Directors' Fiduciary Duty to Act in the Best Interests of the Company: Whose Interests Really – Company or Stakeholders'?

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INTRODUCTION

Recent decisions from the Canadian jurisprudence on corporate governance, particularly directors' duties, have spurred quite a controversy in many Commonwealth countries and for practitioners, and even in several Caribbean countries whose recently revamped corporate laws are modelled on the Canadian legislation perhaps with a view towards good corporate governance.

Corporate governance is a global phenomenon which has been at the centre of attention since several notable corporate collapses which include Enron[1] and WorldCom[2] in the United States and Parmalat[3] in Italy. Even in Jamaica the mid 1990's was plagued by a "calamitous" collapse of the Jamaican domestic financial sector. The government responded to this catastrophe by setting up FINSAC[4] with a view to rescuing these failing entities however this mechanism was short-lived.[5]

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[1] Enron Corporation (former NYSE ticker symbol ENE) was one of the world's major electricity, natural gas, communications and pulp and paper companies which claimed revenues of nearly $101 billion during 2000 before its collapse on 2nd December 2001.

[2] On July 21, 2002 WorldCom filed for Chapter 11 Bankruptcy Protection and was the largest such filing at the time in US history. Both it and Enron's bankruptcy proceedings were heard simultaneously.

[3] Parmalat is described today as Europe's biggest bankruptcy since its collapse in 2003 having been the leading global corporation in the production of ultra high (UHT) milk.

[4] FINSAC (Financial Sector Adjustment Company) was established in 1997 by the Jamaican government and was charged with a mandate to restore stability in a well regulated financial sector after its foresight of the whole indigenous financial system reaching a state of considerable distress.

[5] [5] Clarke, Claude *"Public Affair: The Tragic Folly of FINSAC"*, published in the Jamaican Gleaner on November 22, 2011.

Corporate governance concerns the relationship between the management of the company and its shareholders[6]. The underlying factor which bolsters the need for good corporate governance is that there commonly develops a separation between those who own the company and those who manage it. Large companies generally have an influx of shareholders for whom it becomes increasingly difficult to control the company. As a result of this and owing to statutory requirements, the powers and management of company are transferred to a board of directors appointed by shareholders.

It is this separation of the shareholders from board that proves problematic and in many instances runs companies underground. The board is given a wide array of powers which is curtailed in a limited way by shareholders who have limited rights[7]. Essentially, shareholders are at the "mercy" of the directors.

One would expect the directors to exercise their duties in the interests of the shareholders because in addition to the rights held by the shareholders, they provide importantly equity financing for the company. However, a debate has been ongoing whether there are other interests to be considered by the directors in the exercise of their duties. The genesis of the debate would seem justified when one considers other stakeholders of a company such as creditors, suppliers and even the employees whose service is not to be undermined. These latter interests protrude not only on corporate collapse, but also where there is a takeover or a plan of arrangement as will be explored in this paper.

[6] The Private Sector Organization of Jamaica (PSOJ) in its pursuit of good corporate governance has compiled a Code on Corporate Governance, which is modelled on the UK Combined Code on Corporate Governance. The Code sets out core principles and best practices for adoption by all publicly listed companies in Jamaica and non-listed companies engaging in the provision of financial services.

[7] Shareholders, by virtue of their status, are given notably three rights; right to vote, right to dividend when declared and right to return of their capital upon the winding up of the company.

Essentially, good corporate governance primarily stems from internal structures of the board of directors who must act in the best interest of the company.[8]

It is against this background that this paper will examine the scope of directors' fiduciary duties and the interests to pursue when discharging those duties, drawing from the common law and legislation of commonwealth jurisdictions such as Canada and the UK. This paper will also compare the commonwealth jurisprudence on directors' fiduciary duty with the United States and ultimately inform an approach towards establishing Jamaica's corporate governance jurisprudence.

DIRECTORS' DUTY AT COMMON LAW – *WHOSE INTEREST?*

It is a long established principle of the English common law that directors owe two categories of duties to the company; fiduciary duty and duty of care and skill. The controversial question which follows is to whom these duties are really owed. The question is controversial in that there have been widespread debate, vast literature and academic discussions which undoubtedly still have not settled the question.

The starting point, however, is the cardinal rule of the common law that directors owe a duty to the company and the company alone.[9] This rule has it origin by the court at an early stage, having stemmed from an analogy with the rules applying to trustees.[10] The considerable corpus of learning on the scope of the general fiduciary duties has remained for the most part within the common law.[11] The common law duty was typically formulated as one which required

[8] Hannigan, Brenda, Company Law, 2nd ed. (Oxford University Press) at 116
[9] Percival v Wright [1902] 2 Ch. 421
[10] Davies, Paul L., Gower & Davies: Principles of Modern Company Law, 8th ed. (London: Sweet & Maxwell) at 477
[11] *Ibid* at 477. Importantly, this common law rule has been codified in legislations in many jurisdictions, some with variations.

directors to act in good faith in what they believed to be the best interest of the company. This principle has been subject to vigorous challenges and criticisms.

One argument is that the common law formulation has provided insufficient guidance to the directors as to whose interest to pursue when exercising their powers. This is supported by the fact that a company is an artificial legal person.[12] In this regard, it is argued that it is impossible to assign interests to a company unless one goes beyond it and identifies the interests of one or more group of natural person. This was the view in the case of ***Brady v Brady***.[13] With the current state of the common law, there is little or no assistance to the directors as to how to exercise their powers in the eyes of the law.

Arguably, on the contrary, there is the view that the company as a legal entity separate from its members, and in whose interests the directors must act is well understood.[14] This argument however is strenuously resisted as being unsupported and unsupportable.[15] The learned author of ***Gower & Davis: Principles of Modern Corporation Law***[16] agrees with this proposition only to the extent that the common law *normally* identifies the interests of the company with those of its shareholders.

While the above represents the position of the UK common law, the New Zealand and Australian body of jurisprudence developed vastly different which eventually saw the UK adopting a similar approach. All three jurisdictions recognize the director's obligation to the company. However, in New Zealand and Australia the duty of directors requires them to have

[12] Salomon v Salomon [1897] AC 22
[13] [1988] B.C.L.C 20 at 40. The learned Lord Justice remarked that the interest of a company, as an artificial person, cannot be distinguished from the interests of the persons who are interested in it.
[14] The Law Society, *Company Law Reform White Paper, June 2005, p.6.*
[15] Davies, Paul L., Gower & Davies: Principles of Modern Company Law, 8th ed. (London: Sweet & Maxwell) at 507
[16] *Ibid*

regard to the interests of creditors when the company is insolvent or of doubtful solvency. In ***Nicholson v Permakraft***,[17] Cooke J opined:

> "...the duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider inter alia the interests of creditors. For instance creditors are entitled to consideration, in my opinion if the company is insolvent, or near insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardize its insolvency."[18]

A year later the New South Wales Court of Appeal in ***Kinsela v Russell Kinsela Pty Ltd***[19] took a similar approach to that of the New Zealand Courts. It pronounced that:

> "In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when the questions of the duty of directors arise...But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either

[17] [1985] 1 N.Z.L.R. 242
[18] *Ibid* at 249, 250
[19] (1986) 4 ACLC 215

> liquidation, return to solvency, or the imposition of some alternative administration."[20]

The UK later recognized the existence of directors' duties to creditors which was endorsed by the House of Lords in ***Winkworth v Edward Baron Development Co. Ltd***.[21] Lord Templeman explained that the directors owe a fiduciary duty to the company and its present and future creditors to ensure that its affairs are properly administered to keep the company's property inviolate and available for the repayment of its debt.

It is this somewhat imprecise guidance at common law on how the directors are to exercise their duties and whose interests they are to pursue that saw the emergence of statutory duties of directors. Countries like the United Kingdom have modified the common law in their Companies Act 2006 to exclude the phrase "best interest of the company", which will be discussed in this paper. Canada remains wedded to the common law and thereby codified in statute a restatement of the common law rule.

DIRECTORS' DUTY IN CANADA: *CORPORATION VS. STAKEHOLDERS INTERESTS*

Statutory directors' duty is found in the Canada Business Corporations Act (CBCA).[22] Section 122(1) so far as relevant states that:

> "Every director and officer of a corporation in exercising their powers and discharging their duties shall:
>
> a) act honestly and in good faith with a view to the best interest of the corporation; and

[20] *Ibid* at 223, per Street CJ
[21] (1987) 1 ALL ER 114
[22] R.S.C. 1985

b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

The Act clearly highlights the two categories of duty that are owed by directors of a corporation; fiduciary and duty of care. Also evident is that the duties are no more than a restatement of those at common law. This however leaves room for one to argue that the CBCA has not advanced the state of the law on directors' duties. The conundrum still exists as to what is the best interest of the corporation and who are to be considered when the directors are discharging their duties.

In recent time pressure has been exerted on the courts to expand directors' fiduciary obligations from the corporation to other corporate stakeholders.[23] This was first at issue in the landmark case of ***Peoples Department Stores Inc (Trustee of) v Wise*.**[24] This case arose out of the bankruptcy of Wise Stores Inc. and its wholly owned subsidiary Peoples Department Stores Inc. Wise had acquired Peoples Department Stores in 1992 from Marks and Spencer. After acquisition, Wise and Peoples attempted to realize certain operational synergies and a new inventory procurement policy was instituted. Under this policy, Peoples made all domestic and overseas purchase for both companies while charging Wise for transferring and shipping the goods to its stores. Wise began experiencing serious financial problems with the result that its indebtedness to Peoples began to grow. In December 1994 both corporations filed for bankruptcy. An action was brought on petition by the trustee in bankruptcy for Peoples, on behalf of its creditors, to recover funds relative to reviewable transactions and to recover

[23] Graham C., King W., and Pasquino G., Web Exclusive: Directors have a fiduciary duty to the corporation and only to the corporation!
[24] (2004) 3 S.C.R. 461; 2004 SCC 68

property that was transferred to Wise at gross undervalue pursuant to the inventory procurement policy in contravention of the Bankruptcy and Insolvency Act.[25] The thrust of the creditors' claim was a breach of fiduciary duty and duty of care under section 122 of the CBCA.

The simple yet controversial issue for the court's determination was whether the directors owed a duty to the creditors. The judicial history of the case is interesting. At first instance the Quebec Superior Court found that Wise's directors had breached their fiduciary duty and awarded damages. The court, in relying on decisions from the United Kingdom, Australia and New Zealand, also found that the directors' fiduciary duty extends to creditors when the corporation is insolvent or in the vicinity of insolvency. The controversy was heightened when the decision was reversed by the Quebec Court of Appeal which expressed reluctance to equate the interests of creditors with the best interests of the corporation when the corporation was insolvent or in the vicinity of insolvency. The court remarked that the first instance court had committed a "palpable and overriding error" and stated that the innovation in the law such as this is a policy matter more appropriately dealt with by Parliament than the courts.[26]

The scope of the directors' duty to act in the best interest of the corporation was further obfuscated with the common law to statutory transition by difference of opinions held by the different levels of the judiciary. The appeal then went to the Supreme Court of Canada, the highest court in the jurisdiction, which purported to settle once and for all the law on directors' fiduciary duty to creditor, in its celebrated judgment. The court for the first time expounded on the statutory provision of directors' duty and whose interest they are to pursue. In a unanimous decision, the Supreme Court found that the directors did not owe a duty to the creditors and that

[25] Section 100 prior to it being repealed in 2005 dealt with examination and consideration in a reviewable transaction.
[26] *per* Pelletier J.A.

the decisions made by Wise when the corporation was struggling financially was in the best interest of the corporation since it was with a view to the survival of the corporation.

The court made it clear that the best interests of the corporation should not be confused with the interests of the creditors or those of any other stakeholder. By way of illustration, when a corporation is a going concern, its interests along with those of other stakeholders are the same. However, when the corporation is weathering serious financial difficulties, the interests cannot be the same as the goal is to ensure that the corporation mitigate its losses. At this point, the shareholders are worried about the value of their shares, creditors are worried about the prospects of return on their loan portfolio, and so the interests of various stakeholders are no longer the same. In the face of these competing interests, it is the duty of the directors to ensure that the interests of the corporation are what are of paramount importance.

In addressing the corporation's interests, the court has not excluded the interests of other stakeholders. It noted:

> "Insofar as statutory fiduciary duty is concerned, it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders."[27]

Form an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation.[28] The court has conferred discretion on the directors to consider other interests:

[27] At paragraph 42
[28] Lacobucci, E.M., "Directors' Duties in Insolvency: Clarifying what is at Stake" (2003), 39 *Can. Bus.* 398, at pp. 400-1

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

After ***Peoples*** it would appear that the law is settled on the fiduciary duties of directors. This clearly was not the case as the Supreme Court was again called upon to settle an issue regarding directors but this time their duty to debentureholders in a change of control transaction, in yet another landmark decision, ***BCE Inc. v 1976 Debentureholders***.[29] It would seem as though this case was frivolous to begin with in light of ***Peoples*** since the debentureholders are creditors. Lest we forget however that not all creditors are debentureholders. In this case BCE wholly owned Bell Canada. It became apparent in 2006 to BCE directors that a group called Ontario Teachers Pension Plan was in the process of trying to take over BCE. It would have been financed in part by Bell Canada assuming a substantial portion of the debt. The transaction was to proceed by way of a plan of arrangement pursuant to the CBCA.[30] Initially, BCE directors intervened believing it was not in the best interest of the shareholders to have a single party make a takeover bid rather than having multiple parties compete with one another resulting in a bidding war; the effect of which would increase the offer price for shares of the corporation. Three different groups made complex offers; each of which required Bell Canada to take on a substantial amount of the new debt. After reviewing the offers BCE directors decided on

[29] [2008] SCC 69

[30] Section 192 deals with Plan of Arrangement, particularly at the instance of the target corporation who must apply to the court for approval.

Teachers' which they viewed to be in the best interest of the shareholders. An agreement was entered between BCE and Teachers with 97.93 per cent of the shareholders agreeing to the terms.

A group of Bell Canada debentureholders, upon a press release of BCE's intention, sent letters to BCE voicing their concerns about the potential leveraged buyout transaction and sought assurance that their interests would be considered by the board. BCE replied in writing that it intended to honour the contractual terms of their trust indenture. While the transaction was underway, the debentureholders opposed the leveraged buyout of BCE alleging that the increase debt to be assumed by Bell Canada could reduce the value of their investments by twenty per cent while conferring a premium of approximately forty per cent on the market price of BCE shares. Additionally, a claim for oppression was made thus giving the highest court the chance to settle the law on the oppression remedy under the CBCA.[31]

The court at first instance dismissed the claim for oppression finding that the transaction was not oppressive by reason of rendering the debentureholders vulnerable, that it had a valid business purpose and that BCE directors had not unfairly disregarded the interests of the debentureholders. In arriving at these conclusions, the trial judge proceeded on the basis that BCE directors had a fiduciary duty to act in the best interests of the corporation which are not to be confused with the interests of the shareholders or other stakeholders.[32] The court expressed the view that corporate law recognizes fundamental differences between shareholders and debt security holders which determine the context of directors' fiduciary duty. In consequence, the directors' duty to act in the best interests of the corporation might require them to approve

[31] Section 241 of the Canada Business Corporation Act is the provision on oppression remedy.
[32] At paragraph 24

transaction that, while in the interests of the corporation, might also benefit some or all shareholders at the expense of other stakeholders.

The difference of opinion that was seen in ***Peoples*** also manifested in this case. The Court of Appeal allowed the appeal on the ground that BCE had failed to meet its onus on the test for approval of an arrangement by failing to show that the transaction was fair and reasonable to the debentureholders. Basing its analysis on ***Peoples*** decision, the court found that the directors were required to consider the non-contractual interests of the debentureholders and that they were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to shareholders while avoiding the adverse effect on the debentureholders.

On a further appeal to the Supreme Court, the court restated but this time significantly expounded upon its previous decision in ***Peoples*** which clearly demonstrated that it was not prepared to extend the fiduciary obligations of directors to act in the best interests of corporate stakeholders. It further reinforced the view that directors in discharging their duties *may* look to the interests of other stakeholders. In taking this position, the court had high regard for the business judgment rule which accords deference to director's reasonable decisions, including decisions involving competing and conflicting stakeholder interests.[33] The court made it clear that it will not go on to determine whether the directors' decision was a perfect one provided that, as it so found, the decision was found to have been within a range of reasonable choices that they could have made in weighing conflicting interests. The business judgment rule provides

[33] Graham C., King W., and Pasquino G., Web Exclusive: Directors have a fiduciary duty to the corporation and only to the corporation!

adequate protection to directors so long as they follow a process that takes into account the interests of affected stakeholders.

Implicit in what is a well-reasoned judgment, the court seems to place paramount importance on shareholders' interests in directors' decision-making, especially in the context of change of control. This is emphasized by the fact that market pressures and the reality that shareholder acceptance is critical in allowing a transaction to proceed mean that, in practice, directors will continue to make a central focus of their analysis whether a transaction offers the highest value reasonably available to shareholders, even as they consider the best interests of the corporation and the impact of the transaction on other stakeholders.[34]

While the court expressed its unwillingness to extend the directors' fiduciary obligations, it did so noting that corporate stakeholders can hinge their claim under the oppression remedy. Informed by case law on the oppression remedy, which was thoroughly explored in its decision, the court stated 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 *"fairly and equitably"*.[35] This suggests arguably that in some instances directors *must*, and not simply *may*, consider the impact of their corporate decisions on affected stakeholders to ensure that they are treated fairly. This appears to be a departure by the court from its decision in ***Peoples***. In view of the oppression remedy, the directors arguably must consider the interests of other stakeholders in

[34] Osler, Key Lessons from the BCE Decision, December 2008.
[35] While the minimum requirement to treat stakeholders fairly is only referred to in the Court's discussion of the oppression remedy (see *ibid*. at para. 81), the language used suggests that this obligation flows from the fiduciary duty. In discussing the content of the fiduciary duty, the Court similarly suggests that oppression cases have helped to clarify the content of the fiduciary duty and seemingly refers to a fairness standard by saying that the oppression cases have helped to show "the range of interests that should be considered in determining what is in the best interest of the corporation, acting fairly and responsibly" (*ibid*. at para. 39).

addressing the best interests of the corporation, which stands contrary to this decision and ***Peoples***.

In light of the above, the Supreme Court has subjected itself to criticisms. Academics are of the view that the Quebec Court of Appeal in ***BCE*** has elevated to a level of urgent national importance, questions that have been raised following the Supreme Court's decision in ***Peoples*** as to how a duty owed exclusively to the corporation and not any one group of stakeholders would be applied in the takeover context.[36] It is argued that the Supreme Court missed the opportunity to clarify its previous decision in ***Peoples*** and to demonstrate how the fiduciary duty set out in that case would be applied in the context of a change of control transaction.[37] Defying these expectations, the Supreme Court addressed a narrow set of questions rather than providing a sweeping exposition of the duties of directors on the question as to whether the BCE board of directors was required to take the actions it took in conducting an auction to maximise shareholders value.

It is quite surprising that the Ontario Court of Appeal, in the face of ***Peoples***, would differ in its view as to the meaning of the best interest of the corporation. In ***Ventas Inc v Sunrise Senior Living Real Estate Investment Trust***,[38] which was decided three years after ***Peoples***, the Court of Appeal stated that there is *"no doubt that the directors of a corporation that is the target of a takeover bid have a fiduciary obligation to take steps to maximise shareholder value in the process."* It is perhaps indicative of the lack of guidance provided by the court's formulation of the fiduciary duty in ***Peoples*** so much so that the indeterminacy of a duty that is exclusively "to the corporation" gives boards of directors and courts little guidance as to the

[36] Gray, Wayne, *"A Solicitor's Perspective on Peoples v Wise"* (2005), 41, C.B.L.J. 184 at 189-190
[37] Moore, Alex J., 'Directors' Duties in Change of Control Transactions: A Missed Opportunity
[38] (2007) 222 O.A.C. 102, 29 B.L.R. (4th) 312

appropriate "yardstick against which to measure the discharge by the directors of their duties in any particular fact situation".

Another argument is that ***BCE*** has significantly recast the standard of conduct to be met by directors and officers in Canada without sufficient regard to the legal and policy issues at stake.[39] In this regard, ***BCE*** creates a new but incomplete regime for the responsibilities of directors thereby posing substantial challenges for businesses and their advisors trying to understand what it requires.

Relationship between Oppression and Fiduciary duty

The court's thorough reasoning on the oppression remedy in ***BCE*** has created an interwoven relationship between it and the fiduciary duty. In ***Peoples***, the court refused to shift the interest from corporation to creditors in the vicinity of insolvency as it considered creditor's claim under the oppression remedy. ***BCE*** is helpful in its clarification of the relationship between these concepts. For some time there was a debate among academics and in case law whether a stakeholder making an oppression claim could seek relief from a breach of fiduciary duty.[40] Ordinarily, a stakeholder cannot directly claim a breach of fiduciary duty because the duty is owed to the corporation. The usual recourse was to bring a derivative action on behalf of the corporation. Notwithstanding this however, most courts deciding oppression cases have permitted complainants to seek relief based on a breach of fiduciary duty.[41] ***BCE*** has settled the law once and for all on this loose principle in making it clear that compliance with fiduciary duty is a reasonable expectation and, consequently, that breach of a fiduciary duty can be invoked by

[39] Vanduzer, Anthony J., *"BCE v. 1976 Debentureholders: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision since Peoples"* (2010) 43:1 U.B.C. Law Review at 207
[40] MacIntosh, Jeffrey G., *"The Oppression Remedy: Personal or Derivative?"* (1991) 70 Can. Bar Rev. 29
[41] This was permitted in Sparling c. Javelin International Ltd., [1986] R.J.Q. 1073; Waxman v Waxman (2002), 25 B.L.R. (3d) 1 at 349 (Ont. Sup. Ct. J.)

a stakeholder in support of an oppression claim. This was not without criticisms from scholars who saw it as "inappropriately conflating the fiduciary duty and oppression remedy".[42] The relationship between the oppression remedy and fiduciary duty underscores the fact that directors *must* and not *may* consider the interests of other stakeholders. Though imprecise, this is the state of the law in Canada until further developments.

DIRECTORS' DUTY IN THE UNITED KINGDOM: *DID THEY "SMELL THE RAT"?*

Prior to the promulgation of the Companies Act 2006, directors' duty remained largely at common law which dictates that the directors are to act with a view to the best interests of the company. The Law Commission and the Company Law Review sought to disturb this long standing rule by recommending a "high level" statutory restatement of the common law principles.[43] After much deliberation, the Act received Royal Assent. The proposition for restatement without more of the common law principles was the subject of intense controversy. However, the Act quite curiously omitted the phrase "the best interest of the corporation". Instead section 172 requires a director to act "in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole". Here the statute as reformulated makes shareholders or members the primary object of the directors' focus. Gower is of the view that interests of other stakeholders are "subordinate to the central duty to promote the success of the company for the benefit of its members."[44] This section it is submitted should resolve any confusion in the minds of the directors as to what the interests of the company are. The Act also provides a list of factors that the directors must

[42] See eg. McIntosh, supra.
[43] Company Directors: *Regulating Conflicts of Interest and Formulating a Statement of Duties*, Law Commission No. 261 and Scottish Law Commission No. 173, Cm. 4436 (1999); CLR, Final Report, Ch.3 and Annex C
[44] Davies, Paul L., Gower & Davies: Principles of Modern Company Law, 8th ed. (London: Sweet & Maxwell) at 508

address their mind to in carrying out their duties. This approach is more precise than the Canadian approach which is in pursuit of the best interest concept. As such, it will be difficult for directors to subject themselves to litigations. UK's approach, clarity and precision are no doubt steps in the right direction.

DIRECTORS' DUTY IN THE UNITED STATES: *REVLON MEETS BCE*

Historically there had been struggles as to the different approaches to target board director duties in change of control transactions in both the U.S and Canada.[45] The Delaware Supreme Court in the seminal case of ***Revlon v MacAndrews & Forbes Holdings, Inc***[46] has made it clear that where, in limited circumstances where a "sale" or "break-up' of a corporation is inevitable, the fiduciary obligations of the directors of a target corporation are narrowed significantly - the sole obligation of the board being to maximise immediate shareholder value by securing the highest price available.

In this case Revlon was approached by Pantry Pride with a proposal of either a negotiated transaction or a hostile tender offer if necessary. The board rejected the negotiated transaction fearing that the acquisition would be financed by junk bonds and result in the corporation's dissolution. In the same breath, in an attempt to prevent the hostile tender offer, the board quickly undertook defensive action. It adopted a Note Purchase Rights Plan[47], a variation of the traditional "poison pill". Shortly thereafter, Pantry Pride made a hostile cash tender offer for any or all Revlon shares at higher price than its previous offer, subject to its ability to secure

[45] Dietrich, Nicholas, *"Revlon Redux: Reconciling the BCE Case in Change of Control Transactions – Is Lyondell the Better Way?"* (2009) Business Law International Vol 10, No. 3 at 216
[46] 506 A.2d 173 (Del. 1986)
[47] When this is triggered, it results in the issuance of debt rather than equity rights to existing shareholders other than the unapproved bidder.

financing and to the redemption of the rights issued to shareholders pursuant to the newly adopted Rights Plan.

The Revlon board responded by advising shareholders to reject the offer as inadequate, and it commenced its own offer to repurchase a significant percentage of its own outstanding shares in exchange for senior subordinated notes and convertible preferred stock valued at $100 per share. The offer was quickly oversubscribed and in exchange for ten million of its own tendered shares, the corporation issued notes that contained covenants restricting Revlon's ability to incur debt, sell assets or issue dividends going forward.

The effect of the consummation of the repurchase programme thwarted Pantry Pride's outstanding tender offer which saw it later issuing a new offer that reflected value essentially equivalent to its first offer. This was again rejected by the Revlon board and Pantry Pride repeatedly revised its offer raising it at a price higher than previous.

Revlon subsequently commenced discussion with another corporation, Forstmann regarding a possible leveraged buyout as an alternative to the acquisition by Pantry Pride. It then immediately struck a deal with Forstmann on conditions that Forstmann would receive a lock-up option to purchase one of Revlon’s most important business divisions at a discounted price and a waiver of the restrictions contained in the previously issued notes. As a result of the repeated refusal of the offer and favouring Forstmann, Pantry Pride was pushed to the court for an injunctive relief against Revlon. The Court of Chancery granted the requested relief, finding the Revlon directors had acted to lock up the Forstmann deal by way of the challenged deal provisions out of concern for their potential liability to Revlon’s disaffected and potentially litigious noteholders, a concern that would be allayed by Forstmann’s agreement to restore the

full value of the notes in connection with the new deal. The Court of Chancery found that, by pursuing their personal interests rather than maximizing the sale price for the benefit of the shareholders, the Revlon directors had breached their duty of loyalty.

On appeal the Supreme Court agreed with the court below that it was this new and far narrower duty that the Revlon directors had violated. By having agreed to structure the most recent Forstmann transaction in a way that effectively destroyed the ongoing bidding contest between Forstmann and Pantry Pride, the Revlon board was held to have acted contrary to its newly acquired auctioneer-like obligation to pursue and secure the highest purchase price available for shareholders.

Emanating from this US landmark decision is the principle that the role of the board of directors transforms from "defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the corporation."

On meeting ***BCE*** over two decades later it is evident that such principle is not reconcilable as the Canadian jurisprudence in light of ***BCE*** disaffirmed the pursuit of maximising shareholder value as the sole objective and arguably blurred the line for target board director duties in change of control transactions. Prior to the reasons in the decision in ***BCE***, the granting of summary judgment, allowing the appeals and dismissing the cross appeals created an assumption that Revlon was good law in Canada. This illusion was shattered when the court framed the issue thus:

> "On these appeals it was suggested on behalf of the corporation that the "Revlon line" of cases from Delaware support the principle

> that where the interests of shareholders conflict with the interests of creditors, the interests of the shareholders should prevail.[48]

A further assault on ***Revlon*** applicability in ***BCE*** is found in the court's assertion that:

> "There is no principle that one set of interests – for example the interests of shareholders – should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to the situation, they exercised business judgement in a responsible way."[49]

Its eventual demise came when the court noted that ***Revlon*** line of cases had not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of the business judgment of what is in the best interests of the corporation, in the particular situation it faces.[50]

The court's rejection of "Revlon duty" was first manifested in its pronouncement of the oppression remedy – that the corporation and shareholders are entitled to maximise profit and share value but not by treating individual stakeholder unfairly. The fair treatment concept is the fundamental theme of the oppression remedy and is what the stakeholders are reasonably to expect. Had the court stopped at this fundamental concept, it perhaps would have provided some certainty for directors as to how to treat with stakeholders. It however went much further "in muddying the waters of pursuit of the elusive holy grail of 'the best interest of the

[48] At para 85
[49] *Ibid* at para 84
[50] The supreme Court came to this conclusion praying in aid the article written by former Delaware Chief Justice Veasey, Norman E. and Di Guglielmo, Christine T, *"What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments"* (2005), 153 U. Pa L. Rev. 1399, at p. 1431)

corporation'."[51] In treating stakeholders fairly, the directors wear the badge of honour for "good corporate citizens" while their fiduciary obligations are still to the corporation. ***BCE***, notwithstanding the difficulties faced by the directors, is far beyond reconciliation with the ***Revlon*** and its progeny principle which main objective is maximising shareholder value.

Is there really irreconcilability? It is arguable that ***BCE*** and its best interest construct leave scope for the applicability of the "Revlon duty" which is emphasized by the fact that the court appears to condone ***Revlon*** in change of control transactions. BCE was found to have acted reasonably to create a competitive bidding process in facing certain takeover. The competitive bidding has the effect of maximising shareholder value. On a whole ***Revlon*** was presumed to be good law in Canada as, in addition to the summary judgment in ***BCE***, the Ontario courts in ***Vantas*** (supra) sanctioned the "Revlon duty". The ensuing concern now is whether ***BCE*** will open up the floodgate to strike suits and challenges by stakeholders than would be if ***Revlon*** were the correct law in Canada. It is too early to tell and would be a matter of time before this theory is put to the test.

DIRECTORS' DUTY IN JAMAICA: *THE IMPACT OF PEOPLES AND BCE*

Many territories in the Commonwealth Caribbean including Jamaica[52] have revamped their company laws, particularly with respect to directors' duties and the oppression remedy.[53] Prior to 2004, Jamaica's approach to the directors' fiduciary duty was informed by the English common law. An example of this approach was seen in the case of ***Eagle Merchant Bank of***

[51] See Dietrich (supra)
[52] Companies Act 2004. Prior to this reform, Jamaica's corporation law was found in the Companies Act 1965 which was modelled off the UK Companies Act prior to 2006.
[53] Ffolkes-Goldson, Susan, *"Directors' Duties to Creditors on or Near Insolvency and the Duty of Care in the Commonwealth Caribbean: Should the Peoples Decision be accepted?*

Jamaica Limited and Anor v Paul Chen-Young et al.[54] However, since 2004, with the promulgation of the new Companies Act which is modelled on the CBCA, the debate is ongoing whether Jamaica should still follow the UK approach. Directors in Jamaica owe their fiduciary duty to the company alone.[55] This is the position of the common law which was codified in CBCA. The Act also confers on the directors discretion, by use of the word *"may"*, to take the interests of certain stakeholders into account.[56] It is submitted that this duty is of a discretionary nature because ***Peoples*** and ***BCE*** acknowledge that creditors and debentureholders can invoke the oppression remedy.

However, with respect to the oppression remedy, creditors in Jamaica are at a disadvantage as while they are qualified as victims they are not in the complainant for the purposes of the oppression remedy.[57] In addition, there are other aspects of the legislation which are unique to Jamaica. For example, the definition of a complainant does not include *"any other person who, in the court's discretion is a proper person"* and it does not include *"unfair disregard"* as a conduct warranting oppression relief. The question arises whether in view of these limitations Jamaica will still be bound by the accepted common law duty.[58] The answer to this question goes two ways: the limitations in the Jamaican legislation favour the view that the CBCA and its line of cases should not be followed. However, on the other hand, it is argued that since creditors are objects of the oppression remedy, there may be scope for them to benefit from the remedy.[59] A better approach however, is to "wait and see" since the legislation is fairly recent, it is a matter of time before a decision can be made whether to resort to the English

[54] Claim No. C.L. 1998/E 095 delivered on May 4, 2006
[55] Jamaica Companies Act 2004 section 74(5)
[56] Section 74(4)
[57] Section 212(3)
[58] See Ffolkes-Goldson supra
[59] *Ibid*

common law. In any event, Parliament exerted a lot of time and energy to imitate the CBCA and it is for them to go further and amend the Act to be on all fours with the CBCA and our regional counterparts.

CONCLUSION

The Canadian decision not to follow the proposition that directors have a duty to maximise shareholders value will no doubt provoke reactions from corporate law practitioners in the future especially in light of the jurisprudence that emerged from the Ontario courts. It should not come as a surprise in ***BCE*** that the court affirmed the principle that the board directors owe their duty to the corporation as it was set in motion from its previous decision in ***Peoples***. While this is so, the board is required to treat individual stakeholders fairly and so should be mindful of the need to structure its decision-making processes so that it identifies affected parties and assesses the impact of the transactions on those parties, less they will subject themselves to an influx of claims under the oppression remedy. Though the Supreme Court of Canada does not read the duty of the directors to act in the "best interests of the shareholders", it however implicitly recognizes their importance in the director decision-making which shows that the "Revlon duty" is of applicability in the jurisdiction.

UK appears to have foreseen the difficulty of the "best interest" concept from very early and so excluded such notion from its Companies Act. Jamaica on the other hand is basking in a sea of uncertainty as to which approach to follow. It should not be too quick to reject the Canadian approach despite the restrictions under the oppression remedy. As with any innovation, Jamaica should "wait and see" how the courts will deal with cases under this new regime. If it

does not yield any satisfactory results, then it is for Parliament to amend the Act to bring it on all fours with Canada and our regional counterparts.