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BCE and the Long Shadow of American Corporate Law
Mohammad Fadel*

I. Introduction

In the wake of the recent decision of the Canadian Supreme Court in BCE Inc. v. 1976 Debenture holders, 2008 SCC 69 [hereinafter, “BCE”], the Canadian corporate law of directors’ duties has become beset by uncertainty, incoherence and confused rhetoric with respect to one of the most basic issues of corporate law: how to reconcile the competing interests of shareholders and non-shareholder corporate stakeholders such as bondholders. One of the fundamental causes of the present disarray in Canadian corporate law is the fact that Canadian courts have become too deferential to American principles of corporate law which, in some cases, are in deep tension with the structure of Canadian corporate law as set forth in the Canada Business Corporation Act, R.S.C. 1985, c. C-44 (the “CBCA”). While the Supreme Court’s rhetoric (particularly its refusal to endorse a theory of shareholder primacy) is decidedly un-American, the disposition of the case was decidedly consistent with long-standing principles of U.S. corporate law.

The long shadow cast by American corporate law on the course of this litigation can be seen in the centrality to the disposition of the BCE litigation of two seminal U.S. cases that are usually taken to represent the standard American view regarding the rights of bondholders in the context of leveraged buyouts: Metropolitan Life Insurance Company v. RJR Nabisco [hereinafter, “RJR Nabisco”]1 and Mac Andrews & Forbes Holdings Inc. v. Revlon, Inc. [hereinafter, “Revlon”].2 While there is much for Canadian corporate law to gain from American corporate law, the legal terrain in Canada is substantially different from its American counterpart, and as a result, uncritical deference to American decisions, as occurred in BCE, can lead to erroneous results.

The BCE litigation involved three separate doctrinal questions, two of which arise under the CBCA and one of which is contractual. The substantive questions in each, however, largely overlap: to what extent do bondholders have a legal right to protection against unilateral actions of a corporate borrower that result in transfers of wealth from the bondholders to the shareholders? There was strong reason to believe that BCE behaved opportunistically with respect to its bondholders when it accepted a highly-leveraged offer (the “plan of arrangement”) from a consortium of private equity investors (the “Purchaser”) led by the Ontario Teachers Pension Plan Board (“Teachers”). Pursuant to the terms of that offer, the BCE common shareholders would have received cash in excess of $34 billion, a figure representing a 40% or a $10 billion premium to the pre-transaction price of their shares. At the same time, because Bell Canada, BCE’s wholly-owned and most important operating subsidiary, would be required to guarantee

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2 501 A.2d 1239 (Del. Ch. 1985).
approximately $30 billion of the financing incurred by BCE to finance the arrangement, investors in Bell Canada’s outstanding bonds suffered an 18% decline in the value of their bonds, or approximately $1.3 billion. The bondholders claimed that the plan of arrangement violated both their contractual rights under the various bond indentures and their statutory rights under Section 241 of the CBCA. Procedurally, the bondholders asserted their claims as objections to the Purchaser’s motion for a final order approving its plan of arrangement pursuant to Section 192 of the CBCA.

This comment will proceed along three parts. The first part will discuss the contractual analysis of the bondholders’ rights as set out in CIBC Mellon. The second part will discuss the Supreme Court’s analysis of the bondholders’ oppression claims. The third part will argue that, given the differences between background principles of commercial law in Canada and the United States, in particular the relatively expansive American understanding of fraudulent conveyances, combined with the structural differences between the Delaware General Corporation Law (the “DGCL”) and the CBCA, Canadian courts should adopt American corporate law precedents, particularly those that adjudicate competing claims of creditors and shareholders, only after carefully ascertaining their consistency with background principles of Canadian commercial law and the particular principles of Canadian corporate law, something the Supreme Court failed to do in BCE.

1. Section 8.01 of the 1976 and 1996 Bond Indentures

The least controversial aspect of the BCE litigation involved interpretation of Section 8.01 of the respective bond indentures. This provision permits a “reorganization or reconstruction of [Bell Canada] or the consolidation, amalgamation or merger of [Bell Canada] with any other corporation,” but only if such transaction is approved by the bond

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5 The bondholders held bonds issued pursuant to three different indentures, the 1976 Indenture, the 1996 Indenture, and the 1997 Indenture. The 1997 Indenture lacked the substantive provision set forth in Section 8.01. Nothing in the record, however, provides an explanation as to why the 1997 Indenture omitted the substance of Section 8.01.
trustee as not being “prejudicial to the interests of the debenture holders.” The bondholders argued that the plan of arrangement constituted a “reorganization or reconstruction” of Bell Canada that could not proceed without the bond trustee’s certification that the plan of arrangement was not prejudicial to them. The Purchaser and BCE denied that Section 8.01 applied to the plan of arrangement because the plan of arrangement merely involved a change in the ownership of the shares of Bell Canada’s parent, BCE. The fact that the plan of arrangement would have an effect upon Bell Canada, they argued, was not sufficient under the contract for the plan of arrangement to be either a “reorganization” or “reconstruction” of Bell Canada.7

The bondholders advocated a reading of Section 8.01 that emphasized the open-textured nature of the term “prejudicial” to argue that any kind of transaction undertaken by Bell Canada that was prejudicial to the bondholders, in this case, the $30 billion guarantee of its parent’s acquisition indebtedness, was subject to the terms of Section 8.01.8 The Purchaser and BCE, on the other hand, argued that if Section 8.01 had been intended to operate so broadly, the parties would have simply included an explicit covenant requiring Bell Canada to maintain an investment grade rating for the bonds in question.9 The lower court, relying heavily on the reasoning in RJR Nabisco,10 accepted the Purchaser’s argument, basing its conclusion in large part out of fear that accepting the bondholders’ interpretation of Section 8.01 would have a disastrous impact on the operations of BCE and Bell Canada, on the one hand, and undermine the efficient operation of capital markets on the other.11 Finally, the lower court also rejected the bondholders’ reading of Section 8.01 because Section 5.09 of the indenture included an express covenant limiting the ability of Bell Canada to incur additional debt, and since Bell Canada would be in compliance with Section 5.09 following the completion of the arrangement, the court concluded that bondholders’ reading of Section 8.01 would contradict Section 5.09.12 The Quebec Court of Appeals affirmed the lower court’s interpretation of Section 8.01,13 and the issue was not pursued before the Supreme Court.

This reading of the indenture, however, is not persuasive. Taking the court’s arguments in reverse order, the court’s argument that the bondholders’ proposed interpretation of Section 8.01 would either contradict Section 5.09 or render it superfluous ignores the difference between a rule and a standard and the different functions each play in a complex corporate financing contract such as an indenture. Negative covenants such as that set out in Section 5.09 effectively function as a bright-line for measuring borrower compliance with the indenture. The inclusion of bright-line

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6 CIBC Mellon, supra footnote 4, at para. 32.
7 Ibid., at para. 33.
8 Ibid., at para. 61.
9 Ibid., at para. 62.
10 The lower court did not cite this case in CIBC Mellon, but it did in Aegon, supra, footnote 4, at para. 168-178.
11 Ibid., at para. 63.
12 CIBC Mellon, supra, footnote 4, at para. 76.
13 BCE Appeal, supra, footnote 4, at para. 60-62.
rules such as Section 5.09 in the indenture in no way implies that all rules in the indenture should be read as though they were bright lines.

Rational creditors might have concerns about mergers, for example, that require a more nuanced treatment than that provided by a bright-line rule such as Section 5.09. They may also have good reasons not to structure every limitation on borrower conduct in the form of a negative covenant.\textsuperscript{14} In the context of a long-term bond indenture, it is difficult, if not impossible, to know what the optimal debt ratios of the borrower should be over the life of the contract. A reasonable solution might be to require the borrower to comply with certain minimum requirements, such as those set forth in Section 5.09, while reserving the right to object to extraordinary transactions in the future that, from an ex ante perspective, have an ambiguous impact on the issuer’s creditworthiness.\textsuperscript{15} Section 8.01’s advance approval mechanism solves this problem by giving the bondholders the right to determine whether a particular extraordinary transaction will or will not be prejudicial to their interests.

The court’s assumption that creditors generally seek more, rather than fewer negative covenants, however, is belied by market practice (at least in the investment-grade sector of the market).\textsuperscript{16} Too many negative covenants can be detrimental to the bondholders’ interests by increasing the likelihood of defaults and reducing the borrower’s ability to access other sources of credit.\textsuperscript{17} The marginally decreasing utility of additional negative covenants is largely a result of the peculiar enforcement problems associated with covenant violations. Because the only practical remedy for the breach of a covenant is to declare an event of default and accelerate the obligations,\textsuperscript{18} creditors are

\begin{footnotesize}
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\item[14] Lehn and Poulsen, supra, footnote 4, at 646-647 (noting practical difficulties faced by corporate bond holders in negotiating and enforcing an optimal set of protective covenants as a reason to impose legal protections for bondholders in addition to contractual ones).
\item[15] It cannot be seriously denied that Section 8.01 is motivated by the creditor’s fear that the issuer, by engaging in the transactions of the kind listed there, could suffer a substantial degradation in its creditworthiness. SeeAmerican Bar Foundation, Commentaries on Model Debenture Indenture Provisions, 1965 at pp. 290-291 (1971) (explaining that limiting a corporation’s right to merge is an important consideration for investors who purchase that corporation’s bonds because a merger can result in a less creditworthy obligor).
\item[16] Investment-grade bond indentures attempt to balance firms’ legitimate needs to operate their business without the interference of creditors with “the expectation of bond investors that their covenants will protect them against substantial credit deterioration through voluntary actions by issuers.” The Credit Roundtable in association with the Fixed Income Forum, “Improving Covenant Protections in the Investment Grade Bond Market,” at p. 1 (Dec. 17, 2007), online: <http://www.iimemberships.com/downloads1/creditroundtable/Covenant%20White%20Paper%20revised%207-2-08.pdf> (accessed April 28, 2009).
\item[18] Ibid.
\end{enumerate}
\end{footnotesize}
understandably reluctant to exercise this right since by so doing they may only exacerbate the debtor’s distress, and thereby reduce the value of their own claims. 19

These practical limitations on the usefulness of negative covenants dramatically undermines the trial court’s assumption that the absence of a specific negative covenant tied to maintenance of investment-grade status or change of control of the borrower or its upstream parents 20 means that one can plausibly assume that the bondholders either assumed the risk of a leveraged buyout transaction, were overly optimistic that such a transaction would not occur, or were simply complacent with respect to the risks of a leveraged buy out. 21 To the contrary, credible market evidence indicates that “[a]ll creditors are concerned with the risk of a sudden deterioration in credit quality that can result from a takeover, a recapitalization, or a similar restructuring,”22 which is precisely what occurred in BCE. The court’s failure to understand the different roles bright-line rules, on the one hand, and broad standards, on the other, play in a bond indenture simply invites issuers to invent creative structures to evade the indenture’s limitations.23

The trial court also asserted two policy reasons for rejecting the bondholders’ reading of Section 8.01. The first has to do with corporate governance and the threat that

19 Ibid. This enforcement problem is particularly acute in the context of a public bond offering where the fact of widely-dispersed investors with little desire or means to negotiate with the issuer when a default occurs means there is a substantial risk that a default which could have easily been waived in the context of bank debt could develop into a more serious payment default because of the collective action problems inherent in public bond offerings. Ibid. at p. 35. For a general analysis of the systematic nature of bond covenant underenforcement and selective enforcement, see Marcel Kahan and Edward Rock, “Hedge Fund Activism in the Enforcement of Bondholder Rights,” 103 N. U. L. Rev. 281 at pp. 296-306 (2009).

20 A search of public filings on SEDAR of investment-grade issuers disclosed several issuers (Cameco Corporation, Canadian Hydrodevelopers, Inc., Encana Corporation and Talisman Energy Inc.) whose indentures included provisions similar to that of Section 8.01 in the 1976 and 1996 Indentures regarding mergers of the issuer but that, like the 1976 and 1996 Indentures, were silent as to mergers of an upstream affiliate. None of these indentures, moreover, included covenants requiring the issuer to maintain an investment-grade rating. See online (Cameco Corporation): http://www.sedar.com/GetFile.do?lang=EN&docClass=13&issuerNo=00001296&fileName=/csfsprod/data56/filings/00781828/00000001/C%3A%5CSEDAR%5CTEMP%5CCameco2005%5C1999TI.pdf (accessed June 5, 2009); (Canadian Hydrodevelopers): http://www.sedar.com/GetFile.do?lang=EN&docClass=13&issuerNo=00001702&fileName=/csfsprod/data97/filings/01407440/00000001/b%3A%5Csedar%5CIndenture_CHD_BNY.pdf (accessed June 5, 2009); (Encana Corporation): http://www.sedar.com/GetFile.do?lang=EN&docClass=13&issuerNo=00016914&fileName=/csfsprod/data60/filings/00822456/000000009/s%3A%5CC4%5C904%5CEncana%5C2005mtn%5Cfinal%5CIndenture.pdf (accessed June 5, 2009); and (Talisman Energy Inc.): http://www.sedar.com/GetFile.do?lang=EN&docClass=13&issuerNo=00000768&fileName=/csfsprod/data63/filings/00878743/00000001/j%3A%5CSec%5CISEDAR%5CTalisman%5CMTNProspectus%5CFinal%5CTrustIlnd.PDF (accessed June 5, 2009).

21 Aegon, supra, footnote 4, at para. 178.

22 Corporate Ratings Criteria: 2005, supra, footnote 17 at p. 36.

23 Indeed, creditors have expressed exasperation at the failure of courts to interpret covenants in a manner that meaningfully protects creditor expectations. Ibid. (complaining that enforcement of covenants is dubious and that with the assistance of well-trained counsel, issuers can find ways to evade the requirements of covenants).
bondholders, if their interpretation of Section 8.01 was held to be correct, “would paralyze BCE and Bell Canada in its [sic] day to day operations and could result in irreparable harm to both corporations.”24 Presumably, the trial court believed that the bondholders could use the opportunity afforded by a broad reading of Section 8.01 to challenge a broad array of ordinary course BCE management decisions, such as the level of investment in Bell Canada relative to other BCE subsidiaries.

There are important reasons, however, to be skeptical that such a fear would materialize. First, bondholders generally do not have a right to initiate suits against the issuer on their own. Instead, bond indentures generally provide that only the trustee can sue to enforce the terms of the indenture, and in most cases, the bond trustee is not obliged to bring suit unless a sufficient number of bondholders request that it do so. Bond indentures themselves, therefore, anticipating this risk, have provided an important safeguard against frivolous creditor suits. Second, bondholders need a plausible basis in the indenture to assert that the issuer has violated their rights. In the case of the BCE bondholders seeking to enforce their rights under the 1976 and 1996 Indentures, for example, the simple fact is that they had never attempted to assert Section 8.01 as grounds to interfere with the day to day operations of BCE or Bell Canada prior to the proposed leveraged buy out. It was only when BCE agreed to be sold to the Purchasers in a transaction intentionally structured to defeat the Bell Canada bondholders’ rights under Section 8.01 did they attempt to exercise those rights. This passivity is persuasive evidence that even where bondholders interpret contractual language broadly, they have no interest in harassing management with the purpose of exercising de facto control over the issuer’s operations, or to pressure firm management into adopting an inefficient risk-averse investment strategy. Finally, even if there were credible evidence that bondholders might have an incentive to interfere in day-to-day management decisions, the bondholders of a CBCA corporation are not in need of a particular term in their indenture to give them that right: because a bondholder is a “complainant” for purposes of Section 239 and 241 of the CBCA, a bondholder, regardless of the terms of his contract, is free to bring a derivative or oppression suit challenging the decisions of the corporation’s board of directors to the same extent as a shareholder.

The second policy reason advanced by the CIBC Mellon court relates to the integrity of the capital markets. The court claimed that the bondholders’ claim, if successful, would “undermine the confidence of the financial markets at large in the sanctity of the wording of Trust Indentures, in particular, and contracts in general.”25 The trial court was not clear, however, as to how this interpretation of Section 8.01 could threaten the capital markets. Perhaps the trial court believed that the market for corporate control would be weakened if prospective acquirers of firms could not accurately predict

25 Ibid. at para. 63.
the extent of creditors’ rights in change of control transactions, with the result that otherwise efficiency-enhancing third-party takeovers would decline. 26 If true, this would strongly support a rule of interpretation that construes ambiguous provisions in corporate finance contracts against the creditor, so long as it is plausible to believe that the benefits of reduced agency costs that result from a more efficient market for corporate control exceed the higher cost of credit that would result from a rule that permits shareholders to exploit contractual ambiguities to transfer wealth to themselves from the creditors.

In the absence of empirical evidence, however, the theoretical case for such a position seems ambiguous if not weak: an efficient market for corporate control that is sufficiently robust to reduce agency costs does not require a rule permitting shareholders to engage in opportunistic wealth transfers from creditors. So long as the gains from the reduction in agency costs generated by a change of control are sufficiently large, current shareholders will have sufficient incentive to support an efficient change of control. This ought to be clear from the facts of the BCE case. The Purchaser’s offer involved approximately $50 billion of new capital in the combination of senior and subordinated debt and new common equity. 27 In response to the structure of the offer, the value of the outstanding Bell Canada bonds declined by 18%, or approximately $1.3 billion.28 The loss to the bondholders, then, on a per share basis, comes out to approximately $1.625 per share, 29 or 3.8% of the purchase price of the common shares. When the loss is measured against the aggregate consideration of the contemplated sale to the Purchaser, $51.7 billion in total, 30 the bondholders’ loss represented 2.5% of the total consideration that the Purchaser was prepared to pay for BCE. In other words, had BCE and the Purchaser simply reduced the price paid to the common shares from $42.75 to $41.125, while keeping intact the overall transaction consideration, there was a strong likelihood that the Bell Canada bondholders would not have suffered a loss in the value of their bonds. At the same time, a price of $41.25 would still have represented a premium of approximately 35% to the common equity. Accordingly, it is hard to argue persuasively that had the court accepted the bondholders’ reading of Section 8.01, the prospect of an efficiency-enhancing change of control in BCE would have been precluded. For the same reason, it is also unlikely that courts’ willingness to read indentures functionally rather than


27 In re BCE, supra, footnote 4, at para. 96.

28 Ibid., at para. 162.

29 I derived this figure by dividing the aggregate loss to the bondholders by the approximately 800 million common shares of BCE then outstanding.

formalistically would, in the general course of things, create so much uncertainty in indentures’ terms that potential acquirers would be deterred from launching bids for otherwise attractive targets.

Alternatively, the trial court may have been concerned about the reaction of the investment-grade bond market to a broad reading of Section 8.01. On this theory, investment-grade bondholders are assumed to earn a premium in exchange for willingly exposing themselves to the risk of a leveraged buy out transaction. A victory by the bondholders in either RJR Nabisco or the BCE proceedings would therefore have been pyrrhic: by allowing courts to “protect” bondholders against leveraged buyouts, investment-grade investors would realize substantially reduced prospective returns, thus driving many or most of these investors out of the market, with the result that the availability of capital to investment-grade issuers would be reduced.

In the absence of empirical event studies that document the impact upon investment-grade bond spreads of decisions like RJR Nabisco or BCE, it is hard to assess the plausibility of such arguments. While there is evidence to support the notion that investment-grade bond investors receive a premium relative to actuarial default rates, it is not clear that the source of this premium is the inclusion of an implicit option permitting shareholders to increase the firm’s leverage materially in connection with extraordinary transactions such as leveraged buyouts. There is no dispute, however, that a leveraged buyout has a drastic effect on the riskiness of an investment grade bond. In the case of Bell Canada’s bonds, for example, prior to the announcement of the proposed sale of BCE to the Purchaser, the bonds were rated A’, but their rating declined to BB32 as a result of the announcement of the plan of arrangement.

31 J. Hull, M. Predescu and A. White “Bond Prices, Default Probabilities, and Risk Premiums,” (2005), 1,2 Journal of Credit Risk 53 at pp. 58-59 (noting the existence of a “credit spread puzzle” that declines as bonds become more risky and noting possible explanations for its existence).

32 When translated into risk of default, however, this decline amounts to an increased probability of default in excess of 1000%. According to statistics compiled by Standard & Poor’s for the historical period 1981-2006, the one-year cumulative default rate of a corporate bond rated A was 0.1% whereas for a corporate bond rated BB the rate was 1.1% for the same period. Over a five-year period, the cumulative default rate for a corporate bond rated A was 0.7% whereas it was 10.1% for a corporate bond rated BB for the same period. Standard & Poor’s, “Corporate Ratings Criteria 2008,” (April 15, 2008) at p. 14, online: <http://www2.standardandpoors.com/spf/pdf/fixedincome/corporate_criteria_2008.pdf> (accessed May 2, 2009). Moreover, there is a statistically substantial risk that the creditworthiness of a BB rated issuer will continue to decline rather than improve. According to statistics compiled by Standard & Poor’s for the historical period 1981-2008, there is a 75% probability that after one-year the issuer will remain BB. After one year, there is only little more than a 5% chance, however, that its rating will improve, a 7% chance it will decline to B, a 1% chance it will decline to CCC/C, a 1% chance it will default and a 10% chance it will lose its rating entirely. Over a five-year period, there is a 14% chance that a BB-rated issuer will return to investment grade (12.3% returning to BBB and 1.5% returning to A). At the same time, however, 35% of BB issuers will lose their rating over a five-year period, 10% will default, 2% will decline to a CCC/C, and 11% will decline to B. Standard & Poor’s, “Default, Transition, and Recovery: 2008 Annual Corporate Default Study and Rating Transitions,” (April 2, 2009) at pp. 41-42, online: <http://www2.standardandpoors.com/spf/pdf/fixedincome/corporate_default_study.pdf> (accessed May 20, 2009).

33 CIBC Mellon, supra, footnote 4, at para. 32.
2. The Bondholders’ Oppression Claims

Section 241 permits a “complainant,” explicitly defined to include both shareholders and holders of a corporation’s “debt obligations,” to bring a suit against a corporation or any of its affiliates on the grounds that the corporation or its affiliates conducted its affairs in a manner “that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder.” The bondholders cited six grounds which, in their view, justified relief under Section 241. The trial court, however, disagreed and dismissed their claims. It essentially agreed with the defendants that the bondholders could not have had reasonable expectations for purposes of Section 241 that had not already been set out in the indenture. In addition, the Aegon court agreed with the defendants that, despite the Supreme Court’s interpretation of the duty of loyalty in Peoples v. Wise, the principles set out in Revlon were nevertheless applicable in a change of control transaction. BCE’s board of directors therefore acted properly in structuring the transaction to maximize the value of BCE’s common shares, even if, as a result of that transaction, the value of Bell Canada’s bonds declined. Finally, the court dismissed the bondholders’ claim that the guarantee contemplated in the plan of arrangement lacked any valid business purpose for Bell Canada.

The Quebec Court of Appeals, although it affirmed the trial court’s analysis of the bondholders’ contractual claims, allowed the bondholders’ statutory claims under Section 192. Basing itself on Peoples, the Quebec Court of Appeals rejected the notion that Revlon, to the extent it privileged the interests of shareholders over other corporate stakeholders in change of control transactions, had any applicability in Canadian corporate law. Moreover, because the BCE board erroneously believed that Revlon defined its legal obligations, i.e. they were under the overriding duty to maximize shareholder value by achieving the highest value possible for the BCE common shares while offering the bondholders only what they were promised under their indentures, their decision to accept the Purchaser’s offer was not entitled to deference under the business judgment rule. Because the BCE board applied the incorrect legal standard, the plan of arrangement could survive the bondholders’ challenge only if the court was satisfied that the plan of arrangement was inherently fair. The Quebec Court of Appeals concluded that the plan of arrangement was not “fair and reasonable” under Section 192.

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34 CBCA § 241. The CBCA expressly defines “security” as “a debt obligation of a corporation.”
35 Aegon, supra, footnote 4, at para. 95.
36 Ibid., at para. 120 and 165.
37 2004 SCC 68 [hereinafter, “Peoples”].
38 Ibid., at para. 130-138 and 208.
40 Having found that the plan of arrangement was not “fair and reasonable” under Section 192 of the CBCA, the Quebec Court of Appeals did not complete its analysis of the bondholders’ oppression claim. BCE Appeal, supra, footnote 4, at para. 143.
41 Ibid., at para. 108.
42 Ibid., at para. 109.
because the plan had been intentionally structured to impose losses on the bondholders,
and BCE’s board had made no serious attempt to seek out a structure that would have
offered the common shares a satisfactory price while protecting the value of the Bell
Canada bonds. The Supreme Court reversed the Quebec Court of Appeals.

I will limit my criticism of the Supreme Court’s decision to two aspects of its
analysis. The first is its failure to apply its own conception of the board’s fiduciary duty
to the board’s actual conduct and the second is its decision to treat BCE and Bell Canada
as though they were one corporation.

a. The Supreme Court Did Not Apply the Rule It Purported to Announce

The easiest route available to the Supreme Court would have been simply to adopt
the approach of the trial court: that while the general rule is that the duty of loyalty is
owed to the corporation rather than a specific group among the various corporate
stakeholders, it is owed specifically to the shareholders in change of control transactions,
thereby implicitly adopting the reasoning of Revlon. Somewhat surprisingly, given the
results of the case, it agreed with the Quebec Court of Appeals that, even in the context of
a change of control transaction such as the one presented by the plan of arrangement, the
focus of the duty of loyalty remains the corporation in the abstract. Accordingly, the
Supreme Court agreed, even if only implicitly, that the legal duties of BCE’s directors did
not change because BCE had been “put in play.” In so doing, it rejected the fundamental
concept of what are commonly referred to as “Revlon-duties”: the duty to maximize the
return to the shareholders in circumstances where the corporation will either cease to
exist as an independent enterprise, or shareholders will lose their control of the
corporation. Instead, the Supreme Court reiterated its prior interpretation of the duty of
loyalty as simply the directors’ obligation to act, in all circumstances, in the “best
interests of the corporation.”

Others have noted that this conception of the duty of loyalty is deeply problematic
insofar as it does not provide directors with any guidance as to how and toward what ends
they are to exercise their power to supervise the affairs of the corporation. The
permissiveness of the standard announced by the Supreme Court, however, had it been
applied, should have resolved this case in favor of the bondholders.

43 Ibid., at para. 112.
44 Ibid., at para. 123.
45 While Revlon applies to circumstances where it has become obvious that the target corporation no
longer has a future as an independent firm, Paramount Communications Inc. v. QVC Network Inc. 637
A.2d 34 (Del. 1994) extended the applicability of Revlon to situations where the corporation is merging
into another corporation voluntarily, but as a result of the transaction, the shareholders will be relinquishing
their control rights to the corporation. In this situation, the directors have a duty to maximize the
return to the shareholders, but at the same time, they may take into account the interests of other corporate
stakeholders in a fashion that Revlon had implied was impermissible in a situation where a corporation
faced inevitable break-up.
46 Edward Iacobucci, [insert reference here to Ed’s contribution to the volume].
There can be little dispute that the BCE board believed, erroneously as it turns out, that its fiduciary duties compelled it to take the steps that it did, beginning with its initial decision to put BCE up for sale once it had been “put in play” on April 7, 2007, and its choice of an auction as the preferred means for the sale of BCE. As the trial court noted, after BCE had

“been put ‘in play,’ the Board was required to address its revised fiduciary obligations and the appropriate role to follow in the circumstances. . . . Relying on the principles described by the Supreme Court of Delaware in, what has often been referred to as the ‘seminal’ case of Revlon . . ., the Board determined they had an overriding duty to maximize shareholder value and obtain the highest value for its shareholders while respecting the contractual obligations of the corporation and its subsidiaries.”

This misapprehension of its duty even led the BCE board to advise the Purchaser to revise the structure of its offer to circumvent the bondholders’ approval rights under Section 8.01 of the respective bond indentures.

The Quebec Court of Appeals seized on the BCE board’s legal error to conclude that its decision was not entitled to deference under the business judgment rule. The Quebec Court of Appeals then applied what amounted to an inherent fairness test to the transaction, with the result that it struck down the arrangement as failing to satisfy the “fair and reasonable” standard of Section 192. The Supreme Court, even though it implicitly agreed with the Quebec Court of Appeals that the BCE board used the incorrect legal standard to guide its deliberations, was inexplicably silent as to whether a board’s decision that was the result of an erroneous interpretation of applicable law ought to be entitled to deference under the business judgment rule. It is unlikely that the Supreme Court intended to modify the business judgment rule in Canada so that it is effectively only a requirement that directors act in good faith. The more plausible explanation is that the Supreme Court wanted to reinstate the trial court’s decision, but was reluctant to adopt the trial court’s reasoning on account of its recent discussion of director duties in Peoples.

This failure to wrestle with the consequences of the BCE board’s legal error, and the consequences of such an error for the application of the business judgment rule, weakens the persuasiveness of the Supreme Court’s analysis. In order to defend the

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47 In re BCE, supra, footnote 4, at para. 47.
48 Ibid., at para. 59-60.
49 Ibid., at para. 79. BCE, in its factum before the lower court in the Aegon oppression proceeding, expressly relied on its “duty” to maximize shareholder value to justify its treatment of the bondholders and to deny that the bondholders could have had any reasonable expectation that BCE could have structured the auction in a manner that would have preserved the bonds’ value. Aegon, supra, footnote 4, at para. 102.
50 See Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (finding that, due to failure to exercise genuine business judgment, directors’ decision was not entitled to deference under the business judgment rule, and as a result transaction could only survive if directors could prove it was inherently fair).
arrangement against the bondholders’ claims of oppression while at the same time denying the applicability of Revlon to change of control situations, the Supreme Court resorted to conclusory and circular reasoning rooted in an interpretation of the facts that treats BCE’s board as though it had been compelled by an impersonal market to take the actions that it did rather than through some course of conduct it voluntarily adopted. 51 This analysis, however, only makes sense if one forgets that the BCE board’s decisions were taken in the good-faith but erroneous belief that once BCE had been “put in play” in April 2007, its fiduciary duties had shifted from guardians of the corporation to its auctioneers as set out in Revlon and its progeny. Prior to April 2007, however, the BCE board had rebuffed numerous friendly overtures from prospective acquirers, including Teachers, who had sought to privatize BCE. 52

Conversely, had the BCE board applied the correct legal standard, i.e. that all times it was obligated to protect “the best interests of the corporation” without equating that to the best interests of one set of corporate stakeholders, the BCE board would have recognized that it was free to take several responses to Teachers’ threat, including, adoption of a “poison pill” or sale in a friendly transaction that would respect the economic – if not strictly legal – interests of all its stakeholders, including the bondholders. Indeed, they could have even used an auction to sell BCE, but with the requirement that the successful offer had to be structured to preserve the trading value of Bell Canada’s outstanding bonds or that any offer for BCE would require the bond trustee’s approval regardless of the applicability of Section 8.01. The point should be clear: but for the misapprehension of the relevant legal rule, the BCE board could have pursued numerous options in the spring of 2007 that it erroneously believed the law of fiduciary obligations had foreclosed. In such circumstances, pointing to commercial norms and the expectations of market participants that are conditioned by a different set of legal rules, specifically, Revlon, as is the case for corporations domiciled in Delaware, and to the results of an auction structured under a misapprehension of the rules applicable to a corporation incorporated under the CBCA, can hardly be relevant to determining whether a board of directors discharged its fiduciary obligations.

b. Bell Canada’s Board of Directors and the Business Judgment Rule

The persuasiveness of the Supreme Court’s decision is also weakened by its failure to recognize that BCE and Bell Canada are two separate corporations, and that, pursuant to the proposed terms of the plan of arrangement, each corporation would be required to enter into different transactions. 53 Accordingly, each set of directors, in order

51 See, for example, BCE, at para. 99, para. 104, 106, 108, and 112.
52 Ibid., at para. 9-11.
53 For example, because there was no “threat” to Bell Canada, Bell Canada’s directors would have had no plausible grounds for believing that their fiduciary duties were governed by Revlon. In addition, the Supreme Court’s decision to treat BCE and Bell Canada as though they were one corporation for purposes of its analysis of the bondholders’ Section 192 and 241 claims undermines the very basis on which the lower courts had concluded that Section 8.01 of the 1976 and 1996 Indentures were not implicated by the plan of arrangement.
to discharge its respective duties, would have had to consider different factors in determining whether the proposed plan of arrangement was consistent with the best interests of their respective corporations. Assuming then that the Bell Canada directors were acting consistently with their statutory duty of loyalty as formulated by the Supreme Court, they could not have agreed to guarantee BCE’s post-arrangement debt unless they had some grounds to believe that the proposed guarantee was consistent with the best interests of Bell Canada, independent of the plan of arrangement’s desirability for BCE or for BCE’s shareholders.

In this case, the record in support of why it was in the best interests of Bell Canada to pledge its credit in support of BCE’s debt obligations was, at best, thin. The Supreme Court endorsed the trial court’s finding that

> “Bell Canada needed to undertake significant changes to continue to be successful, and that privatization would provide greater freedom to achieve its long-term goals by removing the pressure on short-term public reporting, and bringing in equity from sophisticated investors motivated to improve the corporation’s performance,”

without providing its own analysis of the relevant facts. The only evidence for how the guarantee could have been beneficial to Bell Canada then is limited to the trial court’s conclusion in *Aegon*. There, the court credited certain affidavit testimony provided by the Purchaser which stated, among other things, that

> “[t]he transaction includes an injection of a significant amount of new equity from sophisticated investors who are highly motivated to improve the company’s performance, maintain solvency, and therefore pay the obligations to the holders of Bell Canada debentures as they come due.”

This statement is at best a post-hoc justification; it is impossible to determine based on the record whether Bell Canada’s board actually relied on such a justification to approve the guarantee. Even on its face, however, this statement should have been insufficient: all leveraged buy outs necessarily include “new” equity to replace the old; the relevant question is the level of equity in the recapitalized firm relative to the equity in the old capital structure. Unfortunately, nothing in the record provides grounds for

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54 The relative indifference of the Supreme Court to ascertaining that the Bell Canada board was guided by a rational decision making process in connection with its approval of the guarantee ought to be compared with the Delaware Supreme Court’s review of the decision making process used by Walt Disney’s employment committee and board of directors in connection with their approval of an executive compensation contract, even though there was no suggestion that the allegations of excessive compensation could have ever threatened Walt Disney with insolvency. *In Re Walt Disney Derivative Litigation*, 906 A.2d 27 (Del. 2006).

55 *BCE*, at para. 112.


answering this question or determining whether Bell Canada, as a consequence of the contemplated arrangement, would have received an additional injection of equity or even debt capital from its parent in an amount reasonably sufficient to compensate it for its guarantee of approximately $30 billion of its parent’s debt.\footnote{A substantial portion of the purchase price was to be used to purchase outstanding common shares rather than fund new investments. Furthermore, no reference was made to the pro forma balance sheet of Bell Canada in any of the BCE-related cases. The $30 billion value of the guarantee was set forth in \textit{Aegon}, supra, footnote 4 at para. 152.}

Since there is nothing in the record which would support the conclusion that the Bell Canada stood to receive a tangible benefit from granting the guarantee, it is no surprise that the record is also devoid of evidence that Bell Canada’s directors took into account whether the heightened risk of default as a consequence of the guarantee outweighed any benefits that Bell Canada believed it would derive from the guarantee. In short, the record is devoid of any evidence that the Bell Canada directors exercised \textit{any} judgment before agreeing to guarantee the substantial debt that BCE would incur pursuant to the arrangement, despite the fact that as a result Bell Canada would suffer decline in its credit rating from investment grade to junk.\footnote{Based on BCE’s proxy statement, “Notice of Special Shareholder Meeting and Management Proxy Circular” (Sept. 21, 2007), online: <http://www.sec.gov/Archives/edgar/data/718940/000120621207000239/m37212orexv1.htm> (accessed May 8, 2009), and its 6-K statement filed July 31, 2007 for the three months ending June 30, 2007, “BCE 2007 Second Quarter Shareholder Report,” (July 31, 2007), online: <http://www.sec.gov/Archives/edgar/data/718940/000127764507000018/bceq2.htm> (accessed May 8, 2009), had the transaction been concluded, BCE’s debt to equity ratio would have been almost 5:1 as compared to a debt-to-equity ratio of 2:1 as of June 30, 2007 (treating preferred equity as debt for this purpose). Unfortunately, it is impossible to estimate what the pro forma balance sheet of Bell Canada would have been because there is no publicly available information with respect to what the impact of the arrangement would have been on Bell Canada’s balance sheet. As of June 30, 2007, however, Bell Canada’s debt-to-equity ratio was approximately 1.6:1 based on its quarterly statement filed August 1, 2007, “Notice of Reliance Section 13.4 of National Instrument 51-102 Continuous Disclosure Obligations,” (August 1, 2007), online: <http://www.sedar.com/GetFile.do?lang=EN&docClass=13&issuerNo=00001645&fileName=/csfsprod/data83 filings/01135331/00000001/x%3ASedar2007\Bell\Interim\Q2BellCanSummE.pdf> (accessed May 8, 2009).}

a. Conclusion

Independent of substantive questions of fairness, the bondholders should have won their oppression claim solely on well-established procedural understandings of the business judgment rule. The undisputed factual record established that the BCE board’s actions resulted from a misapprehension of its fiduciary duties. This legal error, moreover, was the “but for” cause that set in motion the events leading to the bondholders’ losses. Accordingly, none of its decisions should have been accorded deference under the business judgment rule.
Similarly, the record is devoid of any evidence that the Bell Canada board of directors attempted to evaluate the proposed guarantee from the perspective of the best interests of Bell Canada viewed as a corporation separate from BCE. This failure is especially glaring given the fact that the arrangement, had it been consummated, would have materially increased the likelihood that BCE, Bell Canada or both could become insolvent. Rather than exercising independent business judgment, Bell Canada’s directors were mere rubber stamps for the interests of Bell Canada’s controlling shareholder, BCE. For these reasons, the decisions of Bell Canada’s board of directors ought not have received the benefit of the business judgment rule because there was no evidence in the record that the decision to approve the guarantee was guided by a rational process intended to protect Bell Canada’s best interests.

3. Canadian Corporate Law in the Shadow of American Corporate Law

If neither the contractual nor statutory analysis is persuasive, what accounts for the outcome of BCE? The most straightforward explanation is that the Supreme Court was concerned at the prospect that Canadian law might be seen as responsible for halting the largest leveraged buyout in history and at the prospect that Canadian corporate law would be deemed deficient, especially when measured against American corporate law. Even though the bondholders attempted to argue in Aegon that Canadian law was distinctive in important respects from American corporate law and accordingly, American precedents such as Revlon and RJR Nabisco should not be used to qualify the reach of the statutory oppression remedy, the trial court dismissed their argument without meaningful analysis. The Supreme Court unfortunately did not take advantage of the BCE litigation to help clarify the extent to which the American corporate law regime should be relevant for understanding Canadian corporate law. At the same time, the Supreme Court’s freedom to maneuver was constrained by its own recent holding on the law of fiduciary duties in Peoples, in which it adopted a conception of the corporation and its interests that was distinct from the interests of the separate stakeholders making up the corporation.

The most important cases for the resolution of BCE were two American cases, Revlon and RJR Nabisco, even if the Supreme Court nominally rejected the applicability of the former and did not explicitly discuss the latter. Both cases are fundamental in the context of American corporate law: Revlon lays out the foundation for the development of the Delaware law of fiduciary obligations in connection with a hostile takeover bid or other change of control transaction, and is commonly interpreted as imposing a virtual absolute priority rule for common shareholders in connection with such transactions; RJR Nabisco, meanwhile, stands for the proposition that under New York contract law, bond indentures are not to be read as including implied negative covenants that could prevent the corporation from engaging in transactions which are detrimental to bondholders. The

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60 Ironically, the transaction failed to close when BCE’s auditors concluded that BCE would be insolvent upon completion of the transaction.

61 Aegon, supra, footnote 4, at para. 133-138.
ultimate result in BCE, if not the reasoning, is consistent with these two cases and their legacy in the U.S.

While it is quite understandable that Canadian courts would look to U.S. decisions for guidance in the corporate law context, it is an altogether different matter for them to follow U.S. decisions without considering the extent to which the reasoning in those cases is consistent with the policies of the CBCA or if those U.S. decisions ought to be distinguished on their facts. Canadian courts ought to take a critical stance toward the applicability of U.S. precedents in a Canadian context because the CBCA, and other background principles of commercial law, most notably the law of fraudulent conveyances, differ in material respects from comparable U.S. law. In particular, the CBCA, relative to the DGCL, is paternalistic, expressing greater skepticism of market forces as a tool for corporate governance than the DGCL. In this case, for example, given the relatively greater statutory rights the CBCA grants creditors, and its relatively skeptical stance toward private ordering as a means of corporate governance, it would appear to be a methodological mistake to interpret the ambiguities of bond indentures of a CBCA corporation in the same manner that one would interpret similarly ambiguous language in a New York law-governed bond indenture of a Delaware corporation. Because of these statutory differences, a Canadian court need not be reticent, for example, in applying its own substantive conception of fairness in the context of contractual ambiguity, even if American authorities suggest that a corporation owes no duty of fairness to bondholders.

Such an approach might attract criticism on the ground that, relative to U.S. law, it introduces a potentially destabilizing source of indeterminacy into corporate

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62 For purposes of this comparison, I will take the Delaware General Corporations Law as representative of U.S. corporate statutes.

63 For evidence of the CBCA’s relative skepticism of the market as a tool for corporate governance relative to the DGCL, compare DGCL § 102(b)(1), which expressly permits the inclusion of “[a]ny provision for the management of the business and for the conduct of the affairs of the corporation” so long as such provision is “not contrary” to the laws of Delaware in a Delaware corporation’s charter with the CBCA’s case-by-case approach to which CBCA rules can be varied by the articles of incorporation. See CBCA § 39(10), § 49(17), § 103(1), § 105(2), § 114(1) and § 139(1). The CBCA and the DGCL also differ substantially in important details in a manner that reinforces the CBCA’s relative skepticism of the market as a force for good corporate governance. Among the more important differences in the two codes is that the CBCA does not permit a corporation to include a “hold harmless” provision for a director’s breach of duties to the corporation (CBCA § 124) while the DGCL does, at least in the context of breaches of the duty of care (DGCL § 102(7)); the CBCA permits payment of a dividend only if a corporation does not become insolvent as a result (CBCA § 42), while the DGCL permits payment of a dividend out of the current and prior year’s profits without satisfying a solvency test (DGCL § 170); the CBCA always requires director disclosure of self-interested transactions (CBCA § 120(1) while the DGCL permits non-disclosure if the facts are otherwise known to the board (DGCL § 144(a)(1)); the CBCA grants bondholders the right to bring derivative suits (CBCA §§ 238-239) and access to corporate records to the same extent as shareholders (CBCA § 21(1)), while under the DGCL only shareholders can bring derivative suits (DGCL § 327) and bondholders do not have a right to inspect corporate records unless the certificate of incorporation so provides (DGCL § 221).

transactions. U.S. law, however, despite its stated commitment to securing certainty in capital markets transactions, is also open to similar criticism: although cases such as *Revlon* and *RJR Nabisco* further the legal certainty by insisting on a narrow reading of corporate debt contracts combined with an absolute priority rule in favor of common shareholders, the U.S. law of fraudulent conveyances, with its broad concept of "constructive fraud," pushes U.S. law in the opposite direction by placing substantial equitable limitations on the power of debtors – corporate or otherwise – to transfer property despite the absence of contractual limitations on such transfers.

This suggests that US courts may be justified in following a highly-formalistic reading of bond indentures and in refusing to imply a fiduciary relationship between a corporation’s board of directors and its creditors because they know that other areas of the law, such as the law of fraudulent conveyances and the broad definition of "transfer" in bankruptcy law, may be sufficient deter overly-opportunistic debtor behavior. Conversely, because Canadian law lacks sufficiently robust non-corporate law remedies to deter debtor opportunism, the oppression remedy may, as a practical matter, remain the most important tool available to Canadian courts to deter debtor opportunism. If this is the case, it makes little sense for Canadian courts to narrow the applicability of the oppression remedy in this context in reliance on American authorities when the non-corporate remedial tools protecting creditors in the U.S. are broader than what is currently available in Canada.

In addition to the Supreme Court’s failure to take cognizance of the substantial differences in applicable U.S. and Canadian law, the Supreme Court failed to take into account the possibility that *Revlon* and *RJR Nabisco* were inapplicable to BCE on factual grounds. While *Revlon* is often cited for the proposition that once a break-up of the

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65 Indeed, in RJR Nabisco the bondholders also brought a claim of fraudulent conveyance against the corporation which was not dismissed at summary judgment. *RJR Nabisco* at 1522. Indeed, RJR Nabisco, despite successfully defending the bondholders’ claim that its leveraged buyout transaction violated an implied covenant of good faith, subsequently entered into a settlement with the plaintiff bondholders in respect of their surviving fraudulent conveyance claim that essentially made them whole. William A. Klein and J. Mark Ramseyer, *Business Associations: Agency, Partnerships, and Corporations*, 2nd edition (Westbury, N.Y. The Foundation Press, 1994) at p. 841. For a general discussion of the vulnerability of leveraged buy-out transactions to attack by creditors as fraudulent conveyances, see Peter Spero, *Fraudulent Transfers: Application and Implications* § 2:37.

66 “Transfer” under U.S. bankruptcy law, for example, would include a guarantee. *Ibid.*, § 1:18.

67 For a short account of Canadian provincial and federal fraudulent transfer laws, see Anthony Duggan, Stephanie Ben-Ishai, Thomas Telfer, Roderick Wood and Jacob Ziegel, Canadian Bankruptcy and Insolvency Law (2nd ed, Emond Montgomery, Toronto, 2009) (forthcoming), Chapter 5, Part II. See also Anthony Duggan, “Gifts and Transfers at Undervalue” in Stephanie Ben-Ishai and Anthony Duggan (eds), Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond (Lexis Nexis, Toronto, 2007), Chapter 7. It should be noted that a Uniform Law Conference of Canada Working Group is currently working on a project to update and harmonize Canada’s fraudulent conveyance laws, the end result of which may be new fraudulent conveyance legislation that would bring Canadian law closer to American law.
corporation is recognized as inevitable, the only duty of the corporations’ board is to fetch the highest price available for the common shareholders,\textsuperscript{68} no where does Revlon state that all contractual ambiguities must be resolved in favor of the shareholders. On the specific facts of Revlon, the noteholder plaintiffs had purchased the notes in the midst of a contested takeover transaction (indeed they were offered for sale as part of the target’s defensive strategy), and those notes expressly granted Revlon’s board of directors the right to waive certain negative covenants.\textsuperscript{69} Accordingly, while it is plausible to believe that the particular contract at issue in Revlon had indeed fixed the rights of the noteholders (and thus they had no ground to complain of unfair treatment if the board exercised its right to waive the negative covenants at issue), it hardly seems justifiable to transfer a result derived from the specific terms of the Revlon bonds onto the 1976 and 1996 Bell Canada Indentures, which do not include express language permitting the very conduct that forms the basis of the dispute between the corporation and its bondholders.

Likewise, the indenture in the RJR Nabisco litigation differed in material respects from those involved in the BCE litigation. The RJR Nabisco bond indenture, for example, did not include a bondholder approval provision for mergers such as the one in Section 8.01 of the 1976 and 1996 Bell Canada Indentures.\textsuperscript{70} Moreover, the parties in RJR Nabisco had consciously eliminated express negative covenants in the RJR Nabisco bond indentures that would have precluded RJR Nabisco from incurring the very indebtedness that the bondholders sought to enjoin in their suit.\textsuperscript{71} Finally, the RJR Nabisco indentures did not include any negative covenants restricting the incurrence of new debt whatsoever.\textsuperscript{72} The Bell Canada indentures, by contrast, did include negative covenants regulating the incurrence of new debt. Given the substantial differences between the respective bond indentures, the mechanical application of the holding in RJR Nabisco to the facts in BCE is, at a minimum, highly problematic.

4. Conclusion

BCE should have been a landmark decision, but the Supreme Court’s analysis of the case has created a substantial risk that this decision will quickly be forgotten. The relationship of creditors, in general, and bondholders in particular, to the corporation, is one of fundamental importance to corporate law. Canadian corporate law, relative to American corporate law, takes a different approach to this doctrinal problem. When a jurisdiction like the U.S. adopts a broad understanding of fraudulent conveyances, reliance on a highly-formalistic approach to the interpretation of bond contracts in the context of corporate law ought not be very surprising or troubling. Conversely, in a jurisdiction like Canada, where the reach of its fraudulent conveyance statutes is relatively quite narrow, it should not be surprising that its corporate law statutes introduce an element of equity in the interpretation of creditors’ rights. Accordingly, it ought to be

\textsuperscript{68} Revlon, supra, footnote 2, at pp. 1250-1251.
\textsuperscript{69} Ibid., at p. 1248.
\textsuperscript{70} RJR Nabisco, supra, footnote 1, at p. 1510.
\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid., at p. 1508.
a matter of concern when Canadian courts eviscerate the equitable protects of the CBCA in deference to contractual agreements.

Neither the U.S. nor the Canadian approach is inherently superior to the other, but they do differ in timing: under the U.S. approach equitable factors will be taken into account ex post, i.e. in bankruptcy proceedings, while the Canadian approach would seem to require insuring that such transactions are equitable from an ex ante perspective. Unfortunately, because of the inordinate influence of American corporate law on the Canadian corporate law, the Supreme Court in BCE failed to take into account the fundamental differences between the two legal regimes, or even the factual differences between the Bell Canada bond indentures and those in Revlon and RJR Nabisco. As a result of the Supreme Court’s decision in BCE, Canadian law, despite the fact that the CBCA offers more explicit protections to creditors than U.S. corporate law, has ironically become more formalist in its approach to creditors’ rights than U.S. law.