

UNIVERSITY OF CALGARY

Legal Impact of Sustainability Pledges on the Fiduciary Duties of Corporate Directors

by

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN PARTIAL

FULFILMENT OF THE REQUIREMENTS FOR THE

DEGREE OF MASTER OF LAWS

FACULTY OF LAW

CALGARY, ALBERTA

September, 2012

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## **Abstract**

There has been a long standing assumption that directors are required to consider only the interests of shareholders as part of the best interest of the corporation. My research suggests this assumption does not accord with Canadian law. Corporate directors are required to consider the best interest of the corporation which includes a diverse set of stakeholders. Recent case law suggests that corporate directors have a legal obligation to make decisions as a good corporate citizen. This thesis finds that a sustainability pledge does not create legally binding obligations upon corporate directors. However, directors are shielded from liability when engaging in a standard of conduct aligned with the protocols contained in a sustainability pledge. Therefore, while stakeholders may not be empowered to legally hold corporations to account on sustainability pledges, it remains in the purview of directors to decide whether they will follow these self-imposed guidelines.

## **Acknowledgements**

I would like to acknowledge and sincerely thank my supervisor, Shaun Fluker, for methodically spending time going through my research and assisting me in making sense of this project and guiding me towards communicating these ideas in a professional and academic setting. His support has truly meant a lot to me in carving out this project. Additionally, it was only through financial support that my academic adventure was made possible, and it is with tremendous gratitude that I thank the Alberta Law Foundation, the Graduate Scholarship Office of the University of Calgary and the wonderful family of Charles W. Berard and representatives from Vermilion Energy Inc. for their support. Thanks also to the University of Calgary Faculty of Law Professors, staff members and colleagues who have encouraged and guided me through this process. I would also like to thank my fellow graduate students who I share this experience with. Finally, I would like to thank my supportive friends and family who have always been there for me.

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## Chapter 1: Introduction

### 1.1 Research Problem

The power of corporations should not be understated. Corporations today occupy social positions “equivalent to the prominent posts held in other eras by the church, nobility, the army, even the feudal lords.”<sup>1</sup> Currently, over half of the world’s one hundred largest economic entities are corporations.<sup>2</sup> While corporate social responsibility is a relatively novel phenomenon, the pressure behind its emergence has been growing for well over a century.<sup>3</sup> In 1901, United States President Theodore Roosevelt asked Congress to curb the power of large corporations, called in those days “trusts”. He said:

[G]reat corporations known as trusts are in certain features and tendencies hurtful to the general welfare... It is based upon sincere conviction that combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled; and in my judgment this conviction is right... Great corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with these institutions.<sup>4</sup>

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<sup>1</sup> Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984) at ix.

<sup>2</sup> Parag Khanna, “Our neo-medieval world” *National Post* (4 March 2011) at A12.

<sup>3</sup> For instance, “[t]he idea of “corporate responsibility” has attracted increased media attention since the early 1970’s but the concept has been around for more than a century and typically involved helping to build civil society.” Alia McMullen, “New Streams of Responsibility: A Company’s Social Work Should be Aligned with its Business” *National Post* (23 March 2010) at FP 8.

<sup>4</sup> Theodore Roosevelt, (First Annual Message to Congress, December 3, 1901) [unpublished] online: Miller Center of Public Affairs, University of Virginia <<http://millercenter.org/scripps/archive/speeches/detail/3773>>.

Others have argued that corporations do not have any formal requirements to serve a socially responsible objective.<sup>5</sup> Essentially, in order to assign responsibility and attribute “moral agency” to the corporation, it is necessary to show legal independence from that of its stakeholders.<sup>6</sup>

The debate over whether a corporation can assume moral responsibilities has received renewed attention in recent years with Joel Bakan’s book, *The Corporation*, which suggests the legal design of a corporation prevents it from acting beyond self-interest and the motive of profit.<sup>7</sup>

While this question has raised considerable controversy in the past, it is commonly accepted today that corporate social responsibility is reasonable in terms of “enlightened self interest,” that is the corporation embraces social responsibilities in promoting its own self interest.<sup>8</sup> For example, perceived socially responsible businesses may attract more customers or talented employees, create better communities which generates a stable context in which to do business, and finally by adopting a voluntary commitment to social goals, a corporation may “forestall legislation and ensure greater

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<sup>5</sup> Milton Friedman, “The Social Responsibility of the Corporation is to Increase its Profits” (1970) *N.Y. Times Magazine* (13 September 1970), online: University of Michigan <<http://www.umich.edu/~thecore/doc/Friedman.pdf> > [Friedman].

<sup>6</sup> Andrew Crane & Dirk Matten, *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization*, 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2007) at 44-45 [Crane].

<sup>7</sup> Bakan argues that if corporations were actually people, they would be classified as psychopathic because as “externalizing” machines, corporations disregard their social impact on communities. Under this premise, corporations are not capable of achieving socially constructive goals. See Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York: Simon & Schuster, 2004). Note that the preceding three paragraphs are in part reprinted from Jeffrey Bone, “Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?” (2011) 23 *Can J.L. & Jur.* 2 [Bone, Perspectives].

<sup>8</sup> Crane, *supra* note 6 at 47.

corporate independence from government.”<sup>9</sup> This makes corporate social responsibility advantageous from a corporate perspective without a necessary linkage of moral responsibility. Regardless of the intent, the need for corporate social responsibility has been increasing as corporate environmental impacts have proliferated. The evidence of these impacts is lengthy and indisputable.

Consider for example Exxon Mobil Corporation and the infamous Valdez Alaskan oil spill in 1989 that at the time was seen as the most devastating human-caused environmental tragedy in history. The spill occurred when the tanker struck a reef due to human error causing 10.9 million gallons of oil to spill into Prince William Sound. Thousands of animals died immediately and the effects of the spill continue to be felt to this day.

Also consider the British Petroleum PLC disaster involving the oil platform Deep Water Horizon and the subsequent clean-up. During the summer of 2010 the Macondo oil prospect seeped 4.9 million barrels of oil into the surrounding ocean following the explosion of the Deepwater Horizon platform, an oil rig owned by Transocean but ultimately under the control of British Petroleum. The explosion instantly killed eleven men and injured seventeen others. It was the largest marine oil spill in the history of the petroleum industry. The spill crippled commercial and residential interests alike along the Gulf coast and imprinted a permanent scar on the Gulf ecosystem.

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<sup>9</sup> *Ibid.*

These serious incidents demonstrate that corporate interaction with the environment can have detrimental effects, not only to the community and natural world, but also on the reputation and public perception of the corporation. Naturally, corporate reputation is strategically guarded and defended by corporate managers. If it is not, then the corporation suffers.

Since the early 1990's there has been a growing emphasis on corporate social responsibility and a desire for environmental, social and governance concerns to be addressed by resource-based corporations. In reaction to this growing trend corporations have begun voluntarily developing corporate governance strategies that value sustainability and environmental protection.

For example Statoil ASA (Statoil), one of the world's largest suppliers of crude and natural gas has developed a commitment to environmental sustainability that is firmly anchored in its corporate policies.<sup>10</sup> While Statoil may be considered a unique entity because the main shareholder is the Norwegian government, non-state controlled Canadian energy sector corporations such as Shell Canada Ltd.,<sup>11</sup> Nexen Inc.<sup>12</sup> and Suncor Energy Inc.<sup>13</sup> have developed similar corporate pledges. My thesis explores the legal implications of these pledges for corporate directors under Canadian corporate law.

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<sup>10</sup> See StatoilHydro, "StatoilHydro Environment and Sustainability Policy"(2008), online: StatoilHydro <<http://www.statoilhydro.com/en/environmentsociety/environment>>.

<sup>11</sup> Shell Canada, "Code of Conduct" (2009), online: Shell at <[http://www-static.shell.com/static/aboutshell/downloads/who\\_we\\_are/code\\_of\\_conduct/english.pdf](http://www-static.shell.com/static/aboutshell/downloads/who_we_are/code_of_conduct/english.pdf)> at 12 [Shell].

<sup>12</sup> Nexen Inc., "Nexen's People. Safety. Environment Policy" (2008), online: Nexen <<http://www.nexeninc.com/Sustainability>> [Nexen].

<sup>13</sup> Suncor Energy Inc., "Suncor's Commitment to Sustainable Development" (2008), online: Suncor Energy at <[www.suncor.com/popup.aspx?cid=794](http://www.suncor.com/popup.aspx?cid=794)> [Suncor].

The problem is that without strong regulation or the ability for stakeholders to enforce sustainability pledges, a corporation may freely use a policy to facilitate positive marketing as opposed to seriously implementing sustainable objectives. Some have called this greenwashing:

By greenwashing, a corporation might increase its sales or boost its brand image through environmental rhetoric, but at the same time either pollute the environment or decline to spend money on the environment, employee welfare, or otherwise honor its commitments to other constituencies.<sup>14</sup>

If sustainability pledges are merely veiled corporate advertisements, then investors may be led to believe such policies carry more import than they actually achieve. The danger is that a corporation may treat a sustainability pledge as a convenient form of self-serving promotion that is not judiciously followed. At the same time, a socially minded shareholder of that corporation may rely on the content of the sustainability pledge in evaluating their investment.

Socially minded investors that consider sustainability pledges as part of their investment strategy exist. As one example, Northwest & Ethical Investments L.P. (NEI) is Canada's largest provider of socially responsible mutual funds. NEI's approach to investing is based on the theory that companies integrating best environmental, social and governance practices into their strategy will provide higher risk-adjusted returns over the long term.<sup>15</sup> With this approach in mind, NEI invests in natural resource sector

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<sup>14</sup> Miriam A. Cherry & Judd F. Sneirson, "Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster" (2010) 85 Tulane L. Rev. 4 at 985 [Cherry & Sneirson].

<sup>15</sup> As the company states on its website: "Through active engagement with the companies in our funds, we encourage them to adopt positive and sustainable business practices that make them not only better

companies that embrace environmental agendas.<sup>16</sup> However, if these agendas are simply ‘greenwashing’ then it is misleading to NEI, other investors and the public.

This thesis explores whether corporate directors are legally responsible when it comes to following the mandate of a voluntary sustainability pledge enacted by the corporation.

There is an apparent contradiction in considering whether a voluntary pledge can be legally enforced, as by definition, what is voluntary is not legally binding. To address this problem I first establish the basis of a corporate voluntary sustainability policy.

To begin, a corporate sustainability policy includes all forms of environmental covenants, pledges or undertakings. Professor Stephan Wood defines corporate sustainability policies as “voluntary environmental codes” which are:

Commitments undertaken by one or more polluters or resource users, in the absence of an express legal requirement to do so, prescribing norms to regulate their behavior in relation to their interaction with the environment.<sup>17</sup>

Professor Wood indicates that, “voluntary codes are by definition ‘voluntary’ insofar as their development and implementation are not required by official regulation, they may nonetheless be experienced as obligatory or irresistible in practice.”<sup>18</sup> I adopt

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corporate citizens but also more attractive long-term investments.” About Ethical Funds, (August 2, 2010) NEI Investments, online: < <http://www.neiinvestments.com> > [NEI].

<sup>16</sup> As one example, Suncor Energy Inc. is currently held in two of NEI’s funds, the Ethical Growth Fund and the Ethical Balanced Fund. *Ibid.* Suncor’s sustainability policy is discussed in greater detail in chapter four.

<sup>17</sup> Stepan Wood, “Voluntary Environmental Codes and Sustainability” in Benjamin Richardson & Stepan Wood, eds., *Environmental Law for Sustainability* (Oxford: Hart, 2006) at 230.

<sup>18</sup> *Ibid.* at 248.

Professor Wood's argument that, "[t]he important question is not whether voluntary codes are really 'voluntary', but what effectively drives the relevant actors to develop and implement them."<sup>19</sup> The question is not whether corporations have a duty to enact an environmental policy, but rather what are the legal consequences for corporate directors once a policy has been implemented.<sup>20</sup>

## 1.2 Research Questions

My focus is on section 122(1) of the *Canada Business Corporation Act (CBCA)*<sup>21</sup> which outlines the fiduciary duties of corporate directors. I focus on the legal obligations, if any, that attach to directors of a *CBCA* corporation in relation to a corporate sustainability pledge enacted by the company.

This thesis examines section 122(1) legal obligations from two perspectives. First, can corporate stakeholders (such as a socially minded shareholder) hold the corporate directors to account in fulfilling non-financial expectations such as environmental goals? In other words, does a corporate sustainability pledge result in a legal obligation under

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<sup>19</sup> *Ibid.* at 249. Further, Professor Wood believes that the essential "pressures" that have caused corporations to enact these policies are, *inter alia*:

[T]o defuse the threat of mandatory regulation, realize cost savings, distinguish themselves in a competitive market, ameliorate bad publicity, respond to a consumer boycott, satisfy customer or inventory demands, meet industry associations membership requirements, maintain social legitimacy or fulfill a perceived ethical obligation. *Ibid.* at 248.

<sup>20</sup> The various forms of corporate environmental policies also include the popular 'environmental management systems' that have been appearing in greater numbers among Canadian businesses. The spread of environmental management standards is due in part to corporations attempt to improve their internal processes, and may be a prerequisite for participating in various contracts with suppliers or contractors. This is the cornerstone of many Canadian companies compliance with environmental regulations because under Canadian law, directors may be found personally liable for environmentally harmful acts committed on behalf of a corporation. The most effective means for directors to avoid liability for corporate environmental mismanagement is to implement and maintain an environmental management system. See Patricia Richardson, ed., *Directors' and Officers' Duties and Liabilities in Canada* (Markham: Butterworths, 1997) at 149.

<sup>21</sup> *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1) [*CBCA*].

section 122(1) on directors to implement the environmental objectives as set out in a sustainability pledge?

As explained within the thesis, the answer to this question is that sustainability pledges do not create legal liability for corporate directors for failing to uphold the environmental objectives of the pledge. However, arguably the more interesting findings are exposed next in the analysis on the second research question.

Second, in the absence of legal obligations are directors exposed to liability when they exercise their discretion to implement the environmental goals of a sustainability pledge? In other words, do directors have an obligation not to follow through if there are negative financial implications of fulfilling a sustainability pledge?

If so, directors are liable for engaging the corporation in conduct aligned with a sustainability pledge. In this result, stakeholders (such as a profit driven shareholder) may potentially hold the corporate directors to account for following through with a sustainability pledge pursuant to section 122(1) of the *CBCA*.

On the contrary, if directors are not liable for following through with a sustainability pledge, they may decide with impunity whether to follow through with a sustainability pledge, or conversely not to.

I find that directors are shielded from liability when enforcing the objectives contained in a sustainability pledge. Thus, while stakeholders may not be entitled to legally hold corporations to account on sustainability pledges, it remains in the discretion

of directors to decide whether they will follow a sustainability policy even if profit-driven shareholders object to this decision.

### **1.3 Methodology and Overview**

The next chapter begins by exploring the rich legal history of the corporation. I set out a comprehensive literature review on the competing theories of corporate accountability and the relevant variants.

There is at least two different ways to view a corporation. The communitarian view conceives of the corporation as an individual person. It is an inclusive approach that recognizes the legitimacy of various corporate stakeholders. In this conception shareholders are just one of many competing interests and not the dominant constituent.

The communitarian approach is in contrast to the more dominant theory of shareholder primacy. This view lends itself to the contractarian theory of corporate accountability. Contractarian theory asserts that directors of a corporation are not accountable to any group except shareholders and those who have entered into a contract with the company. I find that corporate accountability theory progresses from the narrow shareholder primacy perspective towards the more holistic understanding of the communitarian approach.

Chapter three examines the law concerning directors' fiduciary obligations under the *CBCA* to determine which theory of corporate accountability is implemented therein. I conduct a statutory interpretation and doctrinal analysis using the databases of

WestlaweCarswell and CanLii to explore directors' fiduciary duties toward corporate stakeholders under section 122(1) of the *CBCA*. I also review the implementation of the business judgment rule and the 'good corporate citizen.'

The doctrinal analysis demonstrates that the Canadian judiciary has traditionally adhered to a shareholder primacy model; however, there has been a movement away from shareholder primacy in the case law. I argue that the judicial interpretation of section 122(1) of the *CBCA* has shifted towards the communitarian approach of corporate accountability.

Consequently, it is probable that, on account of the leading case law from the Supreme Court of Canada, the shareholder primacy model has run its course. My analysis also provides a counterpoint to commentaries which suggest that the leading cases are wrongly decided by the Supreme Court of Canada. Further, I argue that the business judgment rule effectively gives discretion to directors in deciding what is in the best interest of the company provided their decisions are reasonable and made in good faith.

At this point I answer my research questions based on the leading case law. I find that corporate directors are not legally compelled to consider the interests of various stakeholders and environmental values. Therefore, a voluntary corporate sustainability pledge does not result in a legal obligation under section 122(1) on directors to implement environmental objectives. However, directors who voluntarily choose to follow the pledges in a corporate sustainability policy will be able to do so without incurring liability on account of the business judgment rule.

In chapter four I use a case study approach to illustrate the above noted answers to my research questions. The case study explores whether corporate stakeholders can enforce the covenants contained in a sustainability or environmental pledge when it negatively impacts shareholder profit in an example involving a Canadian energy company. To this end, I consider the expectations contained in the 2010 Report on Sustainability of Suncor Energy Inc. and issues concerning reclamation of its tailings ponds in the Alberta oil sands. I also consider the business judgment rule as a potential mechanism to shield directors from liability when making strategic decisions based on environmental factors.

The Suncor case study demonstrates the findings of my research questions. Mainly, that corporate sustainability pledges do not create legal liability for directors considering their fiduciary duties contained at section 122(1) of the *CBCA*. However, directors acting on behalf of a corporation may follow through on an environmental pledge without incurring liability from potentially disgruntled shareholders. In the final chapter I summarize my conclusions.

#### **1.4 Summary Findings**

There has been a long standing, unchallenged assumption that directors are required to consider only the interests of shareholders as part of the best interest of the corporation. My research suggests this assumption does not accord with the law under the *CBCA*.

Presently in Canada directors are required to consider the best interest of the corporation which includes a diverse set of stakeholders. Recent case law suggests that corporate directors have a legal obligation to make decisions as a good corporate citizen, however this does not compel directors to consider the interests of various stakeholders. Therefore, a voluntary corporate sustainability pledge does not result in a legal obligation under section 122(1) on directors to implement environmental objectives contained in a sustainability pledge.

Second, directors are not exposed to liability when they exercise discretion to implement the environmental goals of a sustainability pledge. My findings in the case study suggest that a sustainability pledge does not create legally-binding obligations upon corporate directors to avoid implementing sustainability pledges that impact financial performance. In my view, directors are shielded from liability when engaging in a standard of conduct aligned with the protocols contained in a sustainability pledge.

Therefore, while stakeholders may not be empowered to legally hold corporations to account on sustainability pledges, it remains in the purview of directors to decide whether they will follow these self-imposed guidelines.

## Chapter 2: Corporate Accountability

Business corporations may strike you as a pale, perhaps even pathetic, source of the meaning and identity people achieve through community membership and interaction. That may be as it is... But putting personal judgments aside, I suggest that anyone trying to understand how our law deals with corporations must have in mind that they are the locus of many conflicting claims, and not all of those claims are wholly economic.<sup>22</sup>

### 2.1 Introduction

Imagine a child acting selfishly as children sometimes do: Not cleaning their room, misbehaving, ignoring the needs of others. It is the job of parents to raise children to grow out of these tendencies by setting out rules, structure and guidelines. However, imagine this particular child is not told these things. In fact imagine that the child is actually encouraged to behave selfishly, and to seek fulfillment of their own needs at the expense of others. In the same way, one could ask similar questions concerning the corporation. Legally speaking, does a corporate enterprise have to consider the needs of others? This question gives rise to other questions that essentially translate into the following: Which stakeholders do corporate directors have to take into account when making decisions on behalf of the corporation?

Corporate accountability is focused on the extent of considerations that directors must take into account when making decisions based on the best interest of the corporation.<sup>23</sup> The extent of considerations one believes directors must or may consider is

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<sup>22</sup> William T. Allen, "Our Schizophrenic Conception of the Business Corporation" (1992-93) 14 *Cardozo L. Rev.* 261 at 280 [Allen].

<sup>23</sup> Corporate accountability embodies the obligations of corporate directors towards stakeholders. Conversely, some have described corporate accountability by defining the substantive legal rights stakeholders have in relation to a board of directors. *The Canadian Democracy and Corporate Accountability Commission, The New Balance Sheet: Corporate Profits and Responsibility in the 21<sup>st</sup>*

ultimately connected to one's view of corporate accountability. The various theories on corporate accountability are distinguishable on how they answer two questions: (1) What is the corporation? (2) To whom does the corporation account? This chapter explores broadly based accountability structures as applied in this thesis and critiques the various theories accordingly. The methodology is a literature review on theories of corporate accountability and their pertinent themes. In my view corporate accountability theory progresses from a rudimentary notion of the corporation as an economic and contractual unit towards a more organic and holistic understanding that does not rely on contractual relations.

An accountability regime is important in legitimizing public, social and community based decisions by a corporation or more specifically, it explains why a corporation is permitted to balance environmental concerns with corporate wealth. This thesis reviews the accountability structures of contractarian and communitarian theory. The contractarian theory is further elaborated with the developments of shareholder primacy and team production model, and the communitarian themes that are directly related to corporate accountability are discussed.

Central to this chapter is whether a corporation exists separate and apart from its individual constituents, or whether the concept of separation is a mere fiction? It is clear that the law grants natural person powers to the corporate form, and in effect creates an

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*Century* (2002) at 2-5, as reported in Michael Kerr *et al.*, *Corporate Social Responsibility: A Legal Analysis* (Markham: LexisNexis Canada Inc., 2009) at 28 [Kerr]. Further, various theories of corporate accountability exist in economic and social disciplines; however I am simply focused on the legal aspects of corporate accountability.

“artificial person.”<sup>24</sup> This status is unique under the law. It empowers the corporation, a non-living entity, to act as if it were an individual in our world. I suggest this status carries implications beyond the legal powers it creates, and certain obligations and responsibilities are embedded within the corporate concept.<sup>25</sup>

This chapter establishes fundamental assertions that are the basis of the argument set out in this thesis. Firstly, the corporation is an individual ‘person’ and not simply an aggregate of associated units. Secondly, the corporation is a communitarian conception as opposed to a mere nexus of contractual parties. This chapter cultivates this discussion by exploring the rich legal history of the corporation which reminds us that, contrary to popular perception, corporations have an established history as institutions meant to serve the broad public interest.

## 2.2 What is the Corporation?

The corporation is a historic institution, and while issues such as the purpose and economic utility of a corporation have been clearly explained, the exact legal definition of a corporation has never been resolved. The Romans are considered to be the first civilization to utilize a corporate structure known as a *Societas Publicanorum*.<sup>26</sup> These

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<sup>24</sup> John Micklethwait and Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* (Toronto: Random House Inc., 2003) at xvii [Micklethwait]. Under section 15(1) of the *CBCA*: “A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.” *CBCA*, *supra* note 21.

<sup>25</sup> Note that the preceding three paragraphs and the upcoming part two and part three of this chapter is reprinted in part from Bone, *Perspectives*, *supra* note 7.

<sup>26</sup> A translation of the term would essentially equate to ‘Society of Publicians.’ Some translate this entity as the ‘*societates*’ pointing to its first usage in Rome for the collection of government taxes. *William Blackstone agreed with the assertion that the corporation is a Roman invention. William Blackstone, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal*

institutions were used to apportion government leases among investors (known as *Publicans*) who became leaseholders of the government.<sup>27</sup>

The formation of Guilds was another Roman invention that continued throughout the middle ages as corporate-like enterprises for merchants and craftsmen to carry on business.<sup>28</sup> Additionally, the medieval Muslim world exercised influence on the development of corporate-like structures. A *Muqaradas* was a legal structure of flexible trading partnerships under Islamic law.<sup>29</sup> Around the same period, the Italians created lending institutions during the Renaissance. The Italian *compagnia* is a compound of two Latin words (*cum* and *panis*) meaning “breaking bread together.”<sup>30</sup>

Prior to the 19<sup>th</sup> Century the concept of a ‘corporation’ was associated with holding property or power under crown, church or civic charters. In fact in a historical sense, forming a corporation required a special act or royal charter from government.<sup>31</sup>

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*Government of the United States; and of the Commonwealth of Virginia*, translated by St. George Tucker, 2nd ed ( Philadelphia: William Young Birch and Abraham Small, 1803) at 469 [Blackstone].

<sup>27</sup> The investments were typically used for public infrastructure, building monuments and raising armies for war. One example would be the second Punic War (218-202 B.C.). See William Goetzmann & K. Geert Rouwenhorst, *The Origins of Value: the Financial Innovations that Created Modern Capital Markets* (Oxford: Oxford University Press, 2005) at 32.

<sup>28</sup> Micklethwait, *supra* note 24 at 8. Guilds were also called: *collegia* or *corpora*. Further, these entities provided “security and fellowship in an otherwise forbidding world”. Kerr, *supra* note 23 at 56.

<sup>29</sup> Micklethwait, *supra* note 24 at 4.

<sup>30</sup> *Ibid.* at 8. These were typically family ventures, used for the purposes of lending. These entities were akin to partnerships in the sense that every member of the *compagnia* was jointly liable. This attribute was an important feature because the punishment for bankruptcy was imprisonment or servitude. Therefore, it was crucial; that each member had faith and trust in their business associates. These organizations were used to insulate against the effect of usury, a form of lending at high interest rates which was thought to be immoral. Christians condemned this practice, however carefully used the legal intricacies of the *compagnia* to avoid it. For instance, usury was prevented in part because the payment of interest was reconciled with Canon Law as a form of compensation. See Niall Ferguson, *The Ascent of Money* (New York: The Penguin Press, 2008) at 44, 71.

<sup>31</sup> See Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3rd ed. (Queensland: Scribblers, 2006) at 48 [Welling]: “The right to incorporate was jealously guarded by the French kings” as one such historical example. *Ibid.* Further, many profitable businesses in the 19th century did not adopt the

The notion of a corporation as an instrument to serve the public interest was even enshrined in the 1765 treatise of the legendary English Jurist William Blackstone.<sup>32</sup>

History suggests that corporations had a long-standing reputation as institutions meant to serve a public purpose that has been forgotten in recent times. Before the 19<sup>th</sup> century, corporate charters remained a matter of crown and parliamentary discretion, and were only available in England and France to those who performed a “public functions in addition to their commercial exploits.”<sup>33</sup>

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corporate model because they wanted to avoid the restrictive influence of the state in forming their corporate charters. For example, Andrew Carnegie formed his steel operation as a limited partnership, and John D Rockefeller set up Standard Oil as a trust.

<sup>32</sup> William Blackstone said “[b]ut, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politics, bodies corporate (*corpora corporata*), or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct”. Blackstone, *supra* note 26 at 467. Note that the ‘corporation’ as a private commercial entity begins in the United States in 1811 with the advent of general incorporation acts in several states. See Welling, *supra* note 31 at 51. Additionally, the historic public purpose feature of a corporation was also prevalent in the United States. For example, the state of Massachusetts began as the Massachusetts Company, “with the “freeman” stockholders transformed into citizens” when the corporation eventually became a Commonwealth State of the Union in the United States. Kerr, *supra* note 123 at 57. Following in these footsteps the British instituted the *Joint Stock Companies Act* in 1844, which permitted the general registration of a corporation without the requirement of a public service feature. 7 & 8 Vict c 110 (UK). This Act did not provide for limited liability of shareholders which was only introduced in England in 1855 with the *Limited Liability Act* 18 & 19 Vict. c 133.

<sup>33</sup> Welling, *supra* note 28. For instance, see the English *Bubble Act* of 1720 which forbade all Joint Stock Companies which were not registered under Royal Charter or Letters Patent with a public purpose. This was repealed in 1825 paving way for the *Joint Stock Companies Act* in 1844 and the *U.K. Companies Act* of 1862 (25 & 26 Vict. c. 89) and similar legislation in the rest of the world which did not require a public purpose as part of incorporation. Part of the reason for this evolution was on account of the sheer demand for incorporation in commerce and the fact that governments could not enforce and review a public service feature as part of every application to incorporate. Therefore, general incorporation replaced special incorporations in most jurisdictions. Kerr, *supra* note 23 at 56-59.

In 1819 the legendary Chief Justice of the United States Supreme Court, John Marshall, defined the corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law.”<sup>34</sup> This judicial remark remains a candid legal definition on the nature and foundation of the corporate institution. Some commentators have offered different explanations on the nature of corporate personhood such as the legal writer Stewart Kyd, who wrote in 1794 that a corporation is defined as “a collection of many; individuals united in one body, under a *special denomination*, having perpetual succession under an *artificial form*.”<sup>35</sup> The difference between the definition given by Chief Justice Marshall and the legal scholar Stewart Kyd is that Kyd envisioned a corporation as a collection of several individuals, authorized by the law to act as one whereas Chief Justice Marshall viewed the corporation as a connected entity to that of its founders. This comparison demonstrates two ways to understand the concept of corporate personhood.

Ernst Freund promoted the aggregate theory as the more accepted and legitimized form of corporate personhood.<sup>36</sup> The aggregate theory suggests that corporate personhood is a fiction, and the only tangible subject matter of the corporation are the individuals and

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<sup>34</sup>*Dartmouth College v. Woodward*, 17 US (4 Wheat). 518, 4L Ed 629 at 636 (1819) [cited to L Ed].

<sup>35</sup> The author continued: “vested, by the policy of the law, with a capacity of acting, in several respects, as an *individual*, particularly of taking and granting property, contracting obligations, and of suing and being sued, of enjoying privileges and immunities in *common*, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence.” See Stewart Kyd, *A Treatise on the Law of Corporations* (London: J. Butterworth Fleet- Street, 1794) at 13.

<sup>36</sup> Ernst Freund, *The Legal Nature of Corporations* (Kitchener: Batoche Books, 2000) at 33.

assets that are associated with it.<sup>37</sup> This is in contrast to the entity theory, which conceives of a corporation as a unique and individual ‘person.’ The aggregate theory “analogized the corporation to a partnership, and the stockholders to the owners of the business.”<sup>38</sup> This analogy is associated with the shareholder primacy model of corporate accountability and enjoyed prominence during the 1800’s. Noted scholar Morton Horwitz argues that the aggregate theory fell out of fashion at the beginning of the 20<sup>th</sup> century in favor of the entity theory.<sup>39</sup> Concerning the entity conception, “[t]he corporation is *gestalt*, meaning that it is greater than the sum of its constituencies.”<sup>40</sup> Entity theory describes corporations as “collective enterprises that transcend the self.”<sup>41</sup> In this sense, the corporation is recognized as an integral unit, and therefore not simply a collection of individuals. Specifically in 1932, Merrick Dodd, Jr. argued that the corporation has a personality distinct from that of the individual shareholders, and it is possible to distinguish between the interests of the corporation and that of its shareholders.<sup>42</sup>

Embracing of one the particular theories on corporate accountability depends on ones definition of a corporation. In the entity conception as promoted by Kyd and Dodd the corporation stands separate and apart from the individual stakeholders who form it.

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<sup>37</sup> Further, an 1882 treatise on corporate law advanced the notion of the aggregate theory: “a corporation is not in *reality* a person or a thing distinct from its constituent parts. The word “corporation” is but a collective name for the corporators or members who compose an incorporated association”. Victor Morawetz, *A Treatise on the Law of Private Corporations*, 2<sup>nd</sup> ed. (Boston: Boston Little Brown & Co, 1882) at 2.

<sup>38</sup> Ian Lee, “Corporate Law and the Role of Corporations in Society: Monism, Pluralism, Markets and Politics” (2006) 85 Can. B. Rev. 1 at 6.

<sup>39</sup> Morton J. Horwitz, “*Santa Clara* Revisited: The Development of Corporate Theory” (1985) 88 W. Va. L. Rev. 173 at 223.

<sup>40</sup> Leonard Rotman, *Fiduciary Law* (Toronto, ON: Thomson Canada Ltd, 2005) at 418 [Rotman].

<sup>41</sup> Kerr, *supra* note 23 at 57. This concept of corporate personhood is founded upon the following premises: the corporation is an artificial construct created by enacting legislation and registered with the government.

<sup>42</sup> Merrick E. Dodd, “For Whom are Corporate Managers Trustees?” (1932) 45 Harv. L. Rev. 1145 [Dodd].

The corporation is empowered as an independent person. This conception lends itself to the communitarian theory. Under the aggregate conception as endorsed by Marshall and Freund the creation of a corporation is a fiction as it does not produce an independent entity. In essence the corporation is the individual stakeholder who formed it. The aggregate conception lends itself to the contractarian theory of corporate accountability as discussed next.

### **2.3 To Whom Does the Corporation Account?**

There are two main theories of corporate accountability.<sup>43</sup> For the purpose of my thesis I adopt the labels of the contractarian and the communitarian model. The key difference between the theories is to whom the directors account.

#### *2.3.1 Contractarian Theory*

Contractarian theory is rooted in liberalism, and stresses the value of competition, liberty and freedom.<sup>44</sup> Contractarian theory asserts that directors of a corporation are not

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<sup>43</sup> Aaron Dhir, “Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability” (2006) 43 Am. Bus. L.J. 365 at 369 [Dhir].

<sup>44</sup> Michael Bradley *et al.*, “The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads” (1999) 62:3 Law and Contemporary Problems 9 at 42 [Bradley, Accountability]. A liberal interpretation of the individual seeks to avoid imposing exterior obligations on the person. Rather, it leaves the individual as free as possible to assert their own values and ends, “consistent with a similar liberty for others.” Micheal Sandel, “Introduction” in Micheal Sandel ed., *Liberalism and its Critics* (Oxford: Basil Blackwell Publisher Ltd., 1984) at 1 [Sandel]. An important examination in philosophy has focused on the limits of liberty, and whether communal considerations should prevail over the liberal concept of freedom and choice. The Kantian concept was endorsed by John Rawls in his famous *Theory of Justice* arguing that justice is about fairness and incorporating the sacredness of an individual. John Rawls, *A Theory of Justice* (London: Oxford University Press, 1972). The ‘right’ connotes the liberty and freedom to choose an individuals’ own conception of the ‘good.’ Therefore, the liberal interpretation as developed first by Kant, then Rawls does not conceive of a good life or purpose, but just the freedom for the individual to achieve their version of the good life as free moral agents. In this way, Rawls does not conceive of a particular form of the ‘good,’ but essentially argues for the priority of ‘right’ over the ‘good.’ The right-based ethic is further divided between libertarians who advocate private property rights, civil liberties and the market economy where egalitarians argue for the rights being articulated in the welfare state, public education and healthcare. Sandel, *supra* note 44 at 4. This rights-

accountable to any group except shareholders and those who have entered into a contract with the corporation. The corporation is understood as a series of ongoing contracts between management, shareholders, employees and the various other corporate constituents.<sup>45</sup> The major variants on the contractarian theory include shareholder primacy theory and the team production model.

### 2.3.1.1 *Shareholder Primacy Model*

Included among the shareholder primacy theorists is the late Nobel Prize winning economist Milton Friedman who argued that the socially responsible objective for corporations is to increase profits.<sup>46</sup> Friedman wrote:

[The] Responsibilities [of directors] is to conduct the business in accordance with the desires [of shareholders], which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and in ethical custom.<sup>47</sup>

Friedman's argument sets forward the idea that corporations exist for the pleasure of shareholders, and ultimately corporate directors pursuing alternative objectives beyond maximizing shareholder wealth are using the financial capital with which they have been entrusted for improper purposes. The socially responsible objective of corporate directors should be to allow the corporation to engage in the free market economy in an efficient

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based ethic embraces a person wholly detached and justifies political arrangements as a neutral framework that encompasses fairness. This assertion has been argued in what has become known as the communitarian critique of liberalism which is discussed further on in this chapter.

<sup>45</sup> Corrine Fiesel, "Fiduciary Duties of Directors, Corporate Governance and the end of Shareholder Primacy" in Poonam Puri, ed., *Corporate Governance and Securities Regulation in the 21st Century*, (Toronto: Butterworths, 2004) 61 at 77 [Fiesel].

<sup>46</sup> "The Next Question" 386:8563 *The Economist* (19 January 2008) 8.

<sup>47</sup> *Friedman*, supra note 5 at 1.

manner, thereby increasing the wealth of shareholders and all market participants. That is how a shareholder primacy model purports to be the best means to achieve aggregate social interests.<sup>48</sup>

The proponents of shareholder primacy have been extraordinarily confident in the inevitable success of this model, so much so that two noted experts in 2001 declared the “end of corporate law” as consensus was forming in “leading jurisdictions” around shareholder primacy.<sup>49</sup> However, the more recent contractarian theory of the Team production model distances away from the dominant thinking of shareholder primacy.

### 2.3.1.2 *Team Production Model*

Team production model (TPM) is seen as the nascent of a new theory of corporate accountability. Lynn Stout and Margaret Blair developed TPM as a variant on contractarian theory and as a framework of accountability that offers a persuasive explanation of why it is important to consider the various stakeholders of a corporation beyond just shareholders.<sup>50</sup>

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<sup>48</sup> Early developments of the shareholder primacy model begin with Ronald Coase in the late 1930's. Ronald H. Coase, “The Nature of the Firm” (1937) 4 *Economica* 386. Economic efficiency is often equated with the shareholder primacy model. Richard A. Posner, *Economic Analysis of Law*, 5<sup>th</sup> ed. (Boston: Little Brown, 1998). In 1976, Michael Jensen and Dean William Meckling argued the agency theory of shareholder primacy whereby the shareholders should receive the benefits of the corporation as the principals in an agency relationship. Michael Jensen & William Meckling, “Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure” (1976) 3 *J Fin Econ* 305. See also Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* (Cambridge: Harvard University Press, 1991).

<sup>49</sup> Henry Hansmann & Reinier Kraakman, “The End of History for Corporate Law” (2001) 89 *Geo. L.J.* 439 at 441.

<sup>50</sup> Margaret Blair & Lynn Stout, “A Team Production Theory of Corporate Law” (1999) 85 *Va. L. Rev.* 248 [Blair & Stout].

Blair and Stout created the TPM in reaction to the view in which corporate directors are considered merely agents and trustees of corporate assets on behalf of the shareholders.<sup>51</sup> Wealth maximization remains the goal of the TPM, however unlike the shareholder primacy model the directors are to seek profit for the company as a whole, not the shareholders specifically.

Blair and Stout argue that the modern business corporation does not lend itself well to the traditional shareholder primacy model because practically speaking; shareholders retain very little control over corporate management. Therefore, TPM takes issue with the trustee aspect of shareholder primacy. In reality corporate managers consider a broad range of constituents' interests, and don't simply reduce the separation of control between corporate managers and the shareholders.

Blair and Stout challenged this long held assumption and argued that the true objective of corporate governance is to find an efficient solution to the team production problem, whereby corporate managers have to adequately address the valid claims of all corporate constituents encompassed in the "team production model."<sup>52</sup> Under the TPM approach, corporate earnings are seen as the result of different stakeholders contributing their "firm-specific" resources in the business enterprise.<sup>53</sup> Therefore, each constituent is part of the collective effort to produce output from the corporation. The central problem is that once the joint input has been allocated to each constituent the corporation is

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<sup>51</sup> Fiesel, *supra* note 45 at 79.

<sup>52</sup> *Ibid.*

<sup>53</sup> Blair & Stout, *supra* note 50 at 249.

vulnerable to the opportunistic and tactical behavior of individual constituents vested solely with self-interest.

The solution to this corporate problem is two-fold according to Blair and Stout. Firstly, each stakeholder should be entitled to compensation based on his or her original investment of labor or capital. Secondly, the corporate directors should effectively find a fair distribution among the corporate constituents in accordance with their “opportunity costs.”<sup>54</sup> This implies that the role of the corporate director is to mediate the allocation of production in a fair distribution to all corporate constituents, and further to enhance corporate profitability as an independent board with sole allegiance to the corporation itself.

### 2.3.1.3 *Critiques of the Contractarian Theory*

There are a number of shortcomings in the contractarian theory. These shortcomings range from the fundamental assumptions to the impracticability of the theory. One presumption in the contractarian view is that all contracts are negotiated with equal bargaining power, knowledge and influence. That is not a tenable premise when it comes to individual employees and large multi-national corporations, or start-up businesses competing with a wealthy corporation that enjoys a monopoly of service and goods.<sup>55</sup>

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<sup>54</sup> Fiesel, *supra* note 45 at 80 and Blair & Stout, *supra* note 50 at 265-66.

<sup>55</sup> Ruth Kuras, “Corporate Social Responsibility: A Canada-U.S. Comparative Analysis” (2002) 28 Man. L.J. 303 at 306 [Kuras].

Critics of the shareholder primacy model have argued that under this accountability regime, the state is tacitly permitting the use of its resources, such as natural, human and financial capital to support corporations' efforts to accumulate profit without considering the environment or community that is negatively impacted by corporate action in the pursuit of wealth maximization for shareholders alone.<sup>56</sup> This model relies on the interpretation of directors' fiduciary duties, as a mechanism of corporate law that is entirely for the benefit of shareholders. This mandate has no flexibility to include non-shareholder elements that are crucial to the success of a thriving corporation. Accordingly, critics argue the shareholder primacy theory should "confront the harmful effects on stakeholders that shareholder wealth maximization produces."<sup>57</sup> Some of these harmful effects include damage to the ecosystem and human rights which has also been central to rejection of the shareholder primacy model from the standpoint of a variety of legal perspectives including gender theory<sup>58</sup>, critical race theory<sup>59</sup>, and queer theory.<sup>60</sup>

Another weakness of the shareholder primacy theory is that it has escaped rigorous testing and "counterargument."<sup>61</sup> Its justification is based on status quo rather than "a serious examination of what society's 'best interest' would require in corporate

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<sup>56</sup> For example see Noam Chomsky, *Profit Over People: Neoliberalism and Global Order*. (New York: Seven Stories Press, 1999).

<sup>57</sup> Kuras, *supra* note 55 at 306.

<sup>58</sup> Marleen O'Connor, "American Corporate Governance and Resilient Families: Investing in Children's Human Capital in Turbulent Times" (2003), online: SSRN. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=439420](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=439420)>;

<sup>59</sup> Cheryl Wade, "Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination" (2002) 76 Tul. L. Rev. 1461.

<sup>60</sup> Kellye Testy, "Adding Value(s) to Corporate Law: An Agenda for Reform" (2000) 34 Ga. L. Rev. 1025.

<sup>61</sup> Kent Greenfield, "New Principles for Corporate Law" (2005) 1 Hastings Bus. L.J. 87 at 88 [Greenfield].

governance.”<sup>62</sup> In this way “shareholder primacy is not the foundational assumption, but rather one of the potential conclusions.”<sup>63</sup>

TPM addresses some of the weaknesses of the shareholder primacy approach. For instance, directors’ must account to certain non-shareholder interests under this model. However, the inequality of bargaining power among stakeholders is not resolved as a TPM corporation must only consider those stakeholders who earn or contribute profit to the corporation. This leaves out governments, the public and the environment as corporate stakeholders.

Further, TPM is borrowed from economic scholarship and this perspective carries certain shortcomings. Primarily that the ultimate motivation of a corporation is economic efficiency at the expense of other considerations including community wealth creation, environmental protection and corporate social responsibility.<sup>64</sup>

### 2.3.2 *Communitarian Theory*

The contractarian theory is challenged by the communitarian conception which is a development from the communitarian critique of liberalism.<sup>65</sup> The communitarian

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* at 89.

<sup>64</sup> See Robert Ashford, “What is New in Corporate Social Responsibility?: The Socio-Economic Law and Corporate Social Responsibility” (2002) 76 Tul. L. Rev. 1187. Further, an important trend in the western world as Harvard Professor Sandel has pointed out is the ‘marketization’ of government. Thus, government has been replaced by cost benefit analysis as opposed to moral judgment. In this sense ‘the citizen’ has been replaced by the ‘consumer.’ The difference is a consumer is a fixed concept based on the rational person from the economic model, whereas the citizen is not merely a self-interested individual but has concern for the ‘common good.’ Sandel believes governments exist to protect people and work in the ‘common good.’ Micheal Sandel, “A New Citizenship: A New Politics of the Common Good” (Reith Lecture, BBC Radio, June 30 2009) [unpublished].

<sup>65</sup> The communitarian critique of liberalism argues persuasively for a different view of liberalism that gives “fuller expression to the claims of citizenship and community.” Sandel, *supra* note 44 at 5. Charles Taylor

theory of corporate accountability extends the concept of directors' obligations to several corporate groups including shareholders, creditors, bondholders, labour, suppliers, customers, the public, and the environment.<sup>66</sup> In terms of corporate structure, communitarians do not question that directors should be responsible for the running of a corporation, however they question the various stakeholder interests that should be regarded and advocate a more community based decision-making process. Shareholder wealth is seen as one of many competing interests and not the dominant constituent.

The communitarian theory is a humanist discipline and emphasizes cooperation, justice and civic responsibility.<sup>67</sup> Communitarian theory rejects that a corporation is merely property of its shareholders, and embraces a corporation as a "social institution" that is mingled with a "public purpose."<sup>68</sup> The communitarian corporate theory is also known as the "pluralist... [or] managerialist conception, concession conception and social entity" theory.<sup>69</sup> Further, it has also been called the "institutional conception."<sup>70</sup>

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further develops Sandel's position that community and our individual identities are inseparable. Taylor says, "our identity is always partly defined in conversation with others or through the common understanding which underlies the practice of our society." Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985) at 187. In a principled fashion, Sandel and Taylor advance the notion that the communitarian way of life is simply better than others. Beau Breslin, *The Communitarian Constitution* (Baltimore, MD: John Hopkins University Press, 2003) at 37.

<sup>66</sup> Fiesel, *supra* note 45 at 77.

<sup>67</sup> Bradley, *Accountability supra* note 44 at 42.

<sup>68</sup> Allen, *supra* note 22 at 265.

<sup>69</sup> Dhir, *supra* note 43 at 370.

<sup>70</sup> Allen, *supra* note 22 at 265. Further, communitarian corporate theory has also been labelled 'protectionism.' See Ronald Daniels, "Stakeholders and Takeovers: Can Contractarianism be Compassionate: The Corporate Stakeholder Conference: Part 1 - The Adequacy of Stakeholder Contractual Protection" (1993) 315 at 316 in "Special Issue on the Corporate Stakeholder Debate: The Classical Theory and its Critics" (1993) 43 UTLJ 315.

Under communitarian doctrine, a corporation is a distinct unit and capable of fulfilling moral and legal obligations.<sup>71</sup> To this end, corporations are seen as individuals created by law with certain rights and corresponding obligations.<sup>72</sup> Therefore, the theory conceives of a corporation as a community of constituencies with directors owing duties to all stakeholders.

The communitarian school is the leading example of corporate theory that acknowledges the public role of corporations, as opposed to a mere nexus of private contracts.<sup>73</sup> The assertions of the communitarian theory of corporate relations are justified on three pillars: The corporation is: 1) historically consistent with a public service requirement, 2) a social creation; and 3) interconnected with the rest of society.

As a first basis of justification, the theory cites the historical roots of the corporation canvassed previously in this chapter. In fact, the development of the contractarian model of corporate theory is a relatively “recent phenomenon” compared to the communitarian view of corporate law.<sup>74</sup>

Some have suggested that by the 1960’s corporate law was reduced to simple rules concerning minimum requirements as to shareholder meetings and basic record

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<sup>71</sup> Peter A. French, “The Corporation as a Moral Person” (1979) 16 Am. Philo. Q. 207.

<sup>72</sup> Michel Dion suggests that a business enterprise, such as a corporation, is a moral agent and has its own social responsibilities “following from the implicit social contract between the society and business.” Michael Dion, “Corporate Citizenship as an Ethic of Care: Corporate Values, Codes of Ethics and Global Governance” in Jorg Andriof & Malcolm McIntosh, eds., *Perspectives on Corporate Citizenship* (Sheffield, UK: Greenleaf, 2001) at 119.

<sup>73</sup> James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* (Charlottesville: University Press of Virginia, 1970) at 105.

<sup>74</sup> Greenfield, *supra* note 61 at 88. Further, in describing the stakeholder theory, as a parallel of communitarian doctrine, it has been suggested that the “theory is the prevailing spirit of most corporate governance laws in the world”. Peter Cornelius & Bruce Kogut, “Creating the Responsible Firm: In Search for a new Corporate Governance Paradigm” (2003) 4:1 German L.J. 45 at 46 [Cornelius & Kogut].

keeping.<sup>75</sup> The contractarian model was a dominant force in corporate law at this time leading one commentator to lament that “corporation law, as a field of intellectual effort, is dead.”<sup>76</sup> The commentator was remarking on the rich past of legal scholarship that emerged in the mid-1800’s until the 1930’s when the corporation as a concept was given serious treatment.<sup>77</sup> Thoughtful scholarship on corporate accountability was again revived in the 1980s due to among other things, the junk bond market, “takeover entrepreneurs, the growth of institutional investors, and the striking emergence of a global economy.”<sup>78</sup>

As a second basis of justification, the communitarian theory views the corporation as a “social product.”<sup>79</sup> Commenting on this fact in a nuanced and thoughtful piece on the schizophrenic conception of the business corporation, W.T. Allen wrote: “I suggest one trying to understand how our law deals with corporations must have in mind that they are locus of many conflicting claims, and not all of those claims are wholly economic.”<sup>80</sup> The purpose of a corporation is not “individual but social.”<sup>81</sup> Therefore, a healthy debate concerning the responsibility of a corporation as a “social organism” is welcomed by those who support a construct of corporate social responsibility and reject the argument

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<sup>75</sup> Allen, *supra* note 22 at 263.

<sup>76</sup> Bayless Manning, “The Shareholder’s Appraisal Remedy: An Essay for Frank Coker” (1962) 72 Yale L.J. 223 at 245, ftn. 37 [Manning].

<sup>77</sup> This historical debate has been canvassed elsewhere in academic literature. See Dodd, *supra* note 42; Adolf Augustus Berle Jr & Gardiner Means, *The Modern Corporation and Private Property*, (New York: Macmillan, 1993). Referring to the communitarian and contractarian dichotomy, W.T. Allen stated these “apparently inconsistent, conceptions have coexisted in our thinking over the last century.” Allen, *supra* note 22 at 265.

<sup>78</sup> *Ibid.* at 263. Some commentators view corporate malfeasance such as ethical and financial failings as an inability to provide “stakeholder oversight”. Cornelius & Kogut, *supra* note 74.

<sup>79</sup> Allen, *supra* note 22 at 262.

<sup>80</sup> *Ibid.* at 280.

<sup>81</sup> *Ibid.* at 271.

that a corporation is merely an economic unit.<sup>82</sup> This is the message at the heart of the communitarian theory, and therefore corporate influence should be used in the broad public interest.

As a third basis of justification, the communitarian theory conceives of a corporation as an organism that is connected to society through several channels and forms a “community of interrelated, interdependent constituencies.”<sup>83</sup> The interrelatedness of the corporation must be understood in terms of its independent blocks. The communitarian corporation has a responsibility, not only to increase shareholder wealth but has obligations towards the “satisfaction of consumer wants, the provision of meaningful employment opportunities, and the making of a contribution to the public life of its community.”<sup>84</sup> It is implicit that the community should be included as a legitimate corporate stakeholder.<sup>85</sup>

The notion of corporate citizenship is a foundational theme in the communitarian theory. Around the same time as the contractarian theory was developing, Edwin M. Dodd wrote about the responsibilities of the modern business corporation from a citizenship perspective.<sup>86</sup> Dodd’s theory primarily encompassed the communitarian tradition. In Dodd’s conception, if a corporation is seen as a separate entity from that of its shareholders, then management can act on behalf of the corporation at large as

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<sup>82</sup> Manning, *supra* note 76 at 244. Corporate social responsibility (CSR) and communitarian theory are linked in Kellye Testy, “Linking Progressive Corporate Law with Progressive Social Movements” (2002) 76 Tul. L. Rev. 1227.

<sup>83</sup> David Millon, “Default Rules, Wealth Distribution and Corporate Law Reform: Employment at Will Versus Job Security” (1998) 146 U Pa LR 975 at 976.

<sup>84</sup> Allen, *supra* note 22 at 271.

<sup>85</sup> See R. Edward Freeman & William M. Evan, *Corporate Governance: A Stakeholder Interpretation*, 19 (1990) *J. Behavioral Economics*. 337 at 343-44.

<sup>86</sup> Dodd, *supra* note 42.

opposed to acting simply in the best interests of shareholders. The corporate interests would include the benefit of a range of corporate stakeholders, such as employees, creditors, consumers and the community. The interests of these corporate members often conflict. For example, a policy designed to benefit employees may clash with the wealth maximization of shareholders. However, Dodd saw a trend among prominent business leaders towards conceptualizing the corporation as a citizen rather than simply as an engine for shareholder wealth:

If we think of it as an institution which differs in the nature of things from the individuals who compose it, we may then readily conceive of it as a person, which, like other persons engaged in business, is affected not only by the laws which regulate business but by the attitude of public and business opinion as to the social obligations of business.<sup>87</sup>

As observed by Millon, Dodd believed the idea of a good citizen implied “right conduct in the context of a community of others.... Regard for others and a willingness to sacrifice personal interests for others’ sake characterize responsible citizenship.”<sup>88</sup>

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<sup>87</sup> *Ibid.* at 1161. Intriguingly, Dodd quoted an officer of the General Electric Co. who offered a warm assessment of this corporate vision and related this to the public obligation and public duty of large corporations to act as good citizens:

If there is one thing a lawyer is taught it is knowledge of trusteeship and the sacredness of that position. Very soon he saw rising a notion that managers were no longer attorneys for stockholders; they were becoming trustees of an institution.... One no longer feels the obligation to take from labor for the benefit of capital, nor to take from the public for the benefit of both, but rather to administer wisely and fairly in the interest of all.

Address of Owen D Young, January 1929, quoted in “The New Place of the Stockholder” *Sears* (January 1929) as quoted in Dodd, *supra* note 42 at 1154. More recently, a General Electric lawyer wrote in the *The Wall Street Journal* that “corporate citizenship has three interrelated dimensions: strong, sustained economic performance; rigorous compliance with fundamental accounting and legal requirements; and ethical actions beyond what the law requires, which advance the reputation and long-term health of the enterprise.” Benjamin Heineman, “The Next Question”, *The Wall Street Journal* (28 June 2005).

<sup>88</sup> David Millon, “The Ambiguous Significance of Corporate Personhood” (2001) online: Stanford Agora, An Online Journal of Legal Perspectives, Social Science Research Network <<http://ssrn.com/abstract=264141>> 1 at 14.

Therefore, fixation on shareholder profit alone is not conducive to an efficient community. This is congruent with the communitarian conception of the corporation.

In terms of reform, the corporate citizenship model has “substituted a public notion of corporate law, based on the public effects of corporate activity, which implied a much richer notion of obligation than a unitary duty to shareholders.”<sup>89</sup> For example James White wrote:

The corporation is and always has been a collective citizen. It serves not only its shareholders, but its bondholders and creditors of other kinds, as well as its employees and future employees, its suppliers and customers. It has the proper aim not only of making money but of maintaining the conditions that make meaningful economic and social activity possible, for itself and for others. *It is a citizen, and I believe it should be spoken of as having both the responsibilities and benefits of that status.*<sup>90</sup>

As an academic discipline corporate citizenship grew out of corporate social responsibility and various management theories.<sup>91</sup> Corporate citizenship is the acceptance

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<sup>89</sup> *Ibid.*

<sup>90</sup> James B. White, “How Should We Talk About Corporations? The Languages of Economics and of Citizenship” (1985) 94 Yale L.J. 1416 at 1418 [emphasis added].

<sup>91</sup> CSR concerns business practices based on ethical and moral principles and began developing with “pre-Christian western thinkers such as Cicero in the first century BC and their non-western colleagues such as Indian statesman and Philosopher Kautilya in the fourth century BC.” Jędrzej George Frynas, “Corporate Social Responsibility in the Oil and Gas Sector.” (2009) 2 Journal of World Energy Law & Business 3 at 179. CSR academic nascent begin in the late 1970’s with Archie Carroll’s four types of corporate responsibilities: economic, legal, ethical and philanthropic responsibilities. This evolved into stakeholder theory, which questions the potential groups in society that a corporation is accountable towards. See Dirk Matten *et al.*, “Behind the Mask: Revealing the True Face of Corporate Citizenship” (2003) 45 J Bus Ethics 109 at 110 [Matten]; Archie Carroll, “A Three Dimensional Model of Corporate Social Performance” (1979) 4 Acad Mgmt Rev 497. There are other theories such as Thomas Donaldson who argues that CSR activity legitimizes business with a ‘social license’ to operate in society. Donaldson premised his ideas on the relationship of business and society through social contract theory borrowed from political philosophy. Essentially, the business receives its privileges from society: “mainly related to the legally institutionalized corporate personality.... [Therefore] [s]ociety agrees with this exchange as long as the social benefits exceed the social costs”. Ronald Jeurissen, “Institutional Conditions of Corporate Citizenship” (2004) 53 J Bus Ethics 87 at 89 [Jeurissen].

by a corporation of its rightful place in society among other citizens, with whom the corporation forms a community of others.<sup>92</sup>

More specifically, it is defined as a corporation taking accountability for its social and environmental impacts.<sup>93</sup> Most relevantly, corporate citizenship is a concept at the crossroads of corporate governance and sustainable development:

[C]orporate citizenship can become a significant route for overcoming global poverty, inequality and environmental insecurity. This requires that it evolves to a point where business becomes active in promoting and institutionalizing new governance frameworks that effectively secure civil market behaviour, globally. Leading civil corporations will therefore be those that go beyond getting their own house in order, and actively engage in promoting governance frameworks that enable the wider business community to address, effectively and without contradiction, the aspirations underpinning *sustainable development*.<sup>94</sup>

Therefore, corporate citizenship is fundamentally about making the corporation a better steward through its corporate governance practices.<sup>95</sup>

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<sup>92</sup> Matten, *supra* note 91 at 111; see Steven Waddell, “New Institutions for the Practice of Corporate Citizenship: Historical, Intersectoral, and Developmental Perspectives” (2000) 105 *Business & Society Rev* 107. Also see Dirk Matten & Andrew Crane, “Corporate Citizenship: Toward an Extended Theoretical Conceptualization” (2005) 30 *Acad Mgmt Rev* 166: “meanwhile, has been introduced into the CSR discourse in the last few years, mainly at the instigation of corporate actors”. *Ibid.* at 167. Finally, Professor Williams said, “I think there are important differences in the connotations of ‘corporate social responsibility’ versus ‘corporate citizenship,’ with the latter having more connotations of privileges, including of political involvement, rather than duties, as connoted by the term ‘corporate social responsibility.’” Cynthia Williams, “A Tale of Two Trajectories” (2007) 75 *Fordham L.R.* 1629 at 1633, ft. 18.

<sup>93</sup> Simon Zadek, *The Civil Corporation* (London: Earthscan, 2006) at 36.

<sup>94</sup> *Ibid.* at 19 [emphasis added].

<sup>95</sup> See Ingo Pies & Markus Beckmann, “Sustainability by Corporate Citizenship--The Moral Dimension of Sustainability” (Discussion paper) Wittenberg- Center for Global Ethics (2004), online: Social Science Research Network <<http://ssrn.com/abstract=991323>> 1 at 2 [Pies] for the tie between corporate citizenship creating corporations that are “no longer confined exclusively to their economic role, but are more and more perceived as moral and political actors.” *Ibid.*

### 2.3.1.1 Critiques of the Communitarian Theory

As compared to the contractarian theory, the communitarian theory lacks the clarity and rigor that has been developed in the extensive literature on contractarian theory in recent decades. The primary weakness of this theory is the uncertainty associated with giving non-shareholders a stake in corporate accountability.<sup>96</sup>

Given its lack of precision on this point, the communitarian theory fails to convincingly justify the inclusion of several stakeholders that do not contribute to corporate wealth.<sup>97</sup> The vagueness of the communitarian theory is a significant shortcoming. For instance, how is the management of a corporation to know the particular interests of the environment or the public? In particular it is difficult to assign legal rights to the 'environment' as a concept. On what basis would the courts and legislatures define and measure environmental interests under corporate law? Taking these questions to their logical conclusions, it is clear such a task would be imprecise and difficult to support.<sup>98</sup> The theory provides little guidance to address these issues and therefore lacks parameters for defining the stakeholders that are entitled to be considered by corporate directors. Given that is a primary purpose of corporate accountability theory presents a challenge to the legitimacy of the communitarian approach. Finally, communitarian theory has similarities to the contractarian theory of the team production

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<sup>96</sup> Bradley, Accountability *supra* note 44 at 44.

<sup>97</sup> David Millon, "Frontiers of Legal Thought: Theories of the Corporation" (1990) Duke L.J. 201 at 231.

<sup>98</sup> Elizabeth Addabor, *The Regulation of Transnational Corporations: An Assessment of the Alternatives and the Role of Multilateral Development Banks* (LL.M. Thesis, University of Calgary Faculty of Law, 2005) [unpublished] at 49.

model, however the contrast between communitarian theory and the team production model has not been explored in the literature and therefore is underdeveloped.

## **2.4 Conclusions**

The analysis presented in this chapter demonstrates that communitarian and contractarian theories have divergent understandings of corporate accountability. The dominant version of contractarian theory views directors as accountable only to the interests of shareholders.

Variations of the theory recognize stakeholders other than shareholders as corporate constituents to whom directors are accountable as long as they contribute to the firm's financial success. A corporate director who embraces and supports the shareholder primacy model would execute their duties in accordance with fulfilling the desires of the shareholders as the only legal expectation. Under the TPM directors must consider further corporate stakeholders, however only those stakeholders who earn or contribute profit to the corporation.

Under the communitarian theory corporate directors are accountable to a much wider group of corporate constituents. Notable interests that may be considered in the communitarian rubric of corporate accountability include the community and the environment. It is evident that the contractarian model clearly establishes limits on corporate constituents and to whom corporate directors are obligated to consider. Under the communitarian theory, the responsibility of directors to consider diverse interests is greatly expanded.

This chapter also described two different conceptions of the corporation. Under the aggregate conception, a corporation is not an independent entity from that of its stakeholders. The aggregate conception lends itself to the contractarian theory. Contractarian theory asserts that directors of a corporation are not accountable to any group except shareholders and those who have entered into a contract with the corporation.

In the entity conception, the corporation is distinct from the individual stakeholders who form it. This conception is closely tied to the notion of corporate citizenship and communitarian understandings of accountability which compels corporate directors to consider the interests of many stakeholders including shareholders, creditors, bondholders, labour, suppliers, customers, the public, and the environment. In this conception, shareholders are just one of many competing interests and not the dominant constituent. The next chapter examines the law concerning directors' fiduciary obligations under the *CBCA* to determine which theory of corporate accountability is implemented therein.

## Chapter 3: Applying Theories of Corporate Accountability with Directors'

### Fiduciary Duties

#### 3.1 Introduction

As established in the previous chapter, a shareholder primacy model of corporate accountability supports a monolithic approach to directors' fiduciary duties to exclusively consider the interests of shareholders. The communitarian theory of corporate accountability supports the view that corporate directors have pluralistic fiduciary duties that extend to various stakeholders including the community and the environment. This chapter reviews case law that has considered the fiduciary duties of directors prior to the enactment of the *CBCA* and post enactment.<sup>99</sup>

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<sup>99</sup> The methodology is divided into two sections, prior and post enactment of the *CBCA*. Cases prior to the *CBCA* are canvassed from numerous sources of leading textbooks and case studies on the topic. For comprehensive doctrinal reviews see J. Anthony VanDuzer, *The Law of Partnership and Corporations*, 2<sup>nd</sup> ed. (Toronto, ON: Irwin Law Inc., 2003) at 269-89 [VanDuzer]; Douglas Harris *et al.*, *Cases, Materials and Notes on Partnerships and Canadian Business Corporations*, 4<sup>th</sup> ed. (Toronto: Thomson Carswell, 2004) at 301-324, 375-425, 465-519 [Harris]; Kerr *supra* note 23, and Welling, *supra* note 31. Additionally I performed a key cite Canada search on Westlaw Canada on June 12, 2011 for subsequent references to the 1907 case of *Martin v. Gibson*. Since the enactment of the *CBCA* the methodology utilized for cases after 1975 include a search in the legal database of Westlaw Canada and CanLii concerning the particular provision of the *CBCA* at section 122(1). This includes all cases from Superior Courts in all jurisdictions of Canada and above (including the Provincial Courts of Appeal, the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada). This entailed searching under the "full text" criteria in the CanLii database for : "canada business corporation act section 122(1)". As of October 7, 2010, this resulted in 137 cases. I did not implement a timeframe on the search; however the oldest case reported was from 1974. For complete coverage, on December 14, 2010, I performed a key cite Canada search under Westlaw Canada for all cases that have considered section 122 of the *CBCA* in all Canadian jurisdictions in the past 20 years. This resulted in 91 cases reported. I narrowed down the review to cases from the Superior Court level in all jurisdictions of Canada and above (including the Provincial Courts of Appeal, the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada). I cross referenced these results with the Canlii findings to determine whether any cases from the previous search had been omitted. This resulted in an additional 3 cases which were considered as part of the above mentioned criteria/methodology for review. It is these cases, from the Westlaw Canada and Canlii searches that I reviewed for content, but only report herein the findings from the cases that contained topics which are germane to issues in this chapter. Additionally, some cases consider corporate provincial legislation; however I explicitly mention this when it occurs.

The chapter applies theories of corporate accountability with the objective of critically examining the leading case law on section 122(1) of the *CBCA*.<sup>100</sup> The purpose of this examination on the law of directors' fiduciary obligations under the *CBCA* is to determine which theory of corporate accountability is implemented therein.

Specific topics that are salient features in the case law include the application of corporate citizenship and the business judgment rule. The analysis reveals the progression of Canadian law away from a shareholder focused perspective towards a communitarian perspective on directors' fiduciary duties. This chapter concludes that presently in Canada directors are required to consider the interests of a diverse set of stakeholders; however corporate fiduciary duties have their roots in shareholder primacy. At the end of the chapter I use the cumulative information gathered in this thesis to answer my research questions.

### **3.2 Common Law Fiduciary Duties Pre-*CBCA***

Under the common law 'the best interests of the corporation' was analogous to the best interests of the current and future shareholders. In the 1907 case of *Martin v. Gibson*, the Ontario High Court of Justice reviewed a breach of fiduciary duties where directors of a railway company had manipulated stock through a discriminatory share issuance to change the voting control of the corporation. Essentially, the directors of the company issued 2,000 shares to themselves for the purpose of overriding the voting

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<sup>100</sup> As a note, corporate fiduciary duties are adapted and modified from the pre-existing fiduciary standards in trust, agency, partnership and family law. Harris, *supra* note 99 at 375. Specifically, the duties of corporate directors are a development of 'agency law' to prevent corporate directors from benefiting themselves at the expense of the company. VanDuzer, *supra* note 99 at 270.

power of existing shareholders.<sup>101</sup> The court held that such prejudicial conduct towards shareholders was a breach of directors' fiduciary duties. In their ruling, the court recognized that fiduciary duties are owed to the company, which includes the interests of all shareholders.<sup>102</sup>

The 1927 Saskatchewan Court of Appeal decision of *Smith v. Hanson Tire & Supply* was an appeal to have an allotment of shares disallowed on the basis that the directors had breached their fiduciary duties.<sup>103</sup> The new issuance of shares was selectively not available to all existing shareholders. The court held that English and Canadian authorities "bind the directors of a company, as trustees" suggesting that directors act in trust for the benefit of all shareholders.<sup>104</sup> In reaching their finding, the court cited *Lindley's Law of Companies*:

Directors should remember that they are not the masters but the servants of the shareholders; and although it is true that the directors have more power, both for good and for evil, than is possessed by the shareholders individually, still that power is limited, and accompanied by a trust, and is to be exercised bona fide for the purposes for which it was given, and in the manner contemplated by those who gave it.<sup>105</sup>

American law has also primarily treated 'the best interest of the corporation' in accordance with shareholders. In fact, one U.S. case used the term "shareholder" and

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<sup>101</sup> *Martin v. Gibson*, O.J. No. 85, [1907] 15 O.L.R. 623 at 623 (Ont. H.C.J.).

<sup>102</sup> *Ibid.* at para. 10. See Richard Hay, "The Shareholder's Pre-emptive Right: Prevention of Director Abuse in New Share Issuance" (1984) 9 Can Bus. L.J. 2 at 14-15. The holding in *Martin* was reflected in *Parke v. Daily News Ltd.*, [1962] 1 Ch. 927 (Ch. D.), an English case but nevertheless cited with approval in subsequent Canadian decisions.

<sup>103</sup> [1927] 3 D.L.R. 786, (Sask. C.A.).

<sup>104</sup> *Ibid.* at para. 6.

<sup>105</sup> *Ibid.* at para. 32 [Note the author could not locate an original of this manuscript].

“corporation” interchangeably.<sup>106</sup> In one of the more famous American cases, *Dodge v. Ford Motor Co.* the Michigan Supreme Court said, “[a] business corporation is organized and carried on primarily for the profit of stockholders. The powers of directors are to be employed for that end.”<sup>107</sup> In the seminal U.S. case of *Revlon v. MacAndrews & Forbes Holdings*, the Delaware Supreme Court held that directors have a duty to maximize shareholder value once the sale of a company is inevitable.<sup>108</sup>

A 1972 case is the first instance of some movement away from the general principle of shareholder primacy in the common law. In *Teck Corporation Ltd. v. Millar*, Justice Berger of the British Columbia Supreme Court provided the following remarks on the shareholder primacy model of corporate accountability:

A classical theory that was once unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting *bona fide* in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders... [Therefore, if directors] observe a decent respect for other interests lying beyond those of the company’s shareholders in the strict sense, that will not, in my view, leave the directors open to the charge that they failed in their fiduciary duty to the company.<sup>109</sup>

*Teck* is a case concerning Afton Mines Ltd., a junior mining company. The board of Afton rejected a more financially lucrative offer to partner with Teck Corporation over

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<sup>106</sup> *Mills Acquisition Co. v. Macmillan Inc.* 559 A. 2d 1261, 1282, n. 29 [Del. 1989].

<sup>107</sup> *Dodge v. Ford Motor Co.* (1919) 204 Mich. 459 at 684, 170 N.W. 668.

<sup>108</sup> *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.* 506 A. 2d 173, 182 (Del. 1986) [*Revlon*].

<sup>109</sup> *Teck Corp. Limited v. Millar* (1972), 33 D.L.R. (3d) 288 (B.C.S.C.) at p. 314 [*Teck*].

a preferred agreement with Canadian Exploration Ltd. (Canex). Afton directors made this decision without shareholder approval or outside consultation. Essentially, the directors of Afton made their decision based on non-financial merits. Mainly, Afton directors trusted the long record of success that Canex enjoyed in the mining sector and believed they would prove to be a better partner and serve the best interests of the corporation.<sup>110</sup> *Teck* is the first common law authority in Canada that suggests directors may consider various interests beyond a narrow understanding of shareholder wealth in determining the best interests of the corporation.

As demonstrated above, the common law in Canada has traditionally construed corporate directors' fiduciary duties in accordance with the shareholder primacy model of corporate accountability. The reviewed cases cited the shareholders as the only stakeholder interests that directors are to consider up until the *Teck* decision. This trend towards shareholder primacy changes with the introduction of the *CBCA* as explained below.

### **3.3 Statutory Interpretation of section 122(1) of the *CBCA***

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<sup>110</sup> Justice Berger of the British Columbia Supreme Court agreed. Further, the decision in *Teck* acknowledges the ramifications of powerful corporations dominating the Canadian economy, particularly in the resource and energy sector as cited by Justice Berger: "In defining the fiduciary duties of directors, the law ought to take into account the fact that the corporation provides the legal framework for the development of resources and the generation of wealth in the private sector of the Canadian economy." *Teck* as cited in Harris, *supra* note 96 at 469. Further in another case Justice Bull said "the corporation has become almost the unit of organization of our economic life. Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation, is the chief employer of both labour and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present substitute for it except the State itself." *Peso Silver Mines Ltd. Cropper*, [1966] S.C.R. 673, 58. D.L.R. (2d) 1 at para. 154-55.

The law on the extent of directors' fiduciary duties is set out in section 122(1) of the *CBCA* today.<sup>111</sup> It states:

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

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.<sup>112</sup>

The interpretation of the 'best interests of the corporation' depends on one's view of corporate accountability. That is, whether corporate directors' fiduciary duties are shareholder primary focused, or whether directors are required to consider various corporate stakeholders as ascribed under the communitarian approach. The following is a

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<sup>111</sup> This was the work of the reforms introduced by the Dickerson Committee, an advisory body charged with the task of reforming and modernizing Canadian corporate law. See Mohamed Khimji, "Peoples v. Wise – Conflating Directors Duties, Oppression, and Stakeholder Protection" (2006) 39 U.B.C. L. Rev. 209 at 212. The committee presented their findings in the *Dickerson Report*. Robert Dickerson, John Howard & Leon Getz, Proposals for a New Business Corporations Law for Canada (*The Dickerson Report*) vol. 1 Commentary; vol. 2 Draft Canada Business Corporations Act (Ottawa Information Canada 1971). The *Dickerson Report* advocated for the creation of a flexible enterprise of Canadian companies that achieved the objectives of a capitalist corporate planner, however with "superimposed statutory protections" for non-shareholding corporate stakeholders. Welling, *supra* note 31 at 56. This vision became the focus of Canadian corporate law after the enactment of the *CBCA*. The *CBCA* is the dominant legislative approach to corporate law in Canada as the provinces have adopted essentially similar legislation: "The *CBCA* variation on the Ontario initiative swept the country. Manitoba, Saskatchewan, Alberta, New Brunswick, Ontario Yukon, and Newfoundland adopted statutes remarkably similar to the *CBCA*." *Ibid.* Further, New Zealand and several Caribbean countries have also enacted corporate statutes as variations of the *CBCA*. *Ibid.* at 57. The idea that directors' fiduciary duties are focused on the best interests of the corporation itself, and not the individual stakeholders predates the *CBCA* by almost a century. As stated in 1883 by the British Lord Bowen in *Hutton v. West Cork Railway*, "[t]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company." (1883), 23 Ch. D. 654 at 673. The Dickerson Committee did not define in precise terms what was meant by 'the best interest of the corporation,' however it was that Committee's suggestion that the 'best interest of the corporation' be part of the fiduciary duties as contained in the *CBCA*.

<sup>112</sup> *CBCA*, *supra* note 21.

review of prominent decisions involving an interpretation of section 122(1) of the *CBCA* to determine how it has been interpreted by Canadian courts.

In *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* CanWest Communications was in a takeover battle with Shaw Communication.<sup>113</sup> In allowing the WIC board to accept the highest monetary bid the Ontario Court of Justice embraced the so-called *Revlon* rule from the United States.<sup>114</sup> Justice Blair interpreted section 122(1) of the *CBCA* and said that directors have a duty “to act in the best interest of the shareholders as a whole and to take active reasonable steps to maximize shareholder value” when a change of control is inevitable.<sup>115</sup> A change of control occurs with the replacement of the majority of shareholders through a corporate takeover.

In the same year as *CW Shareholdings*, the Ontario Court of Appeal in *Maple Leaf Foods Inc. v. Schneider Corp. (Maple Leaf)* came to a different conclusion on directors’ fiduciary duties in a change of control circumstance.<sup>116</sup> The Schneider family as the controlling shareholder had the power to veto any takeover bid.<sup>117</sup> In 1997, the Schneider board received two potential takeover bids at \$29 and \$25 respectively a share.

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<sup>113</sup> *CW Shareholdings Inc. v. WIC Western International Communications Ltd.*, (1998), 39 O.R. (3d) 755 (Gen. Div. [commercial list]) [*CW Shareholdings*].

<sup>114</sup> *Revlon*, *supra* note 108.

<sup>115</sup> *CW Shareholdings*, *supra* note 113 at para. 41.

<sup>116</sup> *Pente Investment Management Ltd. V. Schneider Corp. (sub nom. Maple Leaf Foods Inc. v. Schneider Corp.)* (1998), CanLII 5121 (ON CA), 42 O.R. (3d) 177 (C.A.) [*Maple Leaf*]. While *Maple Leaf* considers s. 134(1)(a) of the Ontario *Business Corporations Act* R.S.O. 1990, c. B.16. [*OBCA*], the language in the *OBCA* is virtually verbatim to the *CBCA*, and *Maple Leaf* has been cited enumerable times in relation to the interpretation of section 122(1) of the *CBCA*.

<sup>117</sup> Fiduciary duties are typically at issue when directors are faced with a takeover proposal that will result in a change of control in the corporation. Often a board of director may review several bids as part of this process, and they must decipher which bid would serve the best interest of the corporation. This pits economic considerations against more communitarian principles such as community interests and employee protection. Many cases of this nature did not come before the Supreme Court, however were instructive cases on Canadian corporate law.

The Schneider family indicated they would only accept the \$25 bid as it preserved tax benefits and protections extending to employees. The Schneider board recommended that bid to the shareholders.

In an action by Maple Leaf Food Inc. against the directors of Schneider Corp. for a breach of fiduciary duties the court rejected the notion that a breach had occurred and found that board of directors acted reasonably: “[T]he fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction.”<sup>118</sup> In *Maple Leaf* the court interpreted section 122(1) of the *CBCA* in a manner that granted deference to the directors in valuing the preservation of the existing employees and corporate tax benefits above the exclusive maximization of shareholder wealth.<sup>119</sup>

As previously noted, the *Teck* decision was the first common law authority in Canada that suggests directors may consider various interests in the company beyond shareholder wealth.<sup>120</sup> Thirty years later, the Supreme Court of Canada followed *Teck* with its decision in *Peoples*, which states that it “may be legitimate”, although not

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<sup>118</sup> *Maple Leaf*, *supra* note 116 at para. 36.

<sup>119</sup> In the later ruling of *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* the Ontario Court of Appeal came to a different conclusion from *Maple Leaf* and again endorsed the shareholder primacy model in a change of control circumstance: “There is no doubt that the directors of a corporation that is the target of a takeover bid... has a duty to maximize shareholder (or unit holder) value in the process.” *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] 85 O.R. (3d) 354 (C.A.) at para. 53.

<sup>120</sup> *Teck*, *supra* note 109.

mandatory, for directors to consider the impact of a corporate decision on a particular group of stakeholders.<sup>121</sup>

The facts of this case date back to 1992 when the Wise brothers (Wise) purchased Peoples Department Store Inc. (Peoples) by way of a share purchase agreement. The brothers become shareholders and directors for both companies. According to the terms of this agreement, Peoples could not amalgamate with Wise until payment of the purchase price in full. The amortization period on the purchase price was originally eight years, and during that time Wise had to abide by strict covenants concerning the financial management of the corporation. On account of these covenants and given the fact the corporations were operating in financial turmoil, Wise implemented a joint inventory procurement policy which had the effect of ultimately indebting Peoples to Wise. Subsequently both entities went into receivership. The allegation of the Trustee in bankruptcy was that Wise had favored their own interests to the detriment of the creditors' interests in Peoples.

The Supreme Court held that the directors of Peoples, mainly the Wise brothers did not contravene section 122(1) of the *CBCA* in arranging the joint inventory procurement policy.<sup>122</sup> The court framed the fiduciary duties of directors at section

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<sup>121</sup> *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 28, [2004] 3 S.C.R. 461 at para. 42 [*Peoples*].

<sup>122</sup> The court said: "The Wise brothers considered the problem and implemented a policy they hoped would solve it. In the absence of evidence of a personal interest or improper purpose in the new policy, and in light of the evidence of a desire to make both Wise and Peoples "better" corporations, we find that the directors did not breach their fiduciary duty under section 122(1)(a) of the *CBCA*." *Ibid.* at para. 41. Further in regard to section 122(1)(b) of the *CBCA* the court said: "The directors cannot be held liable for a breach of their duty of care in respect of the creditors of Peoples." *Ibid.* at para. 71. It should be remembered that *Peoples* was decided based on Quebec legislation (art. 1457, C.C.Q.) and under civil law

122(1) of the *CBCA* to consider ‘the best interests of the corporation’ in permissive terms:

We accept as an accurate statement of law that in determining whether [directors] 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.<sup>123</sup>

The court rejected the argument that directors owe fiduciary duties to any particular corporate constituent and said, “it is clear that the phrase “best interest of the corporation” should be read not simply as the “best interest of shareholders”.<sup>124</sup> Instead, directors should seek to create “a ‘better’ corporation, and not to favour the interest of any one group of stakeholders.”<sup>125</sup> The court said, “[f]rom an economic perspective, the ‘best interests of the corporation’ means the maximization of the value of the corporation.”<sup>126</sup>

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jurisdiction. However, undoubtedly given the similar nature of corporate statutes in Canada, the *Peoples* case has implications on the common law jurisdictions as has been demonstrated in subsequent judicial decisions. This is explicitly stated in the *Peoples* decision. *Ibid.* at para. 29. See Jacob Ziegel, “The *Peoples* Judgment and the Supreme Court’s Role in Private Law Cases” (2005) 41 *Can. Bus. L.J.* 236 at 242. Additionally, subsequent to *Peoples* the Ontario legislature amended the Ontario *Business Corporation Act*, R.S.O. 1990, c. B. 16 to reflect the notion that the fiduciary duty of directors is not owed to any one person but simply the corporation itself. *Ministry of Government Services Consumer Protection and Services Modernization Act*, 2006, S.O. 2006, c. 34, Sched. B., ss. 1-41, Proclaimed in force August 1 2007, O. Gaz. 2007.656. Some commentators have argued that this amendment is more reflective of the intention of Parliament in crafting section 122(1) in the *CBCA* than the opinion offered by the Supreme Court of Canada in *Peoples*. See Darcy MacPherson, “The Legislature Strikes Back: The Effect of Ontario’s Bill 152 on the Statutory Duty of Care in the *Peoples* Decision” (2009) *Alta. L. Rev.* 47.1 (2009) 37.

<sup>123</sup> *Peoples*, *supra* note 121 at para. 42.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.* at para. 47. In previous case law on this point, the court said directors should attempt to make the company a “better corporation.” See *820099 Ontario Inc v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Ct. (Gen. Div.)) *aff’d* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.) at para. 171.

<sup>126</sup> *Peoples*, *supra* note 121 at para. 42.

It was only beginning in *Peoples*, that the Supreme Court formally approved the business judgment rule.<sup>127</sup> This rule developed as a common law doctrine that permits courts to defer to directors' business judgment as long as an appropriate amount of prudence, diligence and reasonableness was used in making their decision.<sup>128</sup>

Four years after *Peoples*, the Supreme Court of Canada augmented this standard in *BCE Inc. v. 1976 Debentureholders* by linking directors' fiduciary duties with "fairness" and good corporate citizenship.<sup>129</sup> *BCE* concerned the privatization of BCE Inc. and Bell Canada (BCE) that would have transferred corporate ownership to a syndicate of private equity investors led by the Ontario Teachers' Pension Plan Board.<sup>130</sup> This would have significantly devalued the existing bonds of the corporation to an approximate decline of 20%.<sup>131</sup>

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<sup>127</sup> See in *Peoples, Ibid.* at para. 65, where regarding the business judgment rule the court quotes with favor *Maple Leaf*:

The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision.

See *Maple Leaf, supra* note 116 at paras. 35-36. Canadian cases had previously adopted a 'proper purpose test' under the business judgment rule that shifts the burden to directors to demonstrate their actions are consistent with the best interest of the company.

<sup>128</sup> See *Exco Corporation v. Nova Scotia Savings & Loan Company* (1987), 35 B.L.R. 149 (N.S.S.C.(T.D.)) and *Re 347883 Alberta Ltd. and Producers Pipelines Inc.* (1991), 80 D.L.R. (4th) 359 (Sask. C.A.).

<sup>129</sup> *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 at paras. 71 & 81 [*BCE*]. While the context of the *BCE* decision concerns fundamental change of control scenarios, the decision has a general application on directors' fiduciary duties towards stakeholders. See Peer Zumbansen & Simon Archer, "The BCE Decision: Reflections on the Firm as a Contractual Organization" (2008) CLPE Research Chapter 17/2008 vol. 04 No. 04.

<sup>130</sup> The privatization under the proposed consortium of owners would have seen the syndicate invest \$8 billion of capital and required an additional \$30 billion of new BCE debt. Jim Middlemiss, "BCE ruling good news for board" *Financial Post* (20 December 2008).

<sup>131</sup> The deal was eventually terminated in December of 2008 because the Ontario Teachers Pension Plan Board was unable to obtain a professional accounting opinion on the solvency of the proposed transaction.

In 2008, BCE commenced litigation against the consortium for breach of contract in the amount of \$1.2 billion.<sup>132</sup> The salient legal issues in *BCE* were the fiduciary duties of directors, the application of the business judgment rule, the doctrine of corporate citizenship and the oppression claim by the creditors.<sup>133</sup>

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<sup>132</sup> In May 2008, the Québec Court of Appeal (QCA) ruled in favour of the holders of Bell Canada debentures (Bondholders) in permitting the use of the *CBCA* oppression remedy to challenge the BCE plan of arrangement. The shareholders initially approved this plan in September of 2007. The Bondholders argument was threefold: (1) the privatization of BCE converted investment grade debt into junk bonds; (2) the plan of arrangement was not fair and reasonable; (3) and the BCE directors had not appropriately considered the Bondholders interests. In their written decision, the QCA focused on the representations and understandings between BCE and the Bondholders which fell outside the scope of the trust indenture. The QCA held that BCE had continually assured the Bondholders that the investment grade rating of the bonds would continue. By entering the proposed transaction BCE had failed in this commitment. The implications of the QCA decision were troublesome to lawyers and the corporate community. Under this decision, corporations could not rely on the exculpatory terms of their contractual relationship with bondholders and creditors to govern their legal obligations. In other words, bondholders were entitled to rely on expectations that were outside the legal rights as dictated in the terms of the trust indenture. Additionally, corporations were not entitled to rely on the financial literacy or sophistication of their investors. For example, all of the relevant bondholders in *BCE* were savvy investors and/or high-powered financial institutions. This case was destined for the Supreme Court of Canada, and in the spring of 2008 the Supreme Court granted leave to hear the appeal and subsequently overturned the QCA decision. Given that the subject matter of *BCE* was a time sensitive issue concerning a very large and pending commercial transaction, the case stratospherically went from a Superior Court trial decision to submissions before the Supreme Court of Canada in just over three months. At trial, the Quebec Superior Court dismissed the oppression claim and approved the plan of arrangement as fair and reasonable. *BCE Inc., Re* (2008), 43 B.L.R. (4th) 1 (Que. S.C.); *BCE Inc., Re* (2008), 43 B.L.R. (4th) 39 (Que. S.C.); *BCE Inc., Re* (2008), 43 B.L.R. (4th) 69; *BCE Inc., Re* (2008), 43 B.L.R. (4th) 79 (Que. S.C.); *BCE Inc., Re* (2008), 43 B.L.R. (4th) 135 (Que. S.C.). The Quebec Court of Appeal reversed the trial court's ruling and relied on *Peoples* in rejecting the fiduciary obligation of directors to maximize shareholder wealth. *BCE Inc., Re* (2008), 43 B.L.R. (4<sup>th</sup>) 157 (Que. C.A.). In their ruling which reversed the Quebec Court of Appeal, the Supreme Court acknowledged the ratio in *Peoples* and confirmed that the directors of BCE had acted properly under the proposed plan of arrangement. The decision indicated that the BCE directors did not have an overriding legal obligation to take into account the bondholders interests and therefore BCE did not act oppressively towards the creditors. The courts discussion of the clearly defined procedure of a court supervised plan of arrangement and the restatement that directors' fiduciary duties are owed only to the corporation has been followed without controversy in subsequent lower court rulings. See *Tanenbaum Estate v. Tanjo Investments Ltd.*, [2009] O.J. No. 3792 at para. 46, 2009 CarswellOnt 5479 (Sup. Ct.) (QL); *Crystallex International Corp. (Trustee of) v. Crystallex International Corp.*, [2009] O.J. No. 5435 at para. 73, 2009 CanLII 71007 (Sup. Ct.) (QL); *Walls v. Lewis* (2009), 97 O.R. (3d) 16 at para. 45, 61 B.L.R. (4th) 143 (Sup. Ct.); and *Doucet v. Spielo Manufacturing Inc.*, 2009 NBQB 196, 62 B.L.R. (4th) 29 at para. 213, [2009] N.B.J. No. 217 (QL).

<sup>133</sup> Another major issue in *BCE* is the fairness of the proposed plan of arrangement. For the purposes of this thesis, the procedure for a plan of arrangement and the oppression remedy under the *CBCA* are omitted from analysis in order to properly narrow the topic towards the application of directors' fiduciary duties at section 122(1) of the *CBCA*.

The Supreme Court defined directors' fiduciary duties as a "broad" and "contextual" concept that varies depending on the nature and circumstances faced by a corporation.<sup>134</sup> At a minimum the fiduciary duties require directors to meet the corporations' "statutory obligations."<sup>135</sup> The court held that directors have a fiduciary obligation toward the corporation itself. If there is a conflict between the corporation, shareholders and other stakeholders, "the directors' duty is clear – it is to the corporation."<sup>136</sup> The court restated its *Peoples* ruling that the interests of the corporation include the considerations of several corporate constituents such as shareholders, creditors, suppliers, governments, consumers, employees and the environment.<sup>137</sup> Further, the court interprets 'the best interest of the corporation' as being "the long-term interests of the corporation."<sup>138</sup>

The court held that directors are entitled to significant deference from the judiciary towards the directors' assessment of the corporation's interests by applying the business judgment rule:

Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives.<sup>139</sup>

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<sup>134</sup> *BCE*, *supra* note 129, at para. 38.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.* at para. 37.

<sup>137</sup> *Ibid.* at para. 39.

<sup>138</sup> *Ibid.* at para. 38.

<sup>139</sup> *Ibid.* at para. 40. Further the court said:

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

The rule creates a strong presumption in favor of the board of directors for decisions reached in good faith, with care that a prudent person in a similar circumstance would exercise, and in a manner that the directors reasonably believe is in the best interest of the corporation on an informed basis.

Central to the issue of fiduciary duties is the standard by which directors are to resolve stakeholder interests when they conflict. When directors are balancing conflicting corporate interests, the court held that “it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”<sup>140</sup> The purpose for including this reference was discussed in two different portions of the judgment.

When the court addressed the meaning of the good corporate citizen in paragraph 66 it said:

Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen.<sup>141</sup>

The statement above from the Supreme Court suggests that the need to consider the interests of non-shareholders is corollary to good corporate citizenship.

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directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

*Ibid.* at para. 84.

<sup>140</sup> *Ibid.* at para. 81. Note that in regards to the oppression remedy, the Supreme Court defined this obligation as a “responsible corporate citizen” as opposed to a “good corporate citizen.” *Ibid.* at para. 82.

<sup>141</sup> *Ibid.* at para. 66.

The court gave more insight on the purpose of the “good” and “responsible corporate citizen” in paragraph 82 when it remarked that in resolving disputes among conflicting stakeholders:

[T]he duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly... [H]aving regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation’s duties as a responsible corporate citizen.<sup>142</sup>

Therefore, the judgment suggests there is a need for directors to “treat individual stakeholders affected by corporate actions equitably and fairly”.<sup>143</sup> The notion of fair treatment towards stakeholders is a new component introduced into Canadian corporate law under *BCE*. The court defined ‘fair treatment’ as “fundamental to the reasonable expectation of stakeholders.”<sup>144</sup> The court explains the expectation of fair treatment in this manner: “The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly.”<sup>145</sup> Therefore, in resolving the conflict, the corporation should treat individual stakeholders affected by

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<sup>142</sup> *Ibid.* at para 82. These two quotes on the ‘good corporate citizen’ potentially represent a conflict on account of the word ‘oblige’ in paragraph 66 in contrast to ‘not confined to’ as contain in paragraph 82. As stated at paragraph 66 of the judgment, the court suggests directors “may be obliged” to consider the impact of corporate action on various corporate stakeholders as part of the “the best interests of the corporation.” *Ibid.* at para. 66. “Oblige” has been defined generally in the Collins Canadian English Dictionary as a “legal contract”, “put under obligation” and binding “morally and legally to do service to,” or “compel.” Patrick Hanks *et al.*, eds Collins Canadian English Dictionary (New York: Harper Collins Publishers Ltd., 1991) at 283. This appears contradictory to the discretionary application of good corporate citizenship in paragraph 82 of the judgment where it states directors are “not confined to, the need to treat affected stakeholders... as a responsible corporate citizenship.” *Ibid.* at para. 82. Thus, it is unclear under what circumstances directors are mandated to consider the interests of non-shareholders as good corporate citizens, if ever.

<sup>143</sup> *BCE*, *supra* note 129 at para. 82.

<sup>144</sup> *Ibid.* at para. 36.

<sup>145</sup> *Ibid.* at para. 64.

corporate actions equitably and fairly pursuant to the obligation to act as a good corporate citizen.

Previously in the case law, directors were constrained from considering the interests of various stakeholders except for shareholders as part of the best interest of the corporation. Subsequently, in *BCE* the Supreme Court of Canada in interpreting section 122(1) of the *CBCA* suggests that directors may consider the interests of several corporate constituents as a good corporate citizen.

The ‘good corporate citizen’ fits in the application of directors’ fiduciary duties by suggesting directors may balance stakeholder’s interest in a manner that treats the individual stakeholders equitably and fairly. It does not require directors to consider any particular stakeholder interest at any given time. However, if the directors are considering various stakeholder interests, then the good corporate citizen theme is invoked.

The Supreme Court in *BCE* defines the theme of good corporate citizenship as it relates to directors’ fiduciary duties outside of the confines of section 122(1) of the *CBCA*. Instead the Supreme Court established a link between the theme of good corporate citizenship and the oppression remedy.<sup>146</sup>

The oppression remedy is the mechanism by which stakeholders pursue a claim against a corporation or its directors for breaching ‘reasonable expectations’ under s. 241

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<sup>146</sup> *Ibid.* at paras. 58 & 81.

of the *CBCA*.<sup>147</sup> The oppression remedy is expanded in *BCE* as a legal tool to ensure corporations fulfill their mandate to act as good corporate citizens. Initially, the oppression remedy was “designed for interpersonal breakdowns experienced in smaller [private] corporations.”<sup>148</sup> However, the linking of corporate citizenship targets public corporations that have obligations to many corporation constituents. Large corporations service a wide range of interests and conflicts among stakeholders often arise. Currently, on account of *BCE*, directors are to resolve stakeholder conflicts in accordance with their fiduciary duty to act in the best interests of the corporation as a good corporate citizen.<sup>149</sup>

In a dated study following oppression claims in Canada from 1995 to 2001, the authors of the study found that courts have applied the remedy in a way that reflects the shareholder primacy model. However, increasing success of the oppression claim by non-shareholders demonstrated a trend towards communitarian style corporate accountability.<sup>150</sup>

As a summary, the leading decisions of the 1990’s that interpret section 122(1) of the *CBCA* were often conflicting on whether directors must maximize shareholder value

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<sup>147</sup> The court has wide latitude of discretion in determining what is reasonable. Once the claimant has established its reasonable expectation, the claimant must demonstrate that the corporation’s failure to meet that expectation caused oppression, unfairness or prejudice of the claimant’s interest. Oppression claims in Canada can be asserted against a corporation or any of its affiliates including directors, officers, or employees of the company. However, the claimant would still have to show the conduct at issue was corporate conduct, as opposed to personal. See Stephanie Ben-Ishai & Puri Poonam, “The Canadian Oppression Remedy Judicially Considered: 1995 – 2001” (2004) 30 *Queen’s L.J.* 79 [Ben-Ishai & Poonam].

<sup>148</sup> *Chiaromonte v. World Wide Importing Ltd.*, (1996) 28 O.R. (3d) 641 (ON SC) at para. 29. See Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 2<sup>nd</sup> ed. (Markham: Butterworths, 1991) at 563-64.

<sup>149</sup> *BCE*, *supra* note 129 at para. 81.

<sup>150</sup> Ben-Ishai & Poonam, *supra* note 147.

as demonstrated in *CW Shareholdings* and *Maple Leaf*. In 2004, *Peoples* is the first decision of the Supreme Court of Canada to explicitly list the various stakeholders that directors may consider as part of the best interest of the corporation.<sup>151</sup> This includes the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.<sup>152</sup> Finally, the decision in *BCE* suggests that when directors are managing stakeholder interests, they should do so as a good and responsible corporate citizen.

### 3.4 Commentary on the Case Law

The above analysis suggests a progression in the law away from a shareholder primacy perspective towards a communitarian perspective on the extent of directors' fiduciary duties. This shift is most prominently demonstrated in the major Canadian cases: *Teck*, *Peoples* and *BCE*. Commentators have taken exception to these decisions as explained in the following analysis.

The *Teck* decision is the first common law authority in Canada that suggests directors may consider various interests in the company beyond shareholder wealth.<sup>153</sup> Thirty years later, *Teck* was accepted as an accurate statement of the law on directors' fiduciary duties by the Supreme Court of Canada.<sup>154</sup> In *Peoples*, the court said it "may be

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<sup>151</sup> In the *CBCA* there is no mention of individual corporate stakeholders or how to balance their interests. Parliament did not define in precise terms what was meant by the best interest of the corporation and instead left this task to judicial scrutiny. *CBCA*, supra note 21.

<sup>152</sup> *Peoples*, supra note 121 at para. 42.

<sup>153</sup> *Teck*, supra note 109. Professor Ian Lee called Justice Berger's rejection of the shareholder primacy model as expressly, "unambiguous". See Ian Lee, "People Department Store v. Wise and 'The Best Interests of the Corporation'" (2005) 41 Can. Bus. L.J. 212 at 214.

<sup>154</sup> *Peoples*, supra note 121 at para. 42.

legitimate”, although not mandatory for directors to consider the impact of corporate decisions on a particular group of stakeholders.<sup>155</sup>

Professor MacPherson argues that the *Teck* decision is simply an endorsement of a wider view of the shareholder primacy model given that the traditional understanding of “the best interests of the corporation” equates to “the best interests of the shareholders collectively.”<sup>156</sup> To quote Professor MacPherson concerning the *Teck* decision: “Justice Berger seems to be demanding a broader perspective when considering ‘the best interests of the shareholders,’ but he is not challenging the idea of shareholder primacy.”<sup>157</sup> To this end, Professor MacPherson points out that Justice Berger is mainly focused on the interests of shareholders, as “a particular decision on the community is part of acting in the best interests of the shareholders.”<sup>158</sup> Accordingly, “the end desired is making money, it is still acceptable to consider environmental issues, but only to the extent this fits the ultimate goal – in this case, economic success.”<sup>159</sup>

*Peoples* expanded the scope of directors’ duties of care in a way that Canadian corporations should now be “scrupulous in their decision-making process and, if they ignore the interests of significant stakeholders, they do so at their peril.”<sup>160</sup> The court in *Peoples* discusses the nature and scope of directors’ fiduciary duties and demands a

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<sup>155</sup> *Ibid.*

<sup>156</sup> Darcy MacPherson, “The Supreme Court Restates Directors’ Fiduciary Duty- A Comment on *Peoples Department Stores v. Wise*” (2006) 43 Alta. L. Rev. 383 at 390.

<sup>157</sup> *Ibid.* at 391.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.* at 392-93.

<sup>160</sup> Catherine Francis, “*Peoples Department Stores Inc. v. Wise: The Expanded Scope of Director’s and Officers’ Fiduciary Duties and Duties of Care*” (2005) 41 Can. Bus. L.J. 175 at 183.

higher standard in the quality of board decisions.<sup>161</sup> One commentator stated that *Peoples*: “provides a mechanism for the integration into the standard of conduct of the informal ‘best practices’ governance norms that have become more demanding for directors over the last few years.”<sup>162</sup>

Some argue that the pronouncements in *Peoples* have considerable impact on change-of-control situations or in the liquidation of an insolvent company. For instance, Wayne Gray suggests that directors might be permitted to consider questions of the reputation of a firm on environmental matters or the costs to employees under threat of a takeover.<sup>163</sup> Therefore, under the framework in *Peoples*, it is conceivable that directors would not breach their fiduciary duties by recommending shareholders reject a bid that failed to meet social and environmental standards, yet yielded the maximum price.<sup>164</sup>

Using this approach, “directors ought to feel more comfortable that they may engage in environmentally and/or socially responsible corporate decision-making in a wide array of circumstances, without the risk and threat of lawsuits from shareholders for not maximizing the short-term returns of the company.”<sup>165</sup> In commenting on the *Peoples* judgment, the above noted author went further in stating that the Supreme Court’s interpretation of directors’ fiduciary duties:

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<sup>161</sup> *Peoples*, *supra* note 121 at para. 64.

<sup>162</sup> Stéphane Rousseau, “Director’s Duty of Care after *Peoples*: Would it Be Wise to Start Worrying about Liability?” 41 (2005) Can. Bus. L.J. 223 at 231-32.

<sup>163</sup> Wayne Gray, “A Solicitor’s Perspective on *Peoples v. Wise*” (2005) 41 Can. Bus. L.J. 184 at 189-90.

<sup>164</sup> If directors focus exclusively on profit in a change-of-control scenario, then the norm of shareholder wealth maximization is expressed. Although in a change-of-control scenario, it is clear that such a transaction must be put to a shareholder vote as it constitutes a fundamental change of control according to s. 183 of the *CBCA*, *supra* note 21.

<sup>165</sup> Kerr, *supra* note 23 at 121.

did not come with any restrictions or statement that would limit it to takeover situations. It would appear that directors are free to consider non-shareholder interests and engage in integrated decision-making in all circumstances, on the condition they are acting in the best interests of the corporation.<sup>166</sup>

However, some argue that *Peoples* is an embrace of a particular brand of contractarian theory. This is the view of Professor Stephanie Ben-Ishai.

In her article on the *Peoples* decision, Ben-Ishai suggests that several commentators were operating on the false assumption that the shareholder primacy model accurately describes Canadian corporate law.<sup>167</sup> According to Ben-Ishai, the *Peoples* decision specifically contemplates a TPM conception of corporate accountability.<sup>168</sup> It is noteworthy that Ben-Ishai applied TPM and the shareholder primacy model in light of *Peoples*, but did not apply the communitarian theory in her analysis. The same assumption that Ben-Ishai observed after the *Peoples* decision, that the shareholder primacy model accurately describes Canadian corporate law, ostensibly remained subsequent to the *Peoples* decision.

In March of 2009, eminent scholars, practitioners and former Supreme Court Justice Frank Iacobucci gathered for a symposium on the *BCE* judgment.<sup>169</sup> With little exception, they criticized *BCE* for bringing about “incoherence and confused rhetoric with respect to one of the most basic issues of corporate law: how to reconcile the

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<sup>166</sup> *Ibid.*

<sup>167</sup> Stephanie Ben-Ishai, “A Team Production Theory of Canadian Corporate Law” (2006) 44 Alta. L. Rev. 299 at 302.

<sup>168</sup> Ben-Ishai wrote that: “the current state of Canadian corporate law on the statutory fiduciary duty is squarely consistent with Team Production Theory.” *Ibid.* at 311.

<sup>169</sup> This cumulated in the contribution of articles released in December of 2009 by the participants. See “Symposium on the Supreme Court’s *BCE* Judgment” 48 Can Bus. L.J. No. 2.

competing interests of shareholders and non-shareholder corporate stakeholders.”<sup>170</sup> The contributors condemned *BCE* on the following counts: (1) That it failed to endorse the shareholder primacy model and the American standard of corporate accountability;<sup>171</sup> (2) that it leaves corporate directors without guidance in exercising powers to supervise corporate affairs;<sup>172</sup> (3) and that it was a misguided attempt by the Supreme Court to restate the existing fiduciary standard in *Peoples* which was inherently flawed and in need of revision.<sup>173</sup> Further, the concluding opinion was that the “only real hope” for the legal expectations of corporate fiduciary duties to be rationally explained is through legislative intervention.<sup>174</sup>

As stated above, some speculated that *BCE* would adopt the “well-understood” American standards of shareholder primacy such as provided in *Revlon*.<sup>175</sup> However, Canadian law had remained “less rigid” and more “permissive [in] framing fiduciary

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<sup>170</sup> Mohammad Fadel, “*BCE* and the Long Shadow of American Corporate Law” (2009) 48 Can. Bus. L.J. 190 at 190 [Fadel].

<sup>171</sup> *Ibid.* at 201; see also Jeremy Frailberg, “Fiduciary Outs and Maximizing Shareholder Value Following *BCE*” (2009) 48 Can. Bus. L.J. 213 at 218 [Frailberg]; and Jeffrey MacIntosh, “*BCE* and The Peoples’ Corporate Law: Learning to Live on Quicksand” (2009) 48 Can Bus. L.J. 255 at 257.

<sup>172</sup> Edward Iacobucci, “Indeterminacy and The Canadian Supreme Court’s Approach to Corporate Fiduciary Duties” (2009) 48 Can Bus. L.J. 232 at 233-234 & 254.

<sup>173</sup> *Peoples*, *supra* note 121; and see Fadel, *supra* note 170 at 201. Further, there has been criticism levelled at the Supreme Court for failing to follow accepted conventions of statutory interpretation and precedent in *BCE*, which one commentator called “troubling.” Robert Todd, “Scholars Give *BCE* Decision a Scathing Critique” *Law Times* (13 April 2009), online: *Law Times* <<http://www.lawtimesnews.com/200904134623/Headline-News/Scholars-give-BCE-decision-a-scathing-critique>>.

<sup>174</sup> James Tory, “A Comment on *BCE Inc.*” (2009) 48 Can Bus. L.J. 287 at 287.

<sup>175</sup> Jeremy Barretto, “*BCE Inc. v. 1976 Debentureholders: Directors do what is best for the firm*” *Osgoode Hall Law School, York University: The Court* (22 December 2008), online: *The Court* <<http://www.thecourt.ca/2008/12/22/bce-inc-v-1976-debentureholders-directors-do-what-is-best-for-the-firm/>>.

obligations” than the American counterpart.<sup>176</sup> In *BCE*, the statutory fiduciary duties were expanded from previous common law interpretation. The court interpreted the statutory fiduciary duty to include the vague conception of corporate citizenship. Perhaps somewhat unfortunately, the court did not provide a normative or doctrinal underpinning for its reference to good corporate citizenship.

For this reason among others, commentators insist that *BCE* does not provide insight on how to resolve competing corporate interests in an equitable and fair fashion. As one commentator said: “a duty owed to everyone is in effect a duty to no one.”<sup>177</sup> According to some commentators the reference to corporate citizenship only obfuscates directors’ fiduciary duties and the explicit questions involving corporate accountability and stakeholder rights and how to resolve those competing interests were not resolved adequately in the *BCE* decision. As one example, Professor Anand called the “good corporate citizen” remark a “conspicuous ambiguity” in the judgment.<sup>178</sup>

One commentator’s response to the reference was more blunt and critical: “What does it mean to act “as a responsible corporate citizen”? The Supreme Court appears to expect corporate directors and judges, *ex post facto*, to function as an enlightened breed of Philosopher Kings ardently and faithfully pursuing some elusive Aristotelian mean.”<sup>179</sup> Another commentator admonished the Supreme Court for mentioning the “good

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<sup>176</sup> Sarah P. Bradley, “*BCE Inc. v. 1976 Debentureholders*: The new fiduciary duties of fair treatment, statutory compliance, and good corporate citizenship” (2010) 41 *Ottawa L. Rev.* 325 at 330 [Bradley].

<sup>177</sup> Anita Anand, “Backing the BCE Board” *University of Toronto Law School Faculty Blog* (19 December 2008), online: University of Toronto, Faculty of Law <[http://utorontolaw.typepad.com/faculty\\_blog/2008/12/backing-the-bce-board.html](http://utorontolaw.typepad.com/faculty_blog/2008/12/backing-the-bce-board.html)>.

<sup>178</sup> *Ibid.*

<sup>179</sup> Frailberg, *supra* note 171 at 256.

corporate citizen” in a “causal” reference in the absence of any “clear-headed analysis.”<sup>180</sup> Another alleged that the court has created a “contextually social standard, rather than a legally precise one.”<sup>181</sup>

The above noted criticism appears directed towards the lack of specific content on what the obligation of good corporate citizen would require of corporate directors. The court in *BCE* does not articulate a precise legal test or framework for corporate citizenship.<sup>182</sup> It only suggests that the obligation is linked with treating individual stakeholders equitably and fairly when conflicting interests are considered by the directors.<sup>183</sup>

### 3.5 Analysis

It is noted above that Professor Stephanie Ben-Ishai’s paper on the *Peoples* decision of the Supreme Court of Canada suggests that directors’ fiduciary duties under section 122(1) of the *CBCA* contemplates a TPM conception as a variant on the contractarian theory of corporate accountability.

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<sup>180</sup> Edward Waitzer & Johnny Jaswal, “Peoples, BCE, and the Good Corporate ‘Citizen’” (2009) 47 *Osgood Hall L.J.* 439 at 441.

<sup>181</sup> Bradley, *supra* note 176 at 345.

<sup>182</sup> Whether this omission was purposeful is unknown. Even without clear judicial commentary in this regard, the inclusion of the ‘good corporate citizen’ reference is striking. As an analogy, the reference to the parable of the Good Samaritan in the Christian Bible was unconventional in the famous case of *Donoghue v. Stevenson* which is arguably “the most famous case in the common law.” [1931] UKHL 3. See Richard Castle, “Lord Atkin and the Neighbour Test: Origins of the Principles of Negligence in *Donoghue v Stevenson*” (2003) 7 *Ecc. L.J.* 210 at 213. That 1931 decision remains the “classic test for liability in negligence” to this day. *Ibid.* at 210. See also Harold Luntz, “Editorial Comment: Reliving History” (2010). 18 *Torts L.J.* 2.

<sup>183</sup> One commentator has suggested that corporate citizenship is the court attempting to reach a larger audience with an *obiter dicta* statement that acknowledges the growing trend of CSR. *Ibid.* at 347.

I argue that the decision in *Peoples* represents the implementation of a communitarian theme of corporate accountability theory in the courts interpretation of corporate directors' fiduciary duties under the *CBCA*. For instance in interpreting section 122(1) of the *CBCA*, the decision in *Peoples* establishes what factors directors may consider in determining the 'best interest of the corporation.'<sup>184</sup> As previously established these factors include, "inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment."<sup>185</sup> *Peoples* did not underscore financial merit as justifying the inclusion of corporate constituents beyond the shareholders which is a foundational concept of the TPM. In *Peoples*, the environment and government are included as corporate stakeholders which imply the communitarian approach more than the TPM variant of contractarian theory.

Further, I argue that the Supreme Court of Canada's decision in *BCE* augments the findings in *Peoples* with the inclusion of the communitarian theme of good corporate citizenship. Prior to *BCE*, the notion of the "good corporate citizen" is unprecedented in Canadian corporate law.<sup>186</sup> It is a novel concept, introduced by the Supreme Court as a forceful theme of corporate accountability.

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<sup>184</sup> The court stated that "various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation." *Peoples*, *supra* note 121 at para. 42.

<sup>185</sup> *Ibid.*

<sup>186</sup> See Jeffrey Bone, "The Supreme Court Revisiting Corporate Accountability: *BCE Inc.* in search of a legal construct known as the 'Good Corporate Citizen'" (2010) *Alta. L. Rev.*, online: Supplement <[http://ualbertalaw.typepad.com/alr\\_supplement/2010/03/the-supreme-court-revisiting-corporate-accountability-bce-inc-in-search-of-a-legal-construct-known-a.html](http://ualbertalaw.typepad.com/alr_supplement/2010/03/the-supreme-court-revisiting-corporate-accountability-bce-inc-in-search-of-a-legal-construct-known-a.html)>. Outside the materials noted in chapter two on corporate citizenship, this particular theme of communitarian theory has no further normative underpinning in legal scholarship. In 1964, Justice Freedman took the opportunity as a Commissioner under section 56 of the *Industrial Relations and Dispute Investigation Act* to establish that

This builds on the previously presented analysis of *Peoples* which highlights the willingness of the Supreme Court to defer to directors' judgment on integrating corporate social responsibility into corporate decision making without fear of litigation from shareholders for not maximizing short-term returns when considering their fiduciary duties. As one author said in commenting on *BCE*: "Responsible corporate citizenship is the hallmark of fulfilled fiduciary duties."<sup>187</sup>

This debate is largely dependent on whether one subscribes to a contractarian or communitarian perspective of corporate accountability. In my view, *BCE* acknowledges a more expansive role for corporate directors in the pursuit of socially responsible corporate objectives.<sup>188</sup>

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Canadian corporations (both public and private) do not have legal duties towards communities, Justice Freedman said:

Perhaps the true ground of company responsibility to communities was indicated by the company itself. It is the ground of *good corporate citizenship*. It has no basis in law, it is unenforceable, and it has very distinct limits. But in the context of a good society it does exist, and it can function as an operating principle.

Samuel Freedman, *Report of the Industrial Inquiry Commission on Canadian National Railways "Run-Through"* (Ottawa, ON: Queen's Printer, 1965) at 111 [emphasis added]. While there is little contribution on corporate citizenship in legal scholarship, the academic literature on this topic in non-legal disciplines (particularly management) is numerous and substantial. For further review see Malcolm McIntosh, *Living Corporate Citizenship: Strategic Routes to Socially Responsible Business* (London: Pearson Education Limited, 2003); Andrew Crane, Dirk Matten & Jeremy Moon, *Corporations and Citizenship* (Cambridge: Cambridge University Press, 2008); Sandra Waddock, *Leading Corporate Citizens: Vision, Values, Value Added* (New York: McGraw-Hill, 2002); Jörg Andriof & Malcolm McIntosh, eds., *Perspectives on Corporate Citizenship* (Sheffield, UK: Greenleaf, 2001).

<sup>187</sup> Kerr, *supra* note 23 at 129.

<sup>188</sup> To put *BCE* in context, this shift has occurred in other jurisdictions. For instance, corporate law in the United Kingdom was historically based on the shareholder primacy model. In the United Kingdom, the "purpose of the board, as far back as the charter of the Hudson's Bay Company and Dutch East Indies Company is to represent shareholders who cannot be present in person to oversee their investment." Randall Morck & Bernard Yeung, *Some Obstacles to Good Corporate Governance in Canada and How to Overcome Them* (August 18, 2006) Commissioned by the Task Force to Modernize Securities Legislation in Canada at 325. Today, however, the fiduciary duties of directors in the U.K. requires them to "promote the success of the company for the benefit of its members as a whole" by taking into account the long-term considerations of employees, suppliers, customers, the community and the environment, among others:

My thesis is that the court's reference to corporate citizenship has normative support with the emergence of a communitarian view on corporate accountability.<sup>189</sup> The previous case law does not support such a view, but *Peoples* and *BCE* signals the Supreme Court will interpret the *CBCA* pursuant to this theory of corporate accountability. The Supreme Court's objective in writing *BCE* and *Peoples* is potentially an attempt to encourage corporate directors to make decisions based on communitarian principles and corporate social responsibility as opposed to simply economic values. It appears that the Supreme Court has adopted a view similar to the communitarian theory. Whether this is a plausible explanation of the case, or more candidly, an acceptable one is a contentious issue.

In my view, corporate citizenship is a theme that potentially represents a supplementary legal expectation on corporate directors. I suggest that a duty to act merely in the best interests of the corporation is different than a duty to act in the best interests of the corporation *viewed as a good corporate citizen*. There is an innate difference if one accepts the link between corporate citizenship and sustainable development.<sup>190</sup>

I suggest *BCE* is an example of the Supreme Court embracing and expanding upon the communitarian theme of corporate accountability that was noted in the *Peoples*

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*Companies Act* (U.K.), 2006, c 46, s. 172(1). Specifically, the *Companies Act* mentions:

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

<sup>189</sup> As supported in the discussion from chapter two on the communitarian theory. See Dodd, *supra* note 42; Allen, *supra* note 22; and Manning, *supra* note 76.

<sup>190</sup> Pies, *supra* note 95.

decision. In the communitarian approach, directors are expected to contemplate how a corporation should act as an effective citizen. If the directors ignore this obligation, the corporation may face legal consequences. As established in the previous chapter, the communitarian theme of corporate accountability has a normative and historical basis.

The *BCE* remark is likely only the beginning of Canadian courts' treatment of directors' fiduciary duties under the microscope of good corporate citizenship. Lower courts across the country have been citing the reference in recent decisions; however they have been hesitant to apply good corporate citizenship in the judgments. Justice Nason of the Alberta Court of Queen's Bench said:

The *BCE* case pointed out that conflicts may arise between the interests of corporate stakeholders, among themselves, or between stakeholders and the corporation. The court was clear that where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty, and to act in the best interests of the corporation, viewed as a good corporate citizen.<sup>191</sup>

Further, in a finding that was adverse to a group of shareholders, Justice Newbury on behalf of the British Columbia Court of Appeal said:

These considerations also inform the duty of directors, enunciated at para. 82 of *BCE* to treat affected stakeholders in a fair manner, in accordance with the corporation's "duties as a responsible corporate citizen."<sup>192</sup>

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<sup>191</sup> *Carlson Family Trust v. MPL Communications Inc.*, 2009 CarswellAlta 200, 2009 ABQB 77, [2009] A.W.L.D. 2895 (Alta. Q.B. Feb 18, 2009) at para. 72 [underline added].

<sup>192</sup> *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228, 333 D.L.R. (4th) 257. at para 85. The court went on to say: "The case at bar did not involve corporate conduct that might affect the environment or the interests of other stakeholders outside the corporate context." *Ibid*. In my view, this statement leads to the conclusion that had an environmental issue been in play, the court would have found such a factor to be a relevant issue that directors may consider. For other lower court references see also *Hu v. Sung*, 2009 CarswellOnt 4778, 76 C.C.E.L. (3d) 179, 63 B.L.R. (4th) 286 (Ont. S.C.J. Aug 13, 2009) at

However, corporate citizenship as a theme of corporate accountability must be tempered by the practical application of the business judgment rule that allows directors to decide for themselves what is in the best interest of the corporation.

The business judgment rule as analyzed in *Peoples* and *BCE* permits courts to defer to directors' business judgment as long as an appropriate amount of reasonableness was used in making their decision. The rule creates a strong presumption in favor of the board of directors.<sup>193</sup>

As a summary, the doctrinal analysis presented in this chapter has demonstrated that the Canadian judiciary has traditionally adhered to a shareholder primacy model. However, there has been a movement away from shareholder primacy beginning with the *Teck* decision and the more recent corporate law cases from the Supreme Court of Canada including *Peoples* and *BCE*.

Cases such as *Peoples* and *BCE* which interpret section 122(1) of the *CBCA* explicitly increase the list of stakeholders that directors may consider as part of the best interests of the corporation beyond the shareholders. The doctrinal analysis further demonstrated novel themes on corporate accountability. In particular the concept of the

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para. 55; *Harris v. Leikin Group Inc.*, 2011 CarswellOnt 4794, 2011 ONSC 3556 (Ont. S.C.J. Jun 13, 2011) at para. 300; *BAE-Newplan Group Ltd. v. Altius Minerals Corp.*, 301 Nfld. & P.E.I.R. 214, 2010 CarswellNfld 238, 932 A.P.R. 214, [2010] N.J. No. 256, 73 B.L.R. (4th) 12 (N.L. T.D. Aug 17, 2010) at para. 45; *Szarek v. Grad*, 2010 CarswellQue 7204, EYB 2010-176600(C.S. Que. Apr 12, 2010) at para. 93; *Casey v. CopperLeaf Technologies Inc.*, 2010 CarswellBC 757, 2010 BCSC 417, [2010] B.C.W.L.D. 6410 (B.C. S.C. Feb 10, 2010) at para. 18.

<sup>193</sup> It can be argued that corporate citizenship does not have a tangible effect since directors are cloaked with a broad and discretionary business judgment rule which in essence protects any decision of a board provided it was made with good faith. However, conversely directors are not liable for embracing principles of corporate citizenship if they feel it is in the best interest of the corporation and they used diligence and prudence in exercising their fiduciary duties.

good corporate citizen. This is linked with directors' fiduciary duties and how they choose to manage stakeholder's interest.

Some commentators suggest a reading down of *Teck* and *Peoples* and there has been significant criticism levelled at the Supreme Court for failing to explain how directors are to manage stakeholder interests as a good corporate citizen in *BCE*.

I argue these commentaries are based on the contractarian theory of corporate accountability and the discord these critiques have with *BCE* is because it is based on a different theory. Mainly I argue that the criticism of *BCE* fails to acknowledge the court's changing view of corporate accountability. Corporate regulation and directors' fiduciary duties have more significance than issues surrounding hostile takeovers and shareholder wealth. It remains apparent that corporate profit is a primary feature of corporate accountability; however this is not the only legal mandate or objective of a corporation. In this way the communitarian theory is reflected in *BCE*, but not entirely. In the wake of *BCE* it is permissible for corporate directors to balance environmental concerns along with shareholder wealth as a good corporate citizen. This is what I suggest is required of contemporary directors operating pursuant to their fiduciary duties contained at section 122(1) of the *CBCA*. Next, I utilize the information presented in this chapter to answer my research questions.

### **3.6 Application of Law to Corporate Sustainability Pledges**

This chapter examined section 122(1) of the *CBCA* in an effort to explore my research questions. First, can corporate stakeholders (such as a socially minded

shareholder) hold the corporate directors to account in fulfilling non-financial expectations such as environmental goals? In other words, does a corporate sustainability pledge result in legal obligations under section 122(1) on directors to implement the environmental objectives as set out in a sustainability pledge?

My analysis concludes that a corporate sustainability pledge does not create legally-binding obligations upon directors to consider environmental goals over other stakeholder interests. In Canada directors are required to consider the best interest of the corporation which includes a diverse set of stakeholders. Case law suggests that corporate directors have a legal obligation to make decisions as a good corporate citizen, although this does not compel or legally-mandate directors to consider the particular interests of various stakeholders such as the environment. Therefore, a corporate sustainability pledge does not result in a legal obligation under section 122(1) on directors to implement environmental objectives contained in a sustainability pledge.

Second, in the absence of legal obligations are directors exposed to liability when they exercise their discretion to implement the environmental goals of a sustainability pledge?

As seen in the case law, directors have previously decided that what is in the best interest of the corporation is not always what is most profitable to shareholders. In these cases the courts have been deferential to directors. This is evident from the judgments in *Maple Leaf* and *Teck* which involved prospective corporate takeovers. In those cases the directors preferred offers that did not yield the maximize profit to shareholders. Rather

directors considered intangible factors such as in *Teck* where the directors considered the compatibility of their prospective partners as more important than the financial value in the offer. Similarly, in *Maple Leaf* the directors decided that protecting the interests of employees was more important to the corporation than preferring the highest bidder.

In *Peoples* and *BCE* the Supreme Court further expanded judicial deference to directors and firmly established that shareholders, employees, suppliers, creditors, consumers, governments and the environment were legitimate interests that directors may consider as part of the best interest of the corporation.

It seems logical that if these interests are acceptable for directors to consider, then following the objectives of a sustainability pledge is a permissible decision considering section 122(1) of the *CBCA*. In my view, the environmental goals of a sustainability policy are legitimate stakeholder interests on the same level as maximizing corporate profit or expanding company growth. It is in the discretion of directors to value, weigh and ultimately decide which interests best serve their corporation. This is particularly entrenched given the business judgment rule.

The rule creates a strong presumption that directors will not be liable for negative outcomes as long as an appropriate amount of reasonableness and prudence was used in the decisions making process. I will reiterate what the court said in *BCE* to emphasize this crucial point:

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 that situation, they exercised business judgment in a responsible way.<sup>194</sup>

On this basis, I argue directors may accept that a corporate sustainability pledge is a rational policy to implement and abide by. If not, it can erode public confidence and potentially expose the corporation to regulatory scrutiny. These issues are explored in the next chapter with a case study analysis.

Thus, while stakeholders may not be entitled to legally hold corporations to account on sustainability pledges, it remains in the discretion of directors to decide whether they will follow a sustainability policy even if profit-driven shareholders object to this decision.

Finally, the results expressed in this analysis of leading case law on section 122(1) of the *CBCA* do not indicate that the court has adopted the communitarian approach of corporate accountability in its entirety. Communitarian theory asserts that directors are *obliged* to consider non-profit interests; however the law under the *CBCA* suggests that directors *may* consider these interests and be shielded from liability. In my view a fully operational communitarian regime would mean that directors have fiduciary duties to implement corporate sustainability policies and fulfill those objectives at the expense of shareholder profit. In my view, the leading case law has not aligned concretely with a communitarian approach to corporate accountability. The analysis indicates that the court has moved away from the once dominant theory of shareholder primacy. Accordingly, it should be emphasized that the leading case law does not express a model that is aligned

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<sup>194</sup> *BCE*, *supra* note 129 at para. 84.

completely with either communitarian or shareholder primacy conceptions of corporate accountability.<sup>195</sup>

Under this framework, I argue that a corporate board may determine for themselves whether to adopt communitarian principles such as those contained in a corporate sustainability pledge on a voluntary basis. These promises might, for example, focus on ameliorating the impacts of the corporation on the environment as a corporate stakeholder. In contrast, directors are able to embrace these same environmental objectives in a sustainability pledge if, in their view they reasonably believe it will improve the long-term financial position of the shareholders. In this light, the same environmental goals may be advanced by directors for long-term profit-driven motives, effective corporate citizenship or both.<sup>196</sup>

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<sup>195</sup> It has been suggested that such a view as expressed in this thesis contains the “lingering centrality of shareholder primacy.” Thomas Posyniak, “Realizing a “Pious Wish” of Peoples and BCE: Enforcement of Pluralist Theory and Corporate Environmental Responsibility” (2012) 23 J.E.L.P. 99 at 111. With respect to this argument, I advocate an understanding of *BCE* as not a direct endorsement of communitarian theory; rather my view on the judicial pronouncement of *BCE* and *Peoples* is to grant directors the primary control and discretion in asserting what is in the best interest of the corporation.

<sup>196</sup> These interests are not necessarily incongruent according to the proponents of corporate social responsibility. As aptly pointed out by the authors of one study:

Recent years have seen a growth in the voluntary adoption of sustainability reporting in response to both stakeholders concerned with social and environmental performance and investors that rely on this type of non-financial data as an indicator of underlying corporate risks and likely future financial performance.

Ans Kolk & Paolo Perego, “Determinants of the Adoption of Sustainability Assurance Statements: An International Investigation” (2010) 19 Business Strategy and the Environment 182, online: Social Science Research Network <<http://ssrn.com/abstract=1284589>> at 3.

I do believe that openness and candor should be a primary objective of corporate citizenship in order to reveal the genuine motives behind corporate decisions on a substantive level. Corporate citizenship should not simply be a matter of corporate due diligence or profit-seeking. However, this topic is beyond the scope of my thesis which is confined to a legal analysis. Therefore, I have not canvass research on determining the motives of corporate directors in implementing environmental objectives.

On the other hand, directors will not be held accountable for failing to achieve environmental pledges using the leading case law. Given this finding, I conclude that *BCE* and *Peoples* demonstrates a shift further away from the shareholder primacy model by the Supreme Court of Canada; however it is unclear whether this will result in more communitarian decisions by corporate directors who are not legally-mandated to consider communitarian principles under section 122(1) of the *CBCA*.

### **3.7 Conclusions**

As a brief summary of the case law reviewed in this chapter, *Teck* became the first Canadian case to break with the contractarian tradition of shareholder primacy. In *Teck* Justice Berger articulates that community and public interests are relevant factors in determining the best interests of the corporation. Therefore, Justice Berger's comments indicate recognition of the community and presumably the environment as a legitimate corporate constituent.

Some 40 years later, the debate over *Teck* has not subsided. The decision has been criticized as advocating a 'wider' scope of shareholder primacy as opposed to the communitarian model. Further, it has been suggested by one commentator that *Peoples* represents a TPM conception which is a variant on the contractarian theory of corporate accountability.

*BCE* has received the most scorn from commentators for its vagueness and lack of rigor concerning the implementation of the corporate citizen reference. However, I

suggest all these cases are more clearly explained using the communitarian perspective on Canadian corporate law.

There has been a long standing presumption in the case law that the *CBCA* operates under a shareholder primacy norm. I argue that *Peoples* and *BCE* allows directors to embrace the communitarian approach. It can be argued the case law demonstrates a wider scope of enlightened shareholder primacy, however, given the historic roots of the corporation as a public purpose institution it is tenable to support the communitarian vision of corporate accountability. Even a narrow reading of the leading cases acknowledges an expansive role for directors in the pursuit of socially responsible corporate objectives such as sustainability.

Thus far, chapter two provides support for a theoretical basis of the communitarian theory and corporate citizenship. This chapter illustrates that a legal basis of corporate citizenship exists in the case law that interprets section 122(1) of the *CBCA*. I found that directors have a legal obligation to make decisions as a good corporate citizen, however this does not legally-mandate directors to consider the interests of various stakeholders such as the environment.

Therefore in answer to my research questions, a voluntary corporate sustainability pledge does not result in a legal obligation under section 122(1) on directors to implement environmental objectives contained in the pledge. However, while stakeholders may not be empowered to legally hold corporate directors to account on

sustainability pledges, it remains in the discretion of directors to decide whether they will follow these policies.

The next chapter utilizes a case study on the Canadian energy company Suncor Energy Inc. and the reclamation of liquid fine tailings to apply the above noted answers to my research questions concerning an actual sustainability policy.

## **Chapter 4: Case Study on Corporate Sustainability Policies and Directors'**

### **Fiduciary Duties**

#### **4.1 Introduction**

In this chapter I apply my findings on section 122(1) of the *CBCA* to a case study on the 2010 Report on Sustainability of Suncor Energy Inc. (Suncor) and issues surrounding the reclamation of tailings ponds in the Alberta oil sands. I utilize the case study to illustrate and apply the answers to my research questions: (1) Can corporate stakeholders (such as a socially minded shareholder) hold corporate directors to account in fulfilling non-financial expectations such as environmental objectives? (2) Are directors protected from liability when they make a decision aligned with a sustainability pledge that limits shareholder profit?

In this analysis I consider the business judgment rule as a potential mechanism to shield directors from liability when making strategic decisions pursuant to a corporate sustainability policy. As previously established, directors are not required to fulfill sustainability pledges but have the discretion to implement the promises contained in a pledge considering the leading case law on section 122(1) of the *CBCA*.

The first part of this chapter introduces one of Suncor's corporate sustainability policies in order to review what commitments and potential legal obligations are contained therein. The next part explores the application of corporate accountability law respecting Suncor's sustainability policy in a hypothetical case study analysis after an introductory explanation of corporate sustainability.

## 4.2 Corporate Sustainability

In recent years, the Government of Canada has been advocating for Canadians to make environmental sustainability a priority.<sup>197</sup> This is at least one reason why natural resource sector companies have been embracing environmental agendas. Take as one example “sustainable development” as a common phrase used within the resource and energy industry.<sup>198</sup> This includes sustainability reports or audits that measure environmental performance and commitments to ‘sustainable development,’ ‘sustainability’ or ‘responsible development.’

This language is seen in the statements, policies, codes and regulatory disclosure documents of Canadian energy sector corporations such as Shell, Nexen and Suncor among others.<sup>199</sup> Shell’s Code of Conduct states as a general business principle that Shell

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<sup>197</sup> See Environment Canada, “Environment Canada’s Sustainable Development Strategy 2007-2009” (2009), online: Environment Canada < <http://ec.gc.ca/Publications/240FBAC4-DFF8-425D-84FE-7EB7622C3F5D/Environment-Canada's-Sustainable-Development-Strategy-2007-2009.pdf>>.

<sup>198</sup> The “genesis of sustainability was the recognition of increasingly serious and global environmental and socio-economic problems resulting from development.” Shawn Denstedt, JoAnn Jamieson & Matthew Keen, *Sustainable Development and Environmental Assessment Processes* (Discussion Paper) (Calgary: Osler, Hoskin & Harcourt LLP, 2008) at 1. In 1987, the Brundtland Commission prepared a report on behalf of the United Nations that gave “sustainable development” its classic definition: “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” Brundtland Report: Report of the World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 43. Named for the Commission’s Chair, Dr. Gro Harlem Brundtland, former Prime Minister of Norway. In the Canadian context, sustainability on its basic level favors a positive shift from continued incremental degradation of unsustainable practices to gradual recovery through economic and technological efficiencies and greater ecological rehabilitation. See Robert Gibson, “Favouring the Higher Test: Contribution to Sustainability as the Central Criterion for Reviews and Decisions under the *Canadian Environmental Assessment Act*” (2001) 10 J. Env’tl. L. & Prac. 39 at 42. On the international level, implementing sustainable development was the focus of the 1992 United Nations Conference on Environment and Development in Rio de Janeiro (also known as the Earth Summit). Several key documents were produced as a result of the Earth Summit: the Rio Declaration, a statement of general principles needed to achieve sustainable development, and Agenda 21, a global, national and local action plan.

<sup>199</sup> Shell, *supra* note 11; Nexen, *supra* note 12; Suncor, *supra* note 13.

advances a more “efficient and sustainable use of energy and natural resources.”<sup>200</sup> Nexen utilizes the phrase “sustainability” to define its environmental and social objectives. To this end, Nexen defines “sustainability” as operating their business “in a manner that produces economic success, and continually improves performance in the areas of health and safety, environment and social responsibility.”<sup>201</sup>

Suncor has “sustainability” directly embedded in its corporate “values & beliefs.” Suncor states: “In conducting our business, we balance the long term economic and social benefits to our stakeholders, while striving to minimize the impacts to our environment.”<sup>202</sup> Further, Suncor purports to embrace a commitment to “responsible development” and the “environment” through their corporate vision; the pillars of which are climate change, biodiversity, land, water and air.<sup>203</sup>

In 2009 Suncor merged with Petro-Canada and united under the Suncor brand.<sup>204</sup> In the 2010 Report on Sustainability Suncor reaffirmed its environmental policy: “The new Suncor, like the old Suncor, is committed to the principles of sustainable development. This means managing our operations and growth plans in a way that enhances social and economic benefit while striving to minimize the environmental impact associated with development.”<sup>205</sup>

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<sup>200</sup> Shell, *supra* note 11.

<sup>201</sup> Nexen, *supra* note 12.

<sup>202</sup> Suncor, *supra* note 13.

<sup>203</sup> *Ibid.*

<sup>204</sup> The companies amalgamated pursuant to a plan of arrangement under s. 192 of the *CBCA* and exist today as Suncor Energy Inc. (Suncor) as a *CBCA* corporation.

<sup>205</sup> 2010 Report on Sustainability (July 21, 2010), online: Suncor Energy Inc. <<http://sustainability.suncor.com/2010/default.aspx>> [2010 Report on Sustainability]. The Suncor Sustainability Report was developed using the Global Reporting Initiative (GRI) G3 Guidelines and

The following is a discussion of the potential liability flowing from Suncor's 2010 Report on Sustainability (Sustainability Report) considering directors' fiduciary duties at section 122(1) of the *CBCA*.

As previously established, I find that corporate directors do not have a duty to consider (or not consider) environmental interests. However, the second research question concerns whether directors have the freedom of choice to implement a sustainability policy that reaches beyond legal compliance without incurring liability from disgruntled profit driven shareholders. Therefore, I question whether in the absence of a legal requirement to consider environmental interests, directors may consider these interests while complying with their fiduciary duties at section 122(1) of the *CBCA*.

As demonstrated below in the case study, I conclude that the directors of Suncor have a sufficient legal basis to adhere to a voluntary sustainability policy even when there is no duty which requires it.

#### **4.3 Case Study: Suncor 2010 Report on Sustainability**

Suncor made several environmental promises within the 2010 Sustainability Report including a pledge to accelerate the reclamation of Suncor tailings through a new

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reached an A+ reporting level. Further, in preparing the Sustainability Report, Suncor utilized Ceres for input. "Ceres is an advocate for sustainability leadership. Ceres mobilizes a powerful network of investors, companies and public interest groups to accelerate and expand the adoption of sustainable business practices and solutions to build a healthy global economy." Ceres (August 2, 2010), online: Ceres <<http://www.ceres.org/files/in-briefs-and-one-pagers/ceres-in-brief>>.

technology developed in-house at Suncor.<sup>206</sup> This process received regulatory approval from the Energy Resources Conservation Board (ERCB) in June of 2010.<sup>207</sup>

Tailings Reduction Operations (TRO) is a tailings management technology that involves converting fluid tailings into a solid landscape suitable for reclamation. Tailings are a mixture of fine sands, clay, water and residual bitumen produced through the oil sands extraction process. When these tailings settle, a portion will eventually form mature fine tailings. These tailings in particular have historically taken many decades to firm up sufficiently for reclamation.<sup>208</sup>

Tailings contain toxic contaminants such as heavy metals and acids which break down very slowly and therefore pose a long-term threat to the groundwater of the region. A report published by Environmental Defence concluded that oil sands tailing ponds leak more than 11 million liters of contaminated water per day.<sup>209</sup> So speeding up the process

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<sup>206</sup> Suncor committed to reduce water intake, increase land area's reclaimed, improve energy efficiency and reduce greenhouse gas emissions. All of these promises were absolute with the exception of energy efficiency which is intensity based. "Suncor Sustainability Report: Sets Four Environmental Goals for 2015" (August 19, 2010), online: Environmental Leader <<http://www.environmentalleader.com/2010/08/19/suncor-sustainability-report-sets-four-environmental-goals-for-2015/>>.

<sup>207</sup> ERCB Conditionally Approves Suncor Plan to Reduce Fluid Tailings. ERCB Press Release (June 17, 2010), online: ERCB <<http://www.ercb.ca/news-releases/NR2010-08.pdf>> [ERCB Press Release]. Suncor has been researching, developing and testing the TRO technology since 2003. The particular project is located 40 km northwest of Fort McMurray. Green Congress, "Suncor Energy Receives Conditional Regulatory Approval for Oil Sands Tailings Management Plan; Projected 30% Reduction in Volume" (2010), online: <<http://www.greencarcongress.com/2010/06/tro-20100618.html>> [Green Congress].

<sup>208</sup> *Ibid.* For a more in-depth review of Suncor's reclamation techniques concerning liquid fine tailings see Melinda Mamer, "Oil sands tailings technology: understanding the impact to reclamation" (2010), online: British Columbia Mine Reclamation Symposium. <<https://circle.ubc.ca/bitstream/handle/2429/30342/13%20Mamer.pdf?sequence=1>> [Mamer].

<sup>209</sup> Environmental Defence, "11 Million Litres a Day: The Tar Sands' Leaking Legacy" (2008), online: Available for download at <<http://environmentaldefence.ca/reports/11-million-litres-day-tar-sands-leaking-legacy>> at 2.

is an important factor for those concerned with long-term environmental contamination.<sup>210</sup>

TRO speeds up the drying process that is already occurring in conventional heavy water based tailings. According to the Suncor 2010 Sustainability Report, TRO reduces the time of traditional oil sands reclamation down from 30 years to ten years or less.<sup>211</sup>

TRO is advantageous from an environmental perspective for at least two reasons. Firstly, TRO negates the necessity for large scale liquid based tails ponds that were at the centre of the 2010 conviction of Syncrude Canada Ltd. (Syncrude) over causing the death

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<sup>210</sup> TRO “has significant benefits such as: accelerating reclamation, reducing the need for more tailings ponds and reducing the existing inventory of [mature fine tailings]”. Mamer, *supra* note 208 at 1. During the Suncor TRO process: “MFT is mixed with a polymer flocculent and then deposited in thin layers over sand beaches with shallow slopes. This drying process occurs over a matter of weeks, allowing more rapid reclamation activities to occur. The resulting product is a dry material that can be reclaimed in place or moved to another location for contouring and replanting with native vegetation, according to Suncor. The ERCB believes that application of TRO will enable Suncor to reduce the volume of fluid tailings remaining at the end of the project life by approximately 30%. Further, Suncor’s approved plan by the ERCB does not call for the creation of any new tailings ponds and will allow Suncor to operate five fewer tailings ponds and use less space for fluid tailings storage than originally applied for.” *Green Congress*, *supra* note 207.

<sup>211</sup> TRO is expected to increase reclamation of tailings ponds by “decades and already enabled the cancellation of plans to build five additional tailings ponds at... [Suncor’s] existing operations.” 2010 Annual Report (January 26, 2011), online: Suncor Energy Inc. <<http://www.suncor.com/pdf/Suncor-English-Annual-Report.pdf>> at 5 [Annual Report]. The Sustainability Report states: “We expect the TRO™ process to result in reclaimable surfaces 10 years after initial disturbance—the comparable timeframe using CT is about 30 years.” 2010 Report on Sustainability, *supra* note 205 at 12. Also see Mike Byfield, “The Suncor TRO process slashes tailings reclamation time” *Oil & Gas Inquirer* (January 17, 2011), online: Oil and Gas Inquirer <<http://www.oilandgasinquirer.com/article.asp?article=magazine%2F110117%2FMAG2011%5FJH0000%2Ehtml>>. Elsewhere, Suncor restates that TRO will “reduce the time it takes from initial land disturbance to have reclaimable surface to about 10 years – a third of what is now the industry standard.” 2011 Sustainability Report (July 2011), online: Suncor <<http://sustainability.suncor.com/2011/default.aspx>>. In March of 2011 Suncor won a major reclamation award recognizing the “importance of long-term corporate commitment to reclamation through innovation and improved reclamation techniques” with TRO. Press Release: Suncor Energy Recognized for Reclamation Efforts (March 4, 2011), online: Suncor <<http://www.suncor.com/en/newsroom/2418.aspx?id=1406529>>. Further, Suncor was recognized in 2010 for its report on sustainability by the Canadian Institute of Chartered Accountants.

of approximately 1,600 ducks near their oil sand operations in northern Alberta.<sup>212</sup> The issue is that wildlife and in particular fowl are attracted to liquid based tailings, mistaking them for natural lakes. With TRO the surface of the tailings is not a pure liquid and the overall footprint and circumference is reduced.

Secondly, Suncor reports that the time it takes for the surface of the tailings to be suitable for reclamation and revegetation is reduced from 30 years down to 10 making the entire project less time consuming.<sup>213</sup> The down side is that the technology is very expensive. Suncor spent \$670 million implementing TRO in 2011 which was about 10% of Suncor's total capital budget.<sup>214</sup> In sum, Suncor is spending \$1-billion on TRO technology and implementation through to 2012.<sup>215</sup> However, a representative from Suncor has said that the ultimate cost of deployment in the period of 2010 to 2012 is likely to be closer to \$1.2 billion.<sup>216</sup>

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<sup>212</sup> *R. v. Syncrude Canada Ltd.*, 2010 ABPC 229, 56 C.E.L.R. (3d) 124. Syncrude was convicted under the *Migratory Birds Convention Act*, 1994, S.C. 1994, c. 22 and the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

<sup>213</sup> Annual Report, *supra* note 211 at 5.

<sup>214</sup> See 2010 Annual Information Form (March 3, 2011), online: Suncor <[http://www.suncor.com/pdf/3161587\\_Suncor\\_Annual\\_Information\\_Form.pdf](http://www.suncor.com/pdf/3161587_Suncor_Annual_Information_Form.pdf)> at 9 [2010 AIF]. Suncor's CEO said: "Suncor expects to spend more than \$1 billion over 2011 to 2012 to implement a new tailings and reclamation technology at our existing operations." Annual Report, *supra* note 211 at 4. Statement of Brad Bellows, Media correspondent at Suncor Energy Inc. (August 9, 2011) [unpublished] [Bellows].

<sup>215</sup> 2010 AIF, *supra* note 214.

<sup>216</sup> Bellows, *supra* note 214.

As well, TRO technology is still in the process of commercial deployment and the benefits, while promising are uncertain.<sup>217</sup> On this basis, there is no guarantee that TRO will ultimately succeed in reducing the length of time required for reclamation.

In Suncor's 2010 Annual Report, the company announced they were the first oil sands operator to "complete surface reclamation of a tailings pond."<sup>218</sup> It took Suncor approximately 40 years to reclaim this pond without the aid of TRO. Given that TRO is, as of yet, an unproven technology, it is unclear on what basis Suncor calculates a ten year window towards surface reclamation except for Suncor's own speculation.<sup>219</sup>

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<sup>217</sup> There is a reasonable concern that Suncor's expectations of TRO technology (or 'dry tailings') dramatically reducing reclamation time may prove untrue. This potential situation was highlighted in a 2009 report on oil sands operators:

Suncor announced that it was applying for permits to use a new technology to reclaim tailings. If it works, Suncor will have access to an important tool for mitigation the risks associated with its massive tailings ponds. However, technology undertakings made during the permitting process do not always translate to the final project: Total [another oil sands operator] promised commercial-scale dry tailings for its proposed Joslyn mine, and now it seems to be backtracking.

Lines in the Sands: Oil Sands Sector Benchmarking (November 2009), online: Northwest & Ethical Investments L.P. <<http://www.strategywest.com/downloads/LinesintheSands2009.pdf>> at 34. Further, as stated in the report:

Dry tailings would eliminate the need for giant tailings ponds and their associated reclamation costs, and represent the Grail for oil sands miners. Is the lack of progress in implementing dry tailings the result of lack of effort, or is it not possible to fix this problem? If is not possible to fix—what are the implications for investors of building new mines that will create massive new tailings liabilities?  
*Ibid.*

<sup>218</sup> Annual Report, *supra* note 211 at 3.

<sup>219</sup> As of August 2011, Suncor expects the timing of reclamation to a surface suitable for revegetation to be around 10 years and maintains that results so far are promising; however acknowledge they are still in the process of commercial deployment. Bellows, *supra* note 214. Suncor's speculation on such matters does not necessarily create legal liability if the assumption becomes untrue. In order to create legal liability, the assumption would have to be made fraudulently, deceitfully or negligently in light of the facts. See *Hercules Managements Ltd. v. Ernst & Young* [1997] 2 S.C.R. 165 for a thorough overview of these principles (Note that the *Hercules* case is premised on 3rd party auditor liability and not direct corporate liability). In the appendix to the Sustainability Report is Suncor's legal notice (Legal Notice). These notices are often referred to as a safe harbor provisions which exempts a public company from liability under securities law if the statements made in the attached public documents are done so in good faith. Generally, the Legal Notice exempts Suncor from some, or all of the liability associated with misleading or untrue statements. For instance in Suncor's legal notice to the 2010 Sustainability Report it states that the forward-looking statements contained within the report are "estimates, projections, beliefs and assumptions

Finally, in the context of my second research question it is important to note that TRO is not necessarily driven entirely by an effort to establish compliance with existing legal requirements. Evidence suggests that Suncor can be compliant with existing legal regulations without the great expense that TRO development and implementation requires.

I argue that TRO is designed to eliminate tailings effectively and expediently which meets the existing regulations on tailings reclamation. However, it appears the regulator responsible for enforcing these reclamation rules and standards is not requiring compliance by oil sands operators. Thus, if Suncor directors insist on funding TRO they may be exposed to action by disgruntled shareholders who object to corporate spending on an initiative that seeks to exceed regulations.

#### 4.3.1 *ERCB Directive 074*

The ERCB regulates oil sands mining and tailings under the *Oil Sands Conservation Act*.<sup>220</sup> ERCB Directive 074 was established in 2009 and requires oil sands operators to reduce by 50% the amount of fine tailings going into liquid tailings by

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based on information available at the time the statement was made.” 2010 Legal Notice to the Report on Sustainability (July 21, 2010), online < <http://sustainability.suncor.com/2010/en/responsible/1439.aspx>>. Forward-looking statements expressly include “reclamation time-lines” and “future investment decisions”. *Ibid.* Therefore, the Legal Notice exempts Suncor from some, or all of the liability associated with misleading statements for the purposes of tort, civil and securities law when it comes to TRO and reclamation time-lines. This is not in dispute; the central question of this chapter is focused on the application of section 122(1) of the *CBCA* when it comes to corporate directors implementing or suspending sustainability policies and whether these policies are purely voluntary.

<sup>220</sup> RSA 2000, c O-7. Alberta Environment and Alberta Sustainable Resource Development also regulate oilsands development and the three entities have a Memorandum of Understanding outlining each agency’s responsibilities. See for example: Informational Letter (IL) 96-07: EUB/AEP Memorandum of Understanding on the Regulation of Oil Sands Developments (April 18, 1996), online: <<http://www.ercb.ca/ils/pdf/il96-07.pdf>>.

2013.<sup>221</sup> The Directive is also concerned with “trafficability” of fine tailings deposits, or in other words how much weight the tailings can bear after drying.<sup>222</sup> These dry deposits must be ready for reclamation within five years after deposits have ceased.<sup>223</sup>

Oil sands companies must provide a comprehensive plan to reduce the amount of fine tailings they store and deposit in accordance with the above noted rules. The plan must be approved by the ERCB and the company must provide annual and quarterly reports on the progress of its tailings reclamation program.<sup>224</sup> In 2009 Imperial Oil Resources Ventures Limited, Canadian Natural Resources Limited, Shell, Syncrude and Suncor submitted plans under Directive 074. The ERCB approved each plan by the end of 2010.<sup>225</sup> However, of the five different companies, only Suncor’s plan is in substantial compliance with Directive 074.<sup>226</sup>

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<sup>221</sup> Every year thereafter requires an additional 50% reduction in fine tailings. Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes. ERCB Directive 074 (February 3, 2009), online: ERCB <<http://www.ercb.ca/docs/documents/directives/Directive074.pdf>> [Directive 074];

<sup>222</sup> Terra Simieritsch, Joe Obad & Simon Dyer, Tailings Plan Review: An Assessment of Oil Sands Company Submissions for Compliance with ERCB Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes (December, 2009), online: Pembina Institute and Waters Matter <<http://www.water-matters.org/docs/tailings-plan-review.pdf>> at 6 [Simieritsch].

<sup>223</sup> Green Congress, *supra* note 207.

<sup>224</sup> As noted in a ERCB press release concerning Suncor: “The submission of the tailings plan is an annual requirement of Directive 074, which will allow the ERCB to continuously monitor tailings operations and provide a means to take enforcement action when necessary. Compliance with the two main Directive 074 criteria (fines capture and DDA strength) are to be measured by companies annually starting in 2011. Additional reporting is required on the fluid tailings content of each pond annually and is scheduled to be submitted along with the annual tailings plan to the ERCB by September 30 of each year.” ERCB Press Release, *supra* note 207 at 2.

<sup>225</sup> ERCB Conditional Approval of Final Two Tailings Plans Ends Initial Phase of Directive 074 (December 17, 2010), online: ERCB <<http://www.ercb.ca/news-releases/NR2010-20.pdf>> [ERCB Conditional Approval].

<sup>226</sup> Simieritsch, *supra* note 222 at 30-31. Note that Fort Hill’s plan is also substantially compliant (Suncor acquired the Fort Hills project from the merger with Petro Canada in 2009) *Ibid.* at 21.

Under Suncor's plan, the company is compliant through to 2018. At that time, Suncor plans to relocate tailings material as part of the TRO process and decommission portions of the reclamation facility.<sup>227</sup> In this period Suncor has stated they will not meet the requirements of the Directive again until 2020.<sup>228</sup> Therefore, even Suncor is anticipating a lapse in the regulatory requirements concerning timely reclamation of its tailings.

Despite this fact, one commentator with an environmental NGO said that Suncor "raises the bar for all companies operating in the oilsands, and it is essential that other oilsands companies are required to meet the new rules to deal with toxic tailings waste."<sup>229</sup> One legal commentator indicated that the development of TRO demonstrates that when private industry is given the right incentives they "can extract and process natural resources so as to better preserve the surrounding environment."<sup>230</sup>

The reason for these praising comments is likely because the ERCB has been even more flexible in approving the plans of Suncor's competitors.<sup>231</sup> One report found that under the company's plans: Canadian Natural Resources Limited will not be

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<sup>227</sup> Suncor Energy Inc., DDA Plan Prepared in Accordance with Directive 074- Appendix C (January, 2009), online: Suncor Energy Inc. <[http://www.ercb.ca/oilsands/tailings-plans/Suncor\\_2009\\_DDAPlan.pdf](http://www.ercb.ca/oilsands/tailings-plans/Suncor_2009_DDAPlan.pdf)> at 16.

<sup>228</sup> ERCB Conditional Approval, *supra* note 225.

<sup>229</sup> Simon Dyer, "Pembina reacts to Suncor's proposed new tailings technology" The Pembina Institute (October 23, 2009), online: The Pembina Institute <<http://www.pembina.org/media-release/1903>>.

<sup>230</sup> Gail E. Henderson, "Rawls & Sustainable Development" (2011) 7 McGill Int'l J. Sust. Dev. L. & Pol'y 3 at 19-20.

<sup>231</sup> Andrew Leach, "Oilsands debate in Edmonton Centre" (2011), online: <<http://andrewleach.ca/oilsands/oilsands-debate-in-edmonton-center/>>. For an explanation of Suncor's competitors tailings technology see Garth Parker, Arnie Olyan & Melanie Condic, "Oil Sands Extraction Technologies: Perception and Production" (2011), online: <[http://www.gowlings.com/KnowledgeCentre/enewsletters/energy/HtmFiles/V9N02\\_20110315.en.html#4](http://www.gowlings.com/KnowledgeCentre/enewsletters/energy/HtmFiles/V9N02_20110315.en.html#4)>.

compliant with the Directive prior to 2025; Imperial Oil Resources Ventures Limited will not meet the Directive until 2023 and Shell will not be compliant under its plan until 2019 for one tailings pond and 2027 for another.<sup>232</sup>

In effect the ERCB exempts these companies from the Directive for many years to come. This suggests that Suncor's plan involving TRO is above compliance with what the ERCB finds acceptable. Suncor is complying with Directive 074 and is developing TRO as an effective strategy in meeting existing regulations; however the ERCB is not requiring oil sand operators to comply in practice with Directive 074. From a cost savings perspective, TRO may not be legally necessary given its expense to develop and implement. Arguably, the primary rationale for going forward with TRO is the benefits derived from an environmental and reputational perspective.

However, given the failure of the ERCB to enforce Directive 074, it is unclear what incentives Suncor has for continuing with the robust TRO program when it is not legally-mandated. In fact, as of July 25, 2012 Suncor announced a review of company

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<sup>232</sup> Simieritsch, *supra* note 222 at 30-31. Syncrude initial plan expressly stated it would not demonstrate compliance with the Directive, however this was revised and it is expected to reach compliance with the Directive by 2014. As stated by the ERCB:

The Syncrude plans as originally filed on September 30, 2009, did not fully meet ERCB requirements. Subsequent consultations between Syncrude and the ERCB have seen significant improvements to the company's plans. The ERCB has imposed conditions (see background) on Syncrude's approval that will enable the company to meet and exceed Directive 074 requirements by 2014.

ERCB Approves Fort Hills and Syncrude Tailings Pond Plans with Conditions. ERCB Press Release (April 23, 2010), online: ERCB <<http://www.ercb.ca/news-releases/NR2010-05.pdf>>.

At the time the ERCB granted the conditional approval to Syncrude one commentator stated succinctly that "the regulator approved a plan by a company that clearly stated it would not meet the regulations." Dan Woynillowicz, "When it comes to enforcing its regulations, is the ERCB more bark than bite?" The Pembina Institute (August 25, 2010), online: The Pembina Institute <<http://www.pembina.org/blog/396>>.

spending to “wrangle back costs and boost profits”.<sup>233</sup> At the time of writing it is not clear whether this review will impact funding on TRO development and implementation. However, if the costs of TRO are deemed to be superfluous by Suncor’s directors the potential exists that the program may be suspended or diminished. Conversely the directors may choose to continue implementation of TRO despite the impact on the company’s immediate profitability. I explore this situation in light of my research questions in the following case study analysis.

#### 4.3.2 Case Study Scenario

This case study confronts a hypothetical situation involving the future of TRO. What if Suncor’s TRO process proves to be effective from an environmental standpoint however it is more costly from a financial perspective than Suncor anticipates or is willing to pay given the profitability of the company?<sup>234</sup> In this scenario the directors of Suncor have a choice to make between two options in accordance with their fiduciary duties found at section 122(1) of the *CBCA*. Firstly, the directors can increase or maintain expenditures on TRO in order to meet the ten year commitment as pledged in the Sustainability Report.

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<sup>233</sup> Nathan VanderKlippe, “Suncor pulls back on growth ambitions”, *The Globe and Mail* (25 June 2012) [VanderKlippe].

<sup>234</sup> The future of TRO is merely considered in this example for the purposes of testing legal liability for representations made in a corporate sustainability report, and not based on the scientific merit behind TRO technology and prospects. My goal is not to impugn Suncor with negative assumptions, however, the possibility exist that TRO technology may not effectively streamline the reclamation process as quickly or in a cost effective fashion as the Sustainability Report suggests.

Secondly, the directors can limit the projected expenditure of TRO with the consequence that the ten year window towards reclamation to a surface suitable for revegetation will not be met due in part to financial constraints.

In this scenario, Suncor is beginning to experience decreased liquidity to support operations such as TRO implementation and development. The reasons for this decrease in revenue under this hypothetical scenario may be attributed to increased costs, dropping oil prices, or both. However, as previously indicated this pressure to reduce spending is a contemporary challenge facing Suncor in 2012.<sup>235</sup>

In Suncor's 2011 Annual Information Form the risks associated with escalating costs for TRO implementation and development was acknowledged as a realistic possibility:

There are risks associated specifically with our ability to reclaim tailings ponds containing mature fine tailings with TRO™ or other methods and technologies. Suncor expects that TRO™ will help the company reclaim existing tailings ponds by reducing tailings. The success of TRO™ or any other methods or technology and the time to reclaim tailings ponds could increase or decrease our decommissioning and restoration cost estimates. Our failure or inability to adequately implement our reclamation plans, including our planned implementation of TRO™, could have a material adverse effect on Suncor's business, financial condition, results of operations and cash flow.<sup>236</sup>

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<sup>235</sup> VanderKlippe, *supra* note 233.

<sup>236</sup> 2011 Annual Information Form (March 1, 2012), online: Suncor Energy Inc. <[http://www.suncor.com/pdf/Suncor\\_AIF\\_2012\\_en.pdf](http://www.suncor.com/pdf/Suncor_AIF_2012_en.pdf)> at 59. Further: "Suncor may provide cost estimates for major projects at the conceptual stage, prior to commencement or completion of the final scope design and detailed engineering necessary to reduce the margin of error of such cost estimates. Accordingly, actual costs can vary from estimates, and these differences can be material." *Ibid.* at 62.

In this scenario, the ERCB would allow an extension on the timeframe for completing the TRO process so that Suncor's costs do not escalate in meeting the projected date of 2020-2021. Therefore, Suncor is able to extend the life of the project in order to remain on budget. However, while compliant with Alberta regulations this result would violate certain promises contained in the Sustainability Report. Mainly, that TRO accelerates overall mine reclamation efforts by drying "tailings into a material solid enough to be reclaimed in a fraction of the time that earlier technologies require."<sup>237</sup>

My research question is not whether Suncor would be in breach of environmental regulations, but rather would Suncor directors be in breach of their fiduciary duties pursuant to section 122(1) of the *CBCA* in the context of the statements made in the Sustainability Report? The question becomes for Suncor directors: with corporate profits falling, costs of TRO high, outcomes uncertain and a lack of regulatory requirements to implement TRO; should they continue with the program in light of the monetary considerations?

This question involves the legal duties of corporate directors as explored in the previous chapter. The fiduciary duties of Suncor's directors are owed towards the corporation itself. As explained in chapter two, for the purpose of directors' fiduciary duties a corporation is comprised of various stakeholders.

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<sup>237</sup> Oil Sands Tailings, 2010 Report on Sustainability (July 2010), online: Suncor <<http://sustainability.suncor.com/2010/en/responsible/1779.aspx>>.

Suncor has different groups of stakeholders with different interests in the corporation. On one hand there are socially minded shareholders such as an ethical investment fund or an environmental non-governmental organization with sufficient shareholdings. Such groups that want to enforce a voluntary sustainability policy against a corporation may launch an action utilizing the *CBCA*.<sup>238</sup>

Socially minded shareholders that want Suncor to meet the voluntary commitments contained within the Sustainability Report actually exist outside the scope of this hypothetical case study.<sup>239</sup> The other group of stakeholders are profit driven shareholders that prefer the maximization of shareholder wealth utilizing the shareholder primacy model of corporate accountability.

What if the directors of Suncor decide to implement further funding to fulfill the Sustainability Report at the expense of shareholder profit? Under section 122(1) of the *CBCA* can profit driven shareholders hold the directors to account for promoting an environmental interest which is not otherwise required by existing regulations? This is the possibility I explore in the case study.

#### **4.4 Application: Liability Associated with Corporate Sustainability Policies**

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<sup>238</sup> The most likely scenario is that the stakeholder would utilize the oppression remedy. This topic has been discussed in chapter three. See also Ben-Ishai & Poonam, *supra* note 147.

<sup>239</sup> NEI is one example. NEI, *supra* note 15. Suncor is currently held in two of NEI's funds, the Ethical Growth Fund and the Ethical Balanced Fund. NEI's relationship with Suncor is predicated on the understanding that Suncor can fulfill the reasonable benchmarks and goals they establish in the Sustainability Report. As such, NEI's involvement as a shareholder of Suncor is directly connected to TRO technology because NEI is dedicated to seeking out investment opportunities that advance a "positive and sustainable business practices that make[s] them not only better corporate citizens but also more attractive long-term investments." *Ibid.*

In this scenario, what is the legal effect if the directors of Suncor permit the company to break the pledges contained within the Sustainability Policy concerning the anticipated reclamation timeline? The legal issue considered here is whether reneging on the stated expectations contained within the Sustainability Report creates legal liability for Suncor's directors considering section 122(1) the *CBCA*.

Alternatively, assume the directors decide to meet the deadline by increasing funding of the TRO program at the expense of shareholder wealth. This decision will result in more expenditure on TRO which in turn cuts into shareholders profit margins.

For the purposes of this case study, I use the definition of 'shareholder wealth' in the context as put forward by Milton Friedman who said: "[The] Responsibilities [of directors] is to conduct the business in accordance with the desires [of shareholders], which generally will be *to make as much money as possible*".<sup>240</sup>

The reason the directors decide to perform above compliance with Directive 074 is to meet the standards contained within the Sustainability Report.<sup>241</sup> In such a situation are the directors in breach of section 122(1) of the *CBCA* if funding to the TRO program is increased against the expectations of profit driven shareholders?

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<sup>240</sup> See Friedman, *supra* note 5 at 33 [emphasis added].

<sup>241</sup> It is important to note that Suncor has a select committee of directors that considers sustainability and environmental issues. The Environment, Health, Safety and Sustainable Development Committee (EHS&SD) reviews the company's effectiveness in meeting Suncor's obligations under the Sustainability Report. As per the EHS&SD mandate, the committee is responsible for reviewing Suncor's "Sustainability Report or other significant reports... [and to] [r]eview with legal counsel any legal matters having a significant impact on the EHS&SD reports." Mandate of Suncor's Environment, Health, Safety and Sustainable Development Committee (February 1, 2011), online: Suncor <[http://www.suncor.com/pdf/ehs\\_mandate\\_Feb2011.pdf](http://www.suncor.com/pdf/ehs_mandate_Feb2011.pdf)> Further, The Chief Operating Officer holds "top executive responsibility for sustainable issues" Annual Report, *supra* note 211 at 68.

*4.4.1 Option 1: The directors permit the company to break the pledges contained within the Sustainability Report concerning the anticipated reclamation timeline*

The directors would be making a decision between the reasonable expectations of two groups of shareholders comprising different interests. On the one hand, a socially minded shareholder has ethical interests in the corporation such as environmental and social impacts. A profit driven shareholder is interested in maximizing profits at the exclusion of other interests. In my view, a decision that results in the certain failure of Suncor to live up to the expectations of the Sustainability Report relating to the environmental objectives is a decision in favor of maximizing profits.

In order to enforce the pledges in the Sustainability Report, a socially minded claimant would have to successfully argue that the directors of Suncor breached their fiduciary duties to manage the environmental interests of corporate stakeholders as a good corporate citizen along with the financial implications of the TRO program. In the case study, that position would be a difficult burden for the socially minded claimant considering that directors can arguably permit the TRO process to continue past the express timeline of the Sustainability Report considering the aggregate interests of the corporation as a whole.

This is a matter of discretion for directors to decide utilizing the benefit of the business judgment rule. As such, it becomes a question of whether the directors' decision to permit the company to break the pledges contained within the Sustainability Policy concerning the anticipated reclamation timeline "lies within a range of reasonable

alternatives” that the directors considered.<sup>242</sup> Canadian courts defer to directors’ business judgment as long as an appropriate amount of prudence, diligence and reasonableness was used in making that decision.

As long as the decision was reached in good faith, with care and in a manner that the Suncor directors reasonably believe is in the best interest of the corporation as a whole, then the directors of Suncor would not be in breach of their fiduciary duties for renegeing on the timelines of the TRO program as per the business judgment rule.<sup>243</sup>

On account of the business judgment rule, corporate directors are allowed to maintain the clandestine nature of the boardroom, and to keep the opaque character of the decision-making process without the benefit of objective and transparent accountability and instead directors can simply appeal to a broad standard of reasonableness in defending executive decisions.

For a socially minded shareholder to succeed in a claim of this nature requires unequivocal reasoning that continuing with TRO was the only prudent option given the directors’ duty to manage stakeholder interests as a good corporate citizen. This likely requires more egregious action by the Suncor directors beyond failing to fulfill the expectations concerning TRO in the Sustainability Report. It requires a socially minded shareholder to prove that the directors of Suncor were clearly misguided in breaching the

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<sup>242</sup> *BCE*, *supra* note 129 at para. 40.

<sup>243</sup> The application of the business judgment rule depends on whether the directors reached a sound conclusion in permitting an extension to the TRO program due to financial constraints. This depends on the treatment the directors gave to each independent corporate stakeholder and how the directors ultimately balanced those interests. It is more a concern about process and diligence beyond the actual conclusion and decision that the directors reach.

Sustainability Report. Such reasoning seems unlikely, if not impossible given directors' deeply rooted obligation to consider shareholder profit as part of the company's best interest.

*4.4.2 Option 2: The directors approve an increase in funding for the TRO program in order to meet the timelines contained in the Sustainability Report*

Under this option the directors of Suncor decide to increase expenditures on the TRO program at the expense of maximizing corporate profit which equates to shareholder wealth. The reason the directors decide to reach beyond baseline compliance with Directive 074 is to meet the standards contained within the voluntary Sustainability Report. In such a situation, would the directors be in breach of section 122(1) of the *CBCA* resulting in legal liability if profit driven shareholders object to this decision? In answering this question, I apply the jurisprudence as reviewed in the previous chapter to the case study scenario.

In *Teck*, the court endorses community and public interests as relevant factors in determining the best interest of the corporation. Presumably, fulfilling the mandate of the Sustainability Report preserves the concept of 'social license' which is one aspect of the good corporate citizen.<sup>244</sup> Further, the continuation of the pledges made in the Sustainability Report likely builds trust between Suncor, its regulators, impacted communities and stakeholders that benefit from TRO. The jurisprudence from *Teck*

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<sup>244</sup> Jeurissen, *supra* note 91.

demonstrates that the public and community interests are relevant factors that form part of the best interest of the corporation.

In *Peoples*, which was largely restated in *BCE*, the court was clear that the best interests of the corporation should be read “not simply as the ‘best interests of the shareholder’” and lists governments, the environment and consumers among other stakeholder interests that directors may consider.<sup>245</sup> As such, *Peoples* endorses the view that Suncor directors may make the decision of whether to fulfill the pledges contained in the Sustainability Report by having regard to the environmental impacts and other extrinsic interests that directors are not required to consider pursuant to environmental regulations such as Directive 074.

Finally, *BCE* states that directors should have in mind when dealing with conflicting stakeholder interests the concept of responsible corporate citizenship.<sup>246</sup> As one commentator remarked on *BCE*, responsible corporate citizenship is the “hallmark” of fulfilled fiduciary duties.<sup>247</sup> Arguably, this context suggests that a responsible corporate citizen would live up to the objectives in a sustainability policy and give their best efforts in attempting to acknowledge this pledge. A responsible corporate citizen would carefully devise expectations concerning their impacts on the environment and release information with transparency and cite achievable environmental goals. The statements made by a responsible corporate citizen in a corporate sustainability policy

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<sup>245</sup> *Peoples*, supra note 121 at para. 42.

<sup>246</sup> *BCE*, supra note 129 at para. 82.

<sup>247</sup> Kerr, supra note 23 at 129.

would be realistic and based on sober analysis as opposed to optimistic “green washing” as mentioned in chapter one.<sup>248</sup>

Thus, from a legal perspective it appears that fulfilling the pledges contained in the Sustainability Report at the expense of shareholder profit is in keeping with the leading jurisprudence on point from the Supreme Court of Canada interpreting section 122(1) of the *CBCA*. Further, I suggest directors are protected from liability when they make a decision aligned with a sustainability pledge that limits shareholder value. For the reasons cited previously concerning the business judgment rule, directors need only invoke the rule to defend decisions made in good faith that support and preserve commitments to an environmental or sustainability pledge. As such, a profit driven shareholder cannot hold Suncor directors to account for complying with the Sustainability Report despite the financial losses that may result.

I argue that from a communitarian perspective Suncor has an ethical obligation to press forward with its TRO program given its promising potential. Shareholder profit may be impacted by this decision; however assuming there is still profit to be had, Suncor directors may balance stakeholder interests between monetary gain and environmental costs. This decision would reflect the principles of good corporate citizenship as provided in *BCE* and established in the communitarian theory of corporate accountability. However, according to the findings of my first research question, directors will not be held accountable for failing to adopt or achieve environmental pledges such as adhering

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<sup>248</sup> Cherry & Sneirson, *supra* note 14.

to the TRO program. Given this finding, I conclude that the leading case law demonstrates a shift further away from the shareholder primacy model, but the law does not entirely express a communitarian approach to corporate accountability.

To summarize, if there is a reasonable basis for the directors of Suncor to support increasing the funding on the TRO program, the business judgment rule is invoked to shield the directors from liability. Another way of posing this question is to consider whether a sustainability pledge gives rise to a duty or obligation upon corporate directors to acknowledge environmental interests, or a discretionary opportunity to implement the policy by choice (or the choice not to)? If the policies give rise to a discretionary opportunity then they are unenforceable. If the policies create a duty or obligation then they are legally-mandated.

The case study reveals that in Suncor's example, a sustainability pledge is unenforceable. However, even if the enactment and enforcement of a corporate sustainability pledge is voluntary or discretionary, prudent directors will insist on having and fulfilling such policies to help ensure they meet their fiduciary duties.

For instance, there is increasing awareness that long-term sustainability initiatives are a good form of corporate risk management. This outlook has been merging into Canadian corporate law. In *BCE*, the Supreme Court equates the best interest of the corporation as "the long-term interests of the corporation."<sup>249</sup> This trend towards long-

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<sup>249</sup> *BCE*, *supra* note 126 at para. 38.

term thinking has coincided with the ascent of sustainability pledges being enacted by corporations such as the Sustainability Report of Suncor.<sup>250</sup>

Therefore, even if the enactment of a corporate sustainability pledge is voluntary, prudent directors will insist on having these policies to help ensure they meet their fiduciary obligations. In my view sustainability concerns should be promoted to the strategic level of corporate governance.<sup>251</sup> It is not about an exercise in public relations or

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<sup>250</sup> In Canada, corporate sustainability reporting is not mandatory; however, as early as 1998 a study found that sustainable development reporting was up 45% from 1992. David Nitkin & Leonard J. Brooks, "Sustainability Auditing and Reporting: The Canadian Experience" (1998) 17 *Journal of Business Ethics* 1499 at 1502.

This indicates that sustainability reports are important for assessing financial, as well as environmental impacts. The often-cited problem of mixing concepts of sustainability and corporate financial performance is that there is a negative correlation between these principles. Therefore, concern for sustainability issues at the board of directors' level may result in a betrayal of the shareholders' financial interests that in turn is a breach of directors' fiduciary duties. However, these assumptions are misleading and in fact sustainability and financial performance are often linked. Studies suggest a positive correlation between CSR and financial success. For an excellent overview on the literature and empirical evidence surrounding this linkage between sustainability and financial performance; see Stefan Schaltegger & Marcus Wagner, *Managing and Measuring the Business case for Sustainability: Capturing the Relationship between Sustainability Performance, Business Competitiveness and Economic Performance* (Sheffield: Green Leaf Publishing, 2006).

<sup>251</sup> There is a "sufficient legal basis to compel the reporting" of material environmental information respecting public companies. Aaron A. Dhir, "Shadows and Light: Addressing Information Asymmetries Through Enhanced Social Disclosure in Canadian Securities Law" (2009) 47 *Can. Bus. L.J.* 435 at 441. Under securities legislation, there has been a movement towards mandatory disclosure of corporate environmental information. An example is a rule of the Ontario Securities Commission that requires publicly listed companies to disclose and make available information about their contingent environmental liabilities. Ontario Securities Commission, Staff Notice, 51-716, "Environmental Reporting" (29 February 2008), online: OSC <[http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn\\_20080229\\_51-716\\_enviro-rpt.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20080229_51-716_enviro-rpt.pdf)> at 5. This has been followed in 2010 with a national rule that applies across Canada. Canadian Securities Administration, Staff Notice, 51-333, "Environmental Reporting Guidance" (27 October 2010), online: Ontario Securities Commission <[http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa\\_20101027\\_51-333\\_environmental-reporting.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101027_51-333_environmental-reporting.pdf)>. The national rule (called a 'Staff Notice') may appear innocuous as it does not mandate any new legal requirements, however it sharply clarifies the regulators' expectations of environmental disclosure and the broad scope of these expectations may surprise some observers. The Staff Notice emphasizes that investors have a right to know and understand the policies a company has in place regarding environmental issues. Most sustainability policies are publicly available on company websites such as with the case of Shell, Nexen and Suncor. Under the current securities legislation, companies are not required to include these policies along with the mandatory filings of financial statements and annual information forms. However, publicly listed companies need to ensure that sustainability policies do not conflict with mandatory corporate disclosure filings. If there is a conflict between mandatory and

‘greenwashing,’ but an actual implementation of risk management and profit seeking measures. This thesis suggests that voluntarily steps, such as adopting sustainability policies will mitigate directors’ fiduciary duty to encompass long-term sufficiency and environmental concerns, both of which are valid considerations for directors when exercising their fiduciary duties.

Finally, the most effective means to achieving sustainability as an entrenched value is to encourage corporations to voluntarily adopt a sustainability policy that is ratified by the various corporate stakeholders. Novo Nordisk, a Danish company that supplies a large share of the world’s insulin has a sustainability creed that is firmly anchored into the company’s articles of association.<sup>252</sup> Articles of association provide a form of “self-regulation.”<sup>253</sup> When a sustainability pledge is included in the articles of association, the directors are duty bound to act within the scope of these policies, as it

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voluntarily released information, it may be considered a form of selective disclosure by securities regulators which incurs liability. Presentation of Patricia Koval. “CSA Staff Notice 51-333 –Environmental Reporting Guidance: How will it affect you?” Deloitte and Touche LLP (December 8, 2010), Online: Deloitte and Touche LLP <<http://www.cpeq.org/assets/files/Developpement%20durable/Evenements/InvitationwebcastNotice51-333.html>>. Therefore, secondary materials such as a sustainability reports need to be scrutinized closely. On these grounds, public companies need to be keenly aware of how environmental matters affect their business model and future liabilities in order to disclose such information. Today, the lines are beginning to blur between what is required or ‘material’ and what is voluntary in terms of environmental disclosure for publicly listed companies. This has direct implications on corporate governance and liability. A report prepared by former chair of the Ontario Securities Commission Edward Waitzer and York University calls for further dialogue between companies, investors and regulators over corporate environmental performance. Christopher Guly, “Securities commission should take leadership role in corporate social disclosure, says York U report” *The Lawyers Weekly* (June 25, 2010) at 3.

<sup>252</sup> Novo Nordisk, “Sustainability” (2008), online: Novo Nordisk <[http://www.novonordisk.com/sustainability/corporate\\_responsibility/corporate\\_responsibility.asp](http://www.novonordisk.com/sustainability/corporate_responsibility/corporate_responsibility.asp)>: “The company’s articles of association state that it ‘strives to conduct its activities in a financially, environmentally and socially responsible way.’” *Ibid.*

<sup>253</sup> Barry Barton, “The Theoretical Context of Regulation” in Barry Barton, Lila Barrera-Hernández, Alastair Lucas, and Anita Ronne, eds., *Regulating Energy and Natural Resources* (Oxford: Oxford University Press, 2006) at 29.

becomes part of the internal law of the company pursuant to the *CBCA*. To this end, the *CBCA* has a specific provision dealing with corporate directors' duty to comply with the internal law of the corporation.<sup>254</sup>

For the reasons cited above, one is left to conclude that it is advantageous for corporate directors to enforce sustainability policies. Sustainability pledges are promises towards the environment and community at large. Enforcing these promises would be in keeping with the communitarian conception of the corporation. A true conception of the communitarian theory leads to the requirement of corporate directors enforcing voluntary sustainability pledges once they have been established.

In this approach the objective of a corporate director has shifted from exclusively short-term gain to include long-term sustainability as an entrenched value. This transition is not about misconceiving the director's fiduciary duty; it is simply requiring directors to be more engaged in long-term planning, which is certainly in the ambient of the corporation's best interest. Therefore, the directors' fiduciary duty under this analysis has not been distended; rather it has been expanded to include a long-term component of sustainability.

#### **4.5 CONCLUSIONS**

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<sup>254</sup> *CBCA*, *supra* note 21 at section 122(2): "[E]very director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement." This forms part of the fiduciary duties of directors, and liability cannot be escaped or exempted as stated at section 122(3) of the *CBCA*: "Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations, or relieves them from liability for a breach thereof." *Ibid.*

This case study frames the answers to my research questions as presented in chapter three. It illustrates that corporate sustainability pledges do not create legal liability for directors considering their fiduciary duties contained at section 122(1) of the *CBCA*. However, directors acting on behalf of a corporation as a good corporate citizen may follow an environmental pledge contained in a sustainability report at the expense of shareholder profit. The final chapter is a statement of my findings in the thesis.

## **Chapter 5: Conclusions**

### **5.1 Conclusions on Corporate Accountability**

This chapter summarizes the finding of my research and case study. Whether a socially minded shareholder is entitled to enforce the environmental objectives of a sustainability policy depends on one's view of corporate accountability. That is, whether corporate directors' fiduciary duties require the maximization of shareholder wealth as prescribed by variant models under the contractarian theory, or whether directors are required to consider various non-financial matters such as environmental interests as ascribed under the communitarian theory.

Under the contractarian model there are tightly formed limits on whom corporate directors are obligated to consider. In contrast, under the communitarian theory the responsibility of directors to consider diverse interests is expanded.

The communitarian approach supports the principle that directors have an obligation to consider the environment as a stakeholder and the long-term interests of the corporation beyond shareholder wealth maximization. Under the communitarian theory, corporate directors may be liable for a failure to deliver on the expectations and goals set out in a sustainability pledge.

Corporate citizenship is a communitarian theme of corporate accountability that suggests directors may consider non-financial interests that affect corporate stakeholders. The non-financial values of sustainability and environmental goals that form the substance of a typical sustainability report are aligned with the interests of socially

minded shareholders. If those goals as established by a company are not met, then a socially minded shareholder will argue that the environmental interests have not been sufficiently considered.

Under the communitarian theory of corporate accountability directors may promote corporate social responsibility rigorously provided they have a reasonable basis to contend it is in the best interests of the corporation. For instance, sustainability policies provide guidance for directors when faced with a strategic decision as the managers of corporate affairs. Examples of these strategic decisions include whether a board of directors should commit capital towards non-compulsory environmental practices even if the corporation may endure negative financial repercussions. In these circumstances if a voluntary sustainability pledge suggests directors will consider broader issues than simply maximizing shareholder wealth (e.g. such as environmental protection) then this would serve as a valid defense if the corporation faced a law suit from stakeholders who were unsatisfied with the policy.

Under the contractarian theory, corporate directors are liable for breaching the environmental representations of a sustainability pledge only if it ultimately affects the company's share value in a negative way. Without this relationship to corporate profit and shareholder wealth, the contractarian perspective would not sustain a claim against the corporate directors.

On this basis, under the contractarian theory a director may perform in accordance with a sustainability pledge, however, it is unlikely a director operating under this view

would be inclined to enforce such a policy when a less costly option is available that meets existing baseline regulations. Conversely, a communitarian would argue that directors have a responsibility to uphold a sustainability pledge even if it negatively affects the financial performance of the corporation.

## **5.2 Conclusions on Directors Fiduciary Duties**

My thesis also examined the prominent case law in Canada on fiduciary duties of corporate directors. The Canadian judiciary has traditionally supported a shareholder primacy model. However, there has been a movement away from shareholder primacy beginning with the *Teck* decision and the more recent corporate law cases from the Supreme Court of Canada including *Peoples* and *BCE*. *Teck* was the first Canadian case to break with the contractarian tradition. In *Teck* the court articulates that community and public interests are relevant factors in determining the best interests of the corporation. Forty years after *Teck*, *Peoples* was a decision released by the Supreme Court of Canada supporting a wider scope of stakeholder interests that corporate directors may consider. Shortly thereafter *BCE* was released by the Supreme Court of Canada which endorsed the *Peoples* decision.

In interpreting section 122(1) of the *CBCA*, cases such as *Peoples* and *BCE* noted a specific list of stakeholders that directors may consider as part of the best interests of the corporation beyond the shareholders. This analysis further demonstrated novel themes on corporate accountability. In particular the notion of the good corporate citizen. This is

linked with directors' fiduciary duties and how they choose to manage stakeholder's interest when those interests conflict.

Unfortunately, the court in *BCE* did not provide the basis behind the good corporate citizen remark, although the court did link this obligation to the notion that corporate directors must treat "individual stakeholders affected by corporate actions equitably and fairly."<sup>255</sup> Further, good corporate citizenship in *BCE* is characterized by three things: 1) Directors "may be obliged to consider the impact of their decisions on corporate stakeholders",<sup>256</sup> 2) there is a need for directors to "treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen";<sup>257</sup> and finally 3) if the interests of corporate stakeholders conflict directors are to "resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen".<sup>258</sup>

### **5.3 Conclusions on Research Questions**

I applied the above noted findings to answer my research questions. First, can corporate stakeholders (such as a socially minded shareholder) hold the corporate directors to account in fulfilling non-financial expectations? Second, in the absence of legal obligations are directors exposed to liability when they exercise their discretion to implement the objectives of a sustainability pledge?

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<sup>255</sup> *BCE*, *supra* note 126 at para 82.

<sup>256</sup> *Ibid.* at para. 66.

<sup>257</sup> *Ibid.* at para 82.

<sup>258</sup> *Ibid.* at para. 81.

My findings indicate that a sustainability pledge does not create legally-binding obligations upon corporate directors. Pursuant to the previously established case law, directors are required to consider the best interest of the corporation which may include a diverse set of stakeholders. Additionally, the *BCE* decision provides that corporate directors have a legal obligation to make decisions as a good corporate citizen, however this does not require directors to consider the interests of particular stakeholders. Therefore, a voluntary corporate sustainability pledge does not result in a legal obligation on directors to implement environmental objectives contained in a sustainability pledge.

Secondly, directors are shielded from liability when enforcing the objectives contained in a sustainability pledge. On this note, while stakeholders may not be empowered to legally hold corporations to account on sustainability pledges, it remains in the discretion of directors to implement objectives of a sustainability policy when they assess that it is in the best interest of the corporation.

#### **5.4 Summary**

Whether one believes directors may consider discretionary interests is ultimately connected to one's view on corporate accountability. I suggest the preferable view is the communitarian theory which compels directors to focus on a broad scope of social and environmental factors. In contrast, the contractarian view stresses the merits of economic considerations above other principles.

There has been a largely unchallenged assumption that directors are required to consider only the shareholders as part of the best interest of the corporation. I suggest this

is not the accepted standard as prescribed by law. Presently in Canada directors are required to consider the best interest of the corporation which includes a diverse set of stakeholders. While corporate fiduciary duties has its roots in shareholder primacy, recent case law supports a new era in corporate reform where directors have the authority to make decisions based on non-shareholder interests as opposed to simply economic values.

Chapter two provides support for a theoretical basis of the communitarian theory and an explanation for the direction Canadian case law has developed. Chapter three provides support for a legal basis of communitarian theory and a counterpoint for the commentaries which suggest that the major cases of *Peoples* and *BCE* are wrongly decided by the Supreme Court of Canada.

In chapter four I demonstrate through the Suncor case study that voluntary sustainability reports do not create legal liability for directors considering their fiduciary duties contained at section 122(1) of the *CBCA*. However, I argue that a corporation performing as a good corporate citizen may follow an environmental pledge contained in a sustainability report at the expense of shareholder profit.

Ultimately, on account of the business judgment rule it remains in the discretion of directors to decide whether they will follow the self-imposed guidelines contained within a sustainability policy. I argue that even if the enactment of a corporate sustainability pledge is voluntary, prudent directors will insist on having these policies to help ensure they meet their fiduciary duties. However, if Parliament or the Supreme

Court wishes to impose new standards of corporate social responsibility connected to directors' fiduciary duties that are enforced by Canadian law then they must explicitly do so.

Generally, I conclude that it is possible the communitarian theory in relation to section 122(1) of the *CBCA* is more likely to be applied when corporate directors take broader stakeholder interests into account. Conversely, when directors do not act in a communitarian way, courts are likely to apply the contractarian perspective on account of the business judgment rule.

While this has not been explicitly communicated in the jurisprudence, it is clear that when it comes to corporate accountability, the courts have been empowering directors to determine the interests of the corporation, and less focused on concentrating wealth with shareholders as has been the practice in the past.

As of now, the Suncor case study demonstrates that corporate directors are not legally-mandated to follow the pledges contained within a sustainability report under current conditions. However, directors who voluntarily choose to follow the pledges in a corporate sustainability policy will be able to do so without incurring liability on account of the business judgment rule.

I expect in time these legal and regulatory developments will be expanded upon in more certain, less nuanced terms, so corporate directors may better understand their fiduciary duties as they relate to environmental sustainability.

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