedy: For example:

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.32

The court also seems to suggest that “reasonable expectations” is now a part of the duty of loyalty.33 In like fashion, the concept of acting “in the best interests of the corporation” is imported from s. 122(1)(a) into the oppression remedy.34 In net, two independent liabilities are surgically merged into Siamese twins of apparently identical mien.

There are a number of difficulties with this position. First, the duty of loyalty and the oppression remedy are independent statutory provisions. They have independent purposes (a fact explicitly acknowledged by the court).35 While the duty of loyalty specifically seeks to hold directors accountable to shareholders, the oppression remedy was enacted to address shortcomings in the law relating to the treatment of minority shareholders.36 It is drafted quite differently

32. *BCE*, supra, footnote 2, at para. 36. See also paras. 39 and 82.
33. See especially para. 82, *ibid*.
34. *Ibid*., at para. 66.
from the duty of loyalty, and (in respect of its own substantive territory) has always been regarded as establishing a different and lower threshold for liability than s. 122(1)(a). 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 another, particularly given the stark differences in both drafting and function.

Second, to the extent that the courts have propounded a “fair treatment” doctrine under the duty of loyalty, it is one that operates solely in the interest of different classes of shareholders. To assert that it is co-extensive with the “fairness” doctrine under the oppression remedy is simply incorrect.

Third, the notion that the directors must act “in the best interests of the corporation” is a livery that ill-fits the oppression remedy. The Dickerson Committee anticipated that the oppression remedy would be used primarily to redress personal wrongs, with some admixture of actions of a formally derivative character (mostly arising in private corporations) where the true nature of the lis is a dispute between majority and minority shareholders. The Supreme Court seems to recognize this in stating:

Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors.

The predominantly personal flavour of the oppression remedy is why it requires that the complainant show harm to a “security holder, creditor, director or officer”.

A number of observations are in order. First, the drafting of the oppression remedy does not permit a complainant to succeed by showing harm to the corporation; only harm to a security holder, creditor, director or officer will do. And as we have been told in Peoples and BCE, none of these should be “confused” with “the corporation”.

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38. Under the stewardship of Robert W.V. Dickerson, the committee produced a legislative report (volume 1), a draft statute (volume 2), and commissioned a number of background studies (volume 3). See Proposals for a New Business Corporations Law for Canada (Canada Supply and Services: Ottawa, 1971) (referred to hereinafter as the “Dickerson Report”).
40. BCE, supra, footnote 2, at para. 45.
41. CBCA s. 241(2).
of the corporation” into the oppression remedy mixes apples and oranges.

Second, this same drafting expressly forbids a court from taking into account the full range of interests that the Supreme Court hints might be “considered” by directors in prosecuting their duty to the corporation.\textsuperscript{43} This further emphasizes the ill-fit between the oppression remedy and the admonition that the directors must act in “the best interests of the corporation”.

Third, acting in the best interests of “the corporation” could easily entail running roughshod over the reasonable expectations of particular constituencies, driving a wedge between the jurisprudential foundations of the oppression remedy and the duty of loyalty. This may in fact underlie the Supreme Court’s introduction of a novel two-step process for determining whether oppressive conduct has occurred. If, under the oppression remedy, directors are expected to act in the best interests of the corporation, then reasonable expectations can ground only defeasible rights. While (given the premises) this logic is inexorable, it leads to the unfortunate result of materially diminishing the ability of the oppression remedy to redress wrongs to its client constituencies.

Finally, the shotgun marriage of the duty of loyalty and oppression remedy creates yet further uncertainty regarding both. Are all oppression cases to be mapped into the duty of loyalty, and vice-versa?\textsuperscript{44} Again, this uncertainty cries out for a legislative solution.

VII. WHAT CONSTITUTES A “REASONABLE EXPECTATION”?\textsuperscript{45}

Yet another key issue that is wrapped in contradictory statements is the central question of what is capable of grounding a “reasonable expectation”. We are told in one passage (“proposition 1”) that “the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation”. On this view, reasonable

\textsuperscript{42} This is generally ignored by courts that have allowed derivative-type suits to succeed under the oppression remedy. See generally Jeffrey G. MacIntosh, “The Oppression Remedy: Personal or Derivative?” (1991), 70 Can. Bar Rev. 29.


\textsuperscript{44} Since oppression has long been viewed as having a lower liability threshold, a breach of fiduciary duty will often support a finding of oppression. Nonetheless, a direct mapping of fiduciary duty cases on to the oppression remedy is not possible, since the oppression remedy requires that the complainant show conduct “that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer”: C.B.C.A. s. 241(2). As the wording suggests, it was intended to offer redress of a primarily personal character. See Dickerson Report, supra, footnote 38, at para. 484.
expectations cannot be individualized to particular constituents, since (as the Supreme Court has told us) “[t]he interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders”.46 The subjective expectations of particular constituents are irrelevant.

However, another passage (“proposition 2”) asserts that “[f]air treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to ‘reasonably expect’”.47 It is worth noting that this precisely turns on its head the usual understanding of the relationship between “fairness” and “reasonable expectations”.48 

But in any case, the invocation of the concept of fairness necessarily implicates some (unspecified) normative theory. This theory may be applied to each relevant constituency individually — for example, by supplying one or more threshold criteria that must be met before “fairness” is achieved (such as evidence that the directors at least considered the welfare of that constituency). Alternatively, “fairness” may involve some comparison of how each relevant constituency fares relative to the others. In either case, it requires the directors to do more than simply ask what is in the best interests of the corporation as an abstraction, and is thus inconsistent with proposition 1.

In yet another passage (“proposition 3”), the court states that “[t]he [three charging] phrases ['oppressive', etc.] describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders”.49 This may simply be a restatement of the “fair treatment” passage immediately above.50 Whatever its precise meaning, however, it is directly contradicted by a

45.  *BCE*, supra, footnote 2, at para. 66.
46.  *Peoples*, supra, footnote 1, at para. 43.
47.  *BCE*, supra, footnote 2, at para. 64.
48.  See also *ibid.*, at paras. 70 and 71. In the jurisprudence preceding *BCE*, the courts consistently held that the concept of “fairness” encapsulates the three substantive triggers that underpin the oppression remedy, and that the chief criterion in determining whether “fairness” was achieved is whether a given constituent’s (or constituency’s) reasonable expectations were met. In the above-quoted passage, however, instead of reasonable expectations being the determinant of fairness, fairness is the determinant of reasonable expectations. This is a fundamental alteration to the oppression jurisprudence, and introduces more uncertainty into the application of the oppression provision.
49.  *BCE*, *ibid*., at para. 67.
50.  The courts have traditionally held that the overarching standard under the oppression remedy is one of “fairness”, whether by identifying fairness with that which is oppressive, unfairly prejudicial to, or unfairly disregarding, or by holding that “fairness” is the lowest hurdle of the three standards.
further passage ("proposition 4") in which the court posits a two-step process for determining whether there has been oppression. First, the court must assess whether a constituent’s reasonable expectation has been violated. If so, the court must then embark on a further inquiry into whether this violation was also either “oppressive”, “unfairly prejudicial to”, or in “unfair disregard” of the claimant’s interest.\footnote{BCE, supra, footnote 2, at para. 67 (“Even if reasonable, not every unmet expectation gives rise to [a] claim under [the oppression remedy]. The section requires that the conduct complained of amount to ‘oppression’, ‘unfair prejudice’ or ‘unfair disregard’ of relevant interests.”)}

The contradiction arises insofar as under proposition 3, breached reasonable expectations immediately entitle the complainant to a remedy, while under proposition 4, it merely begins a further inquiry.

In another set of passages\footnote{Ibid., at paras. 73 et seq.} (“proposition 5”), the court rehearses the jurisprudentially conventional view that reasonable expectations consist of subjective expectations, arising in relation to individual constituents or constituencies, which must then be objectively confirmed as “reasonable” on the basis of various factors such as the nature of the relationship and dealings between the parties, past and commercial practice, the nature of the corporation, and so on. However correct this may be, it is anathema at least to proposition 1, and probably propositions 2 and 3. Moreover, as I have noted, proposition 4 fundamentally alters the traditional understanding of proposition 5, by requiring \textit{more than} a breached reasonable expectation to ground a remedy under the oppression remedy. Overall, these various contradictory statements make it virtually impossible for a court to know, with any certainty, how it should go about assessing reasonable expectations, and what juridical role should be attributed to such expectations.

VIII. THE NEW, AND UNCERTAIN CONTENT OF THE BUSINESS JUDGMENT RULE

The court in \textit{BCE} held that:

Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule \ldots \textit{[The business judgment rule] applies to decisions on stakeholders’ interests, as much as other directorial decisions.} \footnote{BCE, \textit{ibid.}, at para. 40.}

The court does not tell us whether the business judgment rule (BJR) covers the decision of who to consider, the nature of the consideration given, or both. While the answer is probably the latter, this extension
(and indeed, metamorphosis) of the BJR to either or both constituency decisions creates considerable uncertainty for boards of directors and their legal advisors. The key elements of the Canadian BJR are avoidance of a conflict of interest, good faith, reliance upon the advice of an independent committee of directors, and the directors being reasonably informed. But when directors are called upon either to select constituencies for consideration, or to pick winners and losers, they cannot possibly avoid a conflict of interest. Nor is it possible to convene an independent committee. Directors — both inside and outside — are elected by shareholders. Many directors will own shares themselves. The inside directors will often receive a large proportion, or even the bulk of their remuneration in one form of equity-based compensation or other — and outside director compensation may also be linked to share price. Given these inevitable structural conflicts of interest, the BJR as currently crafted simply cannot be applied.

Perhaps the way to untie this Gordian knot is by externalizing the independence requirement, so that the board must take the advice of independent outsiders. This, however, seems to create more problems than it solves. One is that the externalization of decision-making cuts against the very rationale for having skilled corporate directors. Indeed, since directorial decisions routinely have a differential impact on various corporate constituencies (particularly along the residual/non-residual axis), externalizing the independence requirement will tend to render the board functus. Moreover, what kind of independent reports should, or must, a board seek to satisfy their fiduciary duty? At present, independent advice — such as a valuation or a legal opinion — focuses squarely on protecting shareholders. Must directors now commission independent reports that assess the affect of a transaction (or other decision) on all constituencies? On the privileged few that they select for “consideration”? On the Supreme Court’s chimerical abstraction, the “better corporation”? Whatever the answers to these questions, BCE will, at best, involve a substantial re-crafting of the BJR. At worst, it may be impossible to marry up the constituency decision with the BJR in any coherent fashion.

IX. HAS THE SUPREME COURT PERMANENTLY DEEP-SIXED 
THE STATUTORY DUTY OF CARE?

In Peoples, the Supreme Court held that:

... [T]he statement of the duty of care in s. 122(1)(b) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Thus, the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors.\(^55\)

This statement is at odds with a hundred years or more of settled law. Indeed, to discover this, the court need have looked no further than the \textit{locus classicus} of duty of care cases, \textit{City Equitable Fire Insurance Co. Ltd. (Re)},\(^56\) which clearly holds that the directors' duty of care is owed to the corporation.\(^57\) In equal measure, a quick read of the report of the Dickerson Committee would have revealed that the committee fully intended and expected that a breach of the statutory duty of care would give rise to a derivative action in favour of the corporation.\(^58\)

The Supreme Court's approach to statutory interpretation can most charitably be described as naïve. In fact, it is \textit{per incuriam} in not one, but two ways. First, as noted, it utterly fails to canvass prior and inconsistent common law on point.\(^59\) Second, it violates its own settled approach to statutory interpretation. In \textit{Rizzo & Rizzo Shoes Ltd. (Re)}, the court stated that:

\begin{quote}
Although much has been written about the interpretation of legislation \ldots Elmer Driedger in \textit{Construction of Statutes} (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that \textit{statutory interpretation cannot be founded on the wording of the legislation alone}. At p. 87 he states:

\textit{Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.}\(^60\)
\end{quote}

\(^55\) People, \textit{supra}, footnote 1, at para. 57.
\(^56\) [1925] Ch. 407 at p. 429 (C.A.) (if directors act with due care, "they discharge both their equitable as well as their legal duty to the company"). The English and Canadian case law preceding \textit{Peoples} is more fully canvassed in MacIntosh, \textit{supra}, footnote 3.
\(^57\) Romer J. cites further authority going back to the 19th century. Oddly enough, the case is both cited and discussed in People, \textit{supra}, footnote 1.
\(^58\) Dickerson Report, \textit{supra}, footnote 38, at para. 481 ("[f]or a breach of duty under [what is now s. 122(1)] alleging self-dealing [i.e. a breach of s. 122(1)(a)] or negligence [i.e. a breach of s. 122(1)(b)]").
\(^59\) A fuller review of the cases may be found in MacIntosh, \textit{supra}, footnote 3.
Despite this admonition, the Supreme Court elected to proceed no further than the wording of the statute. No attempt was made to evaluate the scheme of the Act, the object of the Act, or the intention of Parliament.61

Peoples left one shoe suspended in the air. The logical extrapolation of the judgment is that, since the directors' and officers' duty of care is not owed to the corporation, the statutory derivative action is unavailable. And, since the CBCA contains no other mechanism capable of grounding a private right of action for breach of the duty of care, 62 s. 122(1)(b) is functus save in supplying evidence of the appropriate standard of care in a common law tort action for negligence.63 With BCE, this other shoe dropped.64

A possible saving grace is that BCE's comments on the duty of care are entirely obiter, since the duty of care was not in issue. There is a strong argument that the Peoples decision is also obiter on the issue of to whom the duty of care is owed. The case arose under article 1457 of


61. The court cited the Dickerson Report once, ibid., in para. 71, to the effect that the oppression remedy requires only conduct that is wrongful, and not conduct that is unlawful. Remarkably, the paragraph in the report that the court alludes to is on the facing page to the overlooked para. 484, which indicates that a derivative action is available in cases of breach of the duty of care.

62. The English and Canadian courts have generally held that the oppression remedy does not support an action for negligence. This is consistent with the Supreme Court's holding (with much support in the case law) that the oppression remedy is in the nature of an equitable remedy, and that success requires a showing of "wrongful conduct". See BCE, supra, footnote 2, at para. 71. See also e.g. Niedermeier v. York Condominium Corp. No. 50 (2006), 45 R.P.R. (4th) 182 (Ont. S.C.J.) (the remedy may be invoked "where an innocent party has been taken advantage of in an unfair way by a dominant party").

63. Under the principle in Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9. Of course, criminal or quasi-criminal liability may attach. See, e.g., CBCA s. 251. This was clearly not intended to be the exclusive legal consequence of breach.

64. BCE, supra, footnote 2, at para. 44. Not to break form, the Supreme Court expressly contradicted itself yet again — this time in the same paragraph — in stating that "[t]his duty . . . is not owed solely to the corporation". A duty not owed "solely" to the corporation is owed both to the corporation and to others. If this is so, then the statutory derivative action is available for a breach of s. 122(1)(b).

Peoples, supra, footnote 1, fails to realize the difficulty caused by Saskatchewan Wheat Pool, supra, footnote 63, and assumes that s. 122(1)(b) continues to ground an action against the directors and officers — even outside Quebec. See para. 67 ("Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis.")
the Civil Code of Québec,\textsuperscript{65} which creates a private right of action for anyone harmed by breach of a statutory provision.\textsuperscript{66} It was thus unnecessary for the court to deal with the issue of to whom the statutory duty of care was owed, whether inside or outside of Québec. Moreover, I would argue that both cases are not merely \textit{obiter} on this point, but of the variety of \textit{obiter} that the Supreme Court has previously suggested will not bind lower courts.\textsuperscript{67} If I am wrong, then \textit{Peoples} and \textit{BCE} have indeed deep-sixed the statutory duty of care, and a legislative solution is indicated.

X. WHAT IS A DERIVATIVE ACTION? WHAT EVIDENCE MUST BE ADDUCED TO SUCCEED?

Until \textit{Peoples} and \textit{BCE}, it has been customary in law schools to distinguish between personal and derivative actions on the basis that a derivative action is one in which shareholders are hurt indirectly, but co-equally.\textsuperscript{68} By contrast, a personal action arises when a \textit{single} shareholder, or a \textit{subset} of shareholders are hurt. Because a derivative action is one in which the complainant brings “an action in the name and on behalf of a corporation”,\textsuperscript{69} this distinction is obviously reflective of the widely held understanding that “the corporation” means the shareholders.

After \textit{Peoples} and \textit{BCE}, however, it would seem to be impossible to distinguish between the derivative and the personal action in any intelligible way. If “[t]he interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders”\textsuperscript{70} then how does one demonstrate harm to the corporation?\textsuperscript{71} It is obviously not enough to show that one constituency’s ox was gored. But what evidence must be adduced, and relating to which constituencies?

The facts of \textit{BCE} itself are illustrative. The debentureholders could easily show that the contemplated leveraged buyout would materially

\textsuperscript{65} S.Q. 1991, c. 64.
\textsuperscript{66} \textit{Peoples}, supra, footnote 1, at para. 56.
\textsuperscript{67} See supra, footnote 28 and accompanying text. In \textit{BCE}, no duty of care issue arose at any point in the litigation; thus, the issue was not argued at all. Similarly, in \textit{Peoples}, the issue of liability for breach of the duty of care outside of Québec was not argued.
\textsuperscript{68} See, e.g., Harris \textit{et al.}, \textit{Cases, Materials, and Notes on Partnerships and Canadian Business Corporations}, 4th ed. (Toronto: Carswell, 2004), c. 5.
\textsuperscript{69} CBCA S. 239(1).
\textsuperscript{70} \textit{Peoples}, supra, footnote 1, at para. 43.
\textsuperscript{71} Or, conversely, that the corporation was not made a “better corporation” (\textit{Peoples}, ibid., at para. 41)?
reduce the value of the debentures. But since that falls short of demonstrating harm to the corporation, it is unlikely, on that basis alone, that the debentureholders could secure leave to bring a derivative action, let alone succeed in that action. But what evidence is necessary, either to secure leave, or to succeed? Must they show that shareholders, or employees, or the public at large are likely to be harmed? All of these groups? That the net effect on all corporate constituents is likely to be negative?

Ultimately, these questions are unanswerable in any intellectually coherent fashion. Consequently, to the extent that Peoples and BCE are indeed followed by lower court judges, they are likely to lead to different and contradictory readings in different courts, at different times, and by different judges. While Justice Brandeis once remarked that “it is usually more important that a rule of law be settled, than that it be settled right”, 72 the Supreme Court appears to have failed on both counts.

XI. THE DIRECTORS’ DILEMMA: CORPORATE LAW, OR SECURITIES LAW?

Peoples and BCE place directors and their legal counsel between Scylla and Charybdis. Scylla is the corporate law that reproves directors for acting in the best interests of the shareholders, simpliciter. Charybdis is the securities law that reproves directors for doing anything but.

The purposes of the Ontario Securities Act, for example, are “(a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets”. 73 While the term “investors” includes more than shareholders, 74 it clearly does not include employees, trade creditors, the community at large, the government, or various other constituencies affected by corporate conduct — and whom, according to Peoples and BCE, the directors may have a duty to “consider”. Nor does fostering fair and efficient capital markets draw any of those constituencies into the fold.

The area in which the corporate/securities law schism is most likely to cause problems for directors is takeover bids. The purpose of the takeover bid provisions in securities legislation is the “protection of

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74. Investors are people who hold securities, and the term “security” has been given a broad scope. See e.g. osa s. 1(1) (definition of “security”).
the bona fide interests of the shareholders of the offeree company.”

In exercising their discretionary public interest powers, securities legislators have taken their cue from this legislative purpose, and have made it clear that in responding to a hostile takeover bid, they expect directors of the target company to maximize shareholder value.

Thus, directors must now choose. Either they satisfy the requirements of corporate law, or they satisfy the requirements of securities law. They cannot do both. It need not be stressed that this places directors in a rather untenable position.

**XII. SHORT-TERM VERSUS LONG-TERM VALUE**

In *BCE*, the Supreme Court stated that:

> The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation.

There are a number of difficulties with this statement. It is not based on any citation of authority, and is in fact *per incuriam*. Extant jurisprudence follows the U.S. law in this respect and, at least in the context of a takeover bid, impresses directors with “an obligation to seek the best value reasonably available to shareholders in the circumstances”. That clearly means value immediately available.

Allowing directors to resist a takeover bid on the basis that it is not in the corporation’s long-term interest merely provides dishonest or ineffective directors with a serendipitous tool for evading their fiduciary responsibilities. It is all too easy for directors to concoct a superficially plausible story stuffed full of claims about long-term interest, such that they may, if minded to do so, “just say no” to a takeover bid. This is a result that is contrary to sound public policy, existing jurisprudence, and the considered position of securities regulators across the country.

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76. See *National Policy 62-202: Take-Over Bids — Defensive Tactics*, ss. 1.1(2), and see, e.g., *Chapters Inc. (Re)* (2001) 24 OCSL 1064. In “Submission of the Staff of the Ontario Securities Commission” in the case of *Neo Material Technologies Inc. (Re)* (2009), 32 OCSL 6941 commission staff stated (at para. 14): “The objectives of the take-over bid provisions are a subset of the Act’s broader purposes. The objectives of the take-over bid provisions are stated in subsection 1.1(2) of National Policy 62-202 *Take-Over Bids — Defensive Tactics* (NP 62-202), with the primary objective being the ‘protection of the bona fide interests of the shareholders of the target company’.”
77. *BCE*, *supra*, footnote 2, at para. 38.
78. See e.g. *Pente Investment Management Ltd. v. Schneider Corp.*, *supra*, footnote 54.
Again, the Supreme Court’s statement is clearly obiter. Moreover, this issue was not argued before the court\(^79\) (no issue of short- versus long-term interest arose at any point in the litigation). It is thus my hope that it will not be followed by the lower courts.

**XIII. CONCLUSION**

The Supreme Court’s decisions in *BCE* and *Peoples* are fraught with difficulties. Many of these problems extend from the court’s remarkably casual approach to prior case law. Indeed, the court contradicts not only its own prior (and recent) authority, but basic and universally accepted principles of corporate law extending back over a hundred years. In interpreting the statutory duty of care, the court disregards not only prior case law, but basic principles of statutory interpretation—also set down in Supreme Court rulings of recent vintage.

Although significant parts of *Peoples* and *BCE* are either obiter dicta, per incuriam, or both, these cases have thrust virtually all of corporate law into a state of uncertainty and confusion. Scarcely an important doctrine emerges unscathed, including the directors’ (and officers’) duty of loyalty, the directors’ (and officers’) duty of care, the oppression remedy, the nature and juridical significance of “reasonable expectations”, the business judgment rule, and the distinction between personal and derivative actions.

There is a low probability that these issues will be re-litigated before the court in the near future. Even if they are re-litigated, the court may decline to reverse itself. Thus, in my view, the only solution that will restore corporate law to a state of equilibrium is for legislators to modify the corporate legislation to make it clear that directors’ duties are owed to shareholders alone.

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\(^79\). See *supra*, footnote 28, and accompanying text.