RESHAPING THE DUTIES OF DIRECTORS

Robert Flannigan*

The decision of the Supreme Court of Canada in Peoples Department Stores Inc. (Trustee of) v. Wise addressed what some might regard as the two main duties of directors – the duty of loyalty and the duty of care.1 The court determined that (1) directors do not have a status fiduciary duty to corporate creditors where the corporation is approaching insolvency and (2), on the facts, the defendant directors did not breach their duty of care. While those conclusions are factually unremarkable, the conceptualization of the law by the court is problematic in a number of respects. Of particular concern is the court’s analysis of the scope and operation of fiduciary responsibility. Generally, the importance of the issues addressed in the case will give it an enduring notoriety, both positive and negative, in Canadian corporate law.

Peoples Department Store Inc. (Peoples) had become the wholly-owned subsidiary of Wise Stores Inc. (Wise) upon the latter’s purchase of Peoples shares from Marks & Spencer. The three Wise brothers were directors of both the parent and subsidiary. Because the purchase agreement prohibited the amalgamation of the two corporations, their operations were initially conducted separately. That was inefficient, however, and a new policy of joint procurement of product was implemented, albeit without formal institution or documentation of the adoption of the arrangement. Peoples did most of the procurement for the two corporations under the new policy and then transferred to Wise the

* University of Saskatchewan.

1 [2004] 3 S.C.R. 461. The main duty of all agents (including directors) is to perform their agency in the best interest of their principals. The concurrent duties of loyalty and care support that nominate duty.

As a separate matter, query the problematic statement in the first paragraph of the judgment (at 466): “[W]e conclude that directors owe a duty of care to creditors, but that duty does not rise to a fiduciary duty.” The duties of care and loyalty address different mischiefs that do not rise or descend to each other. Later in the judgment (at 477), the court does state that the two duties “are, in fact, distinct and are designed to secure different ends.” Query also, in this regard, the earlier statement in Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142 at 165, that “there is nothing special in this case to elevate the breached duty [not to misuse confidential information] to one of a fiduciary character.” Properly understood, there is no conceptual elevation from a breach of confidence to a breach of fiduciary obligation. Breach of confidence is one form of opportunism in limited access arrangements, and therefore merely one form of fiduciary breach.
inventory purchased for it. Over time, that resulted in several million dollars being owed to Peoples by Wise. Upon bankruptcy, the trustee for Peoples claimed that the directors had breached their statutory duties of loyalty and care to the subsidiary when they implemented the joint procurement plan.

The Supreme Court specifically noted that the standing of the trustee to sue had not been questioned. Presumably that observation was intended to counter the potential criticism that the trustee only had standing to sue on behalf of the corporation, and that creditors could not be equated with the corporation for that purpose. It will be appreciated that the creditors themselves could legitimately have pursued negligence claims against the directors under the general law of negligence (or, as the court noted, oppression claims). That, however, was not how the matter came before the court, and apparently the court was not inclined to offer substantive comment on the point.

*The Duty of Loyalty*

The duty in section 122(1)(a) of the *Canada Business Corporations Act* is that directors (and officers) shall “act honestly and in good faith with a view to the best interests of the corporation.”\(^2\) The court described that duty as a “duty of loyalty” or “statutory fiduciary duty.”\(^3\) That, however, is a mistaken characterization. The duty to act in the best interest of the corporation is *not* a fiduciary duty.\(^4\) It is a rule of the general law of agency. All agents have a default obligation to pursue the best interest of their principals. The duty might involve, for example, making suitable choices of goods and services, negotiating satisfactory terms of contracts, keeping assets in good order and organizing work in efficient ways. The fiduciary duty is a separate parallel obligation that supports the performance of the agency function in a particular way. It controls the mischief of opportunism. It is a narrow jurisdiction. Agents (specifically directors) must not prefer their own interest in the course of pursuing the best interest of their principals. The best interest duty is wider in scope. Many actions or decisions of directors will not be in the interest of the corporation, but will nevertheless not be fiduciary breaches because no conflict or personal benefit is involved. The best interest duty is conceptually inadequate as a descriptor for the scope of fiduciary responsibility because it would

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\(^2\) R.S.C. 1985, c. C-44.

\(^3\) The term “loyalty” may not be sufficiently precise for the lay understanding of the duty. It is not intended, in the present context, to invoke notions of personal bonding or standing together against others. It means faithfulness to an undertaking or purpose.

effectively extend that strict form of regulation to matters well beyond the regulation of opportunism. Controlling the exercise of discretion generally, for example, is functionally very different from controlling the opportunistic or self-interested exercise of discretion.

The distinction between idiosyncratic nominate regulation and fiduciary regulation is apparently not well understood today.\(^5\) Agency law, corporate law and partnership law are examples of idiosyncratic rule sets that govern the particular arrangements that fit within those nominate categories. In the corporate context, for example, there are rules dealing with the process of incorporation, corporate capacity, the issuance of shares, the declaration of dividends, solvency tests, management of the corporation, the calling of meetings and the appointment of officers. Those are corporate law rules. They are imposed (on a default basis in most cases) by the corporate legislation of the particular jurisdiction. The separate fiduciary duty imposed on directors is to perform their agency undertaking without self-interest. The strict proscription against self-interest, and the sub-rules that illustrate it, constitute the general law of fiduciary obligation. Corporate law and fiduciary law, in that way, are independent concurrent regimes governing directors. That has been obscured over the years, however, as legislatures have increasingly incorporated fiduciary duties directly into corporate legislation, making it appear to some that fiduciary responsibility is corporate law. That blurring of functional distinction has contributed to the weakening of fiduciary regulation in the corporate context.

The genesis of the CBCA “statutory fiduciary duty” is described in the 1971 “Dickerson Report.”\(^6\) The Dickerson committee stated that its proposed duty represented “a general statutory formulation of the principles underlying the fiduciary relationship between corporations and their directors.”\(^7\) The committee had relied on earlier reform proposals out of England\(^8\) and Ontario.\(^9\) It is instructive to review those earlier reports because the transformation from a conventional statement of fiduciary accountability to a “best interest” fiduciary duty occurred between them. Unfortunately, there is relatively little discussion of fiduciary accountability in the Ontario report. It is nevertheless plain that there was no attempt to alter the conventional understanding of the jurisdiction. The


\(^{7}\) Ibid. at 81.


\(^{9}\) Interim Report of the Select Committee on Company Law, Ontario, 1967.
fiduciary rules were regarded as certain: “The law is clear as to what duties of good faith are owed by a director to the company arising from the fiduciary relationship…. [T]he Committee has determined that it is not the director’s fiduciary relationship to the company which is unclear in law, nor do the precise scope or nature of his duties and responsibilities need codification.”10 Accordingly, it appears that the terminology in the Ontario report (subsequently adopted by the Dickerson committee) was intended to describe the conventional function of controlling opportunism. The reference to the best interest of the corporation would then be cognizable as an alternative formulation of the duty to forgo one’s own self-interest. The redundancy of honesty, good faith and best interest would be explicable as intended to clarify the duty through the device of multiple alternative description. The other interpretation is that the Ontario provision was designed to combine in one statement both the general agency duty (the best interest duty) and the general fiduciary duty.11

The Dickerson committee regarded the language as “simply an attempt to distill the effect of a mass of case law illustrating the fiduciary principles governing the position of directors.”12 In a statement that seems incoherent in various respects, the committee identified the purpose of the proposed provision as being “to give statutory support to principles that are as difficult to apply as they are well understood.”13 The committee went on to state that: “No attempt has been made…to give precision to the notion of ‘the best interests of the corporation.’”14 It did, however, offer the observation that the wording appeared “to leave the way free for directors to take into account whatever factors they consider relevant in determining corporate policies.”15 That observation suggests that the best interest duty is concerned with the economic and social merits of corporate decisions, which would be consistent with the conventional agency duty, and inconsistent with conventional fiduciary accountability. The Dickerson committee offered no further elaboration of its thinking in formulating the statutory language. It is clear, however, that the statutory provision was not intended to be applied as a code. Rather, it was designed to direct the reader to the common law and equitable principles.

The Supreme Court appears not to have been led too far astray by the statutory statement of duties. Though the court wrongly accepted that the

10 Ibid. at 53.
11 To accord with a conventional analysis, the language would be understood as imposing two distinct duties – a proscriptive fiduciary duty (to act honestly and in good faith) and a prescriptive agency duty (to act in the best interest of the corporation).
12 Supra note 6 at 81.
13 Ibid.
14 Ibid. at 82.
15 Ibid.
best interest duty was part of the “fiduciary” duty of directors, it described the content of the statutory duty in conventional terms:

The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally.\(^\text{16}\)

The content of this passage is broadly congruent with the content of conventional fiduciary responsibility.\(^\text{17}\) The court also cited its 2003 decision in *K.L.B. v. British Columbia*,\(^\text{18}\) where Justice McLachlin observed that fiduciary regulation addressed breaches of loyalty.\(^\text{19}\) Accordingly, notwithstanding its initial identification of the best interest duty as a fiduciary duty, the court did appear to limit the function of the statutory fiduciary duty to the control of opportunism. That analytical recovery, however, was short-lived.

The court next observed that the fiduciary liability of directors is strict.\(^\text{20}\) Despite that observation, the court appeared to then immediately compromise the strict ethic: “[I]t is not required that directors and officers in all cases avoid personal gain as a direct or indirect result of their honest and good faith supervision or management of the corporation.”\(^\text{21}\) The premise for that striking assertion was that: “In many cases the interests of directors and officers will innocently and genuinely coincide with those of the corporation.”\(^\text{22}\) The court gave two examples of that coincidence: “If directors and officers are also shareholders, as is often the case, their lot will automatically improve as the corporation’s financial condition improves. Another example is the compensation that directors and officers usually draw from the

\(^\text{16}\) *Supra* note 1 at 477.

\(^\text{17}\) Flannigan, *supra* note 5. There is perhaps a small possibility the second sentence could be [mis]read as contemplating fiduciary regulation of the merits of the management of the business.


\(^\text{19}\) See Flannigan, *supra* note 5 at 75. Cf. *R. v. Neil*, [2002] 3 S.C.R. 631, where the Supreme Court passed beyond the opportunism boundary when it characterized the duties of candour and zealous representation of lawyers as aspects of the duty of loyalty (they are nominate duties).

\(^\text{20}\) *Supra* note 1 at 479. See Flannigan, *ibid.* at 42-44.

\(^\text{21}\) *Ibid.* at 480.

\(^\text{22}\) *Ibid.*
corporations they serve.”23 Those examples, it should be appreciated, are instances where the fiduciary has the consent of the corporation. In both cases the benefit is received in a capacity that was approved by the corporation. The examples therefore do not in any way diminish the strict character of fiduciary accountability (that an unauthorized benefit by itself produces liability). Nevertheless, the court went on to assert that “all the circumstances may be scrutinized to determine whether the directors and officers have acted honestly and in good faith with a view to the best interests of the corporation.”24 Later in the judgment, in the course of its duty of care analysis, the court also declared that the “subjective motivation of the director…is the central focus of the statutory fiduciary duty.”25 Those assertions, it will be appreciated, amount to a radical denial of the conventional strict operation. Conventional fiduciary liability is established if the beneficiary proves either a conflict or a benefit on the part of the fiduciary.26 Fiduciaries are not permitted to justify or excuse their actions, whether or not they acted honestly or in good faith. In a conventional fiduciary analysis, subjective motive is irrelevant, and courts will not scrutinize “all the circumstances.” That has been a clear feature of the general jurisprudence for at least two centuries.27 The court dismissed that conventional understanding without any discussion (or apparent appreciation) of the rationale for the strict standard. That was a serious analytical failure, though perhaps not an unexpected one, given that the Supreme Court has a history of bypassing the conventional fiduciary jurisprudence.28 The explanation may be that the court simply did not, for whatever reason, attribute that particular conceptual significance to its analysis. That is implied by the complete absence of any discussion of principle.29

23 Ibid.
24 Ibid. [emphasis added].
25 Ibid. at 491 [emphasis added].
26 See Regal (Hastings), Ltd. v. Gulliver, [1942] 1 All E.R. 378 at 386 (“My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.”).
27 Ibid. See also R. Flannigan, “The Adulteration of Fiduciary Doctrine in Corporate Law” [forthcoming], discussing the linguistic imprecision (and consequent distortion) in the English and Australian cases.
28 See Flannigan, supra note 5.
29 The strict operation of the standard is explicitly challenged from time to time. See
Presumably the court asserted the legitimacy of a factual inquiry in order to justify its adoption of the determination at trial that “there was no fraud or dishonesty” on the part of the defendant directors. That determination supposedly stood in the way of a conclusion of fiduciary breach. The analysis, however, is flawed. In conventional terms, the actual presence or absence of fraud or dishonesty is irrelevant. It is enough to prove fiduciary status, and then either a conflict or a benefit. At that point, the only escape for the fiduciary is to show consent.

The proper fiduciary analysis in the circumstances was straightforward. The defendants, as directors of both corporations, had a separate fiduciary obligation to each corporation. There was a conflict of duty and duty for the directors in the sense that the two corporations had competing businesses and competing interests in survival. The possibility of conflict was a real one as a result of the intercorporate inventory arrangements. There was also a conflict of interest in that the directors had economic interests in both corporations. The directors could benefit indirectly as shareholders if they favoured one corporation over the other.

Ultimately there was no fiduciary breach. The respective corporations consented to the existence of the conflict. That meant that the mere existence of the conflict could not produce liability. It would be necessary to show that the directors actually yielded to the conflict and favoured one corporation over the other. The evidence, though not framed in response to that specific point, indicated that there had been no favouritism. The court accepted as a fact that the defendants were solely motivated by a desire to solve the problem of managing inventories. The same analysis applies to the conflict of interest arising out of their concurrent status as shareholders. The corporations consented to the existence of that conflict, though not to the directors actually yielding to it. Again, with that consent, the mere existence of the conflict was not actionable. Lastly, the indirect benefit they received as shareholders was not actionable because it was received in an approved capacity.

The court treated the issue before it as whether directors owed a fiduciary obligation to creditors either directly or indirectly. As indicated above, however, the proper analysis involved investigating whether the

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G. Jones, “Unjust Enrichment and the Fiduciary’s Duty of Loyalty” (1968) 84 L.Q.R. 472, who attempted to press fiduciary responsibility into an unjust enrichment mould. For a recent challenge in the trust context, see J. Langbein, “Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest” (2005) 114 Yale L.J. 929. Langbein’s analysis is deficient in part because of his failure to accept the significance of the ability to contract around what he calls the “sole interest” rule.

30 Supra note 1 at 480.
31 Ibid. at 480-81.
directors had breached their duty to the *corporation*. In the ordinary case, there is no conventional status fiduciary obligation owed to creditors by directors. Creditors fail at the first step of a fiduciary analysis. There is no limited access arrangement between them and the directors and, consequently, no fiduciary accountability.\(^{32}\) Corporations (and their directors) receive assets from creditors on an open access basis. It is understood that the corporation is entitled to exploit the capital supplied by creditors for its own purposes, not the purposes of the creditors. The analysis never reaches the stage of determining whether there was a conflict or a benefit, or to the stage of determining whether there was consent. Creditors may indirectly recover if the corporation proceeds against its directors, but that is a recovery that flows from the obligation owed to the corporation.

The court chose to take a different path. It first considered the debate over what stakeholder claims are entitled to consideration by the board of directors.\(^{33}\) The court rejected the idea that the best interest of the corporation meant the best interest of the shareholders. The positions of other stakeholders were entitled to consideration by the board. Creditors were one group whose interests could properly and advantageously be considered at any point, and not merely during an approach to insolvency. Still, according to the court, none of that justified a shift of the fiduciary duty of directors from the corporation to the creditors. The court did not further develop that particular line of analysis.

The reason the duty does not shift, it should be apparent, is that the original access arrangements do not change as the corporation approaches insolvency. The relation between the directors and the corporation is still one of limited access, and the relation between the directors and creditors is still one of open access.\(^{34}\) The entire stakeholder debate is in fact *irrelevant* to the issue of fiduciary accountability. That debate is about the relative significance of various interests given the otherwise proper exercise of duties by directors. It is not concerned with the prospect or effect of self-interested conduct by directors. The confusion regarding relevance is directly attributable to the mistaken characterization of the best interest duty as a fiduciary duty.

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\(^{32}\) See Flannigan, *supra* note 4 at 280-81, 300-301.

\(^{33}\) *Supra* note 1 at 481-84. The “stakeholder” argument was the conceptual pathway or device for the creditors to express their claim (for their injured interests) in the action by the trustee *on behalf of the corporation*. The supposition is that the duty of the directors to act in the interest of the corporation (an amalgam of interests) narrows to the interests of creditors when insolvency is near. Had the device been effective, other significant issues would have arisen.

\(^{34}\) See the discussion of the access granted by shareholders and creditors at Flannigan, *supra* note 4.
The argument the court did employ was that creditors were protected in other ways. The main protection was the oppression action. According to the court, “the availability of such a broad oppression remedy undermines any perceived need to extend the fiduciary duty imposed on directors.”35 It concluded there was “no need to read the interests of creditors into the [statutory fiduciary duty].”36 Presumably, however, the oppression cause of action was intended to address matters other than opportunism, given that it came into being in Canada contemporaneously with an explicit affirmation and incorporation of conventional fiduciary accountability. Though the language of the oppression section is broad enough to accommodate opportunism claims against directors, it could and should be read to apply to the nominate dimensions of director conduct. That will direct fiduciary claims and oppression claims into distinct legal channels (bearing in mind of course that the same facts may raise both claims). Otherwise, fiduciary and oppression claims will fully conflate, likely with the effect of subverting, and eventually cancelling, the strict operation of the former.

The court also noted that an action based on the duty of care was another viable remedy that diminished the need for a fiduciary duty to creditors. That, however, is an analytical diversion. The duty of care is quite distinct from the duty of loyalty and the various nominate duties that govern the actions of directors. The duties address different mischiefs. It is therefore no answer to a fiduciary claim that one has a tort claim. A fiduciary claim must be assessed independently on its own merits.

The Duty of Care

The analysis of the court on the duty of care issue, although thin, did purport to clarify the law in important respects. The court first asserted that the common law duty had been “reinforced by statute to become more demanding.”37 That proposition, however, was not as clear as the court seemed to assume. The common law standard was a low standard in the sense that it permitted the actual competence of individuals to define the legal expectation of their competence. The standard was subjective. Directors had to exercise the care of a person with their particular attributes. They were not required, as others were under the general law of negligence, to meet the standard of the reasonable person. As explained elsewhere, that was an unjustified deviation from the norm.38 There was

35 Supra note 1 at 485-86.
36 Ibid. at 486.
37 Ibid. at 489.
no credible rationale for that special accommodation.

The court noted that the Dickerson Report had proposed raising the common law standard by requiring directors to meet the standard of a “reasonably prudent man.”39 That standard, however, did not survive the lobbying (“consultation”) process. When enacted, the new provision described the standard as that expected of a reasonably prudent person in comparable circumstances.40 The addition of the “comparable circumstances” phrase was artful. It was language that could serve the purposes of both sides to the policy (lobbying) contest. Those seeking to reform (elevate) the standard could claim that the phrase only articulated the uncontroversial idea that tort liability was contextual, or dependent on the surrounding circumstances in which reasonably prudent persons might find themselves. On that view, the added words were essentially superfluous, as context was obviously significant in a conventional negligence analysis. The opposed view was that the phrase was intended to confirm (retain) the common law subjectivity of the duty of care. The words, on that interpretation, were directed to the personal attributes or circumstances of the directors or officers. Deficiencies of skill or knowledge, for example, would be “comparable circumstances” that qualified what would be “reasonable prudence” for such individuals. The revised wording thereby produced the political solution of interpretive ambiguity. The addition of the words was an instrumental accommodation that essentially left for another day (took off the table) the final determination of the standard. Until that day arrived, corporate actors and their counsel retained the ability in defending claims to argue that the standard remained subjective.

That day arrived with the decision in Peoples. The Supreme Court accepted that, even with the added words, the standard had been elevated: “The main difference is that the enacted version includes the words ‘in comparable circumstances,’ which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care.”41 The court noted that in Soper

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39 See Dickerson, supra note 6 at 83.
40 CBCA, s. 122(1)(b). The earlier Ontario proposal, supra note 9 at 53-54, containing that phrase was intended to “upgrade” the common law standard in some undefined way. When the Dickerson committee did not include the phrase in its proposal (presumably to avoid the potential ambiguity), or even discuss the difference in terminology, the lobbying to insert the words began. For a discussion of terminology issues, see C. Nicholls, Corporate Law (Toronto: Emond Montgomery, 2005) at 289-92.
41 Supra note 1 at 490-91.
Case Comment

The Federal Court of Appeal had described the standard as “objective subjective.” The Supreme Court thought that could be confusing. It preferred to describe the standard as an objective one: “To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the s. 122(1)(b) duty of care, as opposed to the subjective motivation of the director or officer.” With that analysis, the court sought to resolve the main interpretation issue with the statutory language. The duty of care imposed on directors now appears to be the same duty imposed on all other persons. In that respect, in what was a fairly open exercise in judicial law making, the decision was perfectly justified. There is no satisfactory rationale for treating directors more leniently than others. The general social policy of risk regulation has the same application in the corporate sphere as it does elsewhere.

The other significant feature of the duty of care analysis of the court was the explicit recognition of the business judgment rule. There was sufficient authority and dicta in the case law to establish the rule, but there had never been a satisfactory explicit recognition of the rule in the Supreme Court. That deficiency was corrected when the court approved the Canadian development of “a rule of deference to business decisions.” The Supreme Court has now made formal what had been tentative. Although not likely the cause of the prior reticence, it is worth noting that the business judgment rule was inconsistent with the common law standard of care. The rule was premised in part on the superior expertise or experience of directors relative to judges. The common law standard, however, protected corporate decisions made by directors who were neither skilled nor experienced. That anomaly has now partially dissolved as a consequence of the decision. It remains a concern, however, if courts apply the business judgment rule in preference to, rather than in tandem with, the reasonable person standard. If improperly applied, the business judgment rule has the potential to return considerable subjectivity to the equation.

The clarification of the standard of care is important. There are, however, a number of statements in the judgment that are troublesome. The first has to do with the “context” interpretation of the phrase “in

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43 Supra note 1 at 491.
44 Ibid.
45 See the policy analysis at Flannigan, supra note 38 at 310 et seq.
46 Ibid. at 267.
47 Supra note 1 at 492.
48 See Flannigan, supra note 38 at 267.
comparable circumstances.” According to the court: “[T]he contextual approach dictated by s. 122 (1)(b) of the CBCA not only emphasizes the primary facts but also permits prevailing socio-economic conditions to be taken into consideration.” It is not at all clear, however, what socio-economic conditions would be relevant, or how they might be incorporated into the analysis. More importantly, there is a suggestion here that judges now have a free hand to adjust the liability standard by reference to their view of prevailing conditions. That is a legislative discretion that arguably is not conferred by the statutory language. The second confusion is found in the court’s ostensible conclusion that there was no breach of the duty of care: “But we, like the Court of Appeal, are not satisfied that the adoption of the new policy breached the duty of care under s. 122 (1)(b) of the CBCA. The directors cannot be held liable for a breach of their duty of care in respect of the creditors of Peoples.” Here the first sentence denies that there was a breach. The second sentence appears to state that there was a breach of care relative to the creditors, but that the directors were not liable for that breach. This may be no more than a semantic miscue, however, as it seems clear that the court concluded the directors were not negligent. Finally, there seems to be an intimation in the case that creditors only have a direct right to sue directors for a lack of care because of the existence of the statutory duty. If that is the view of the court, it is not supportable. Creditors (where they are “neighbours”), like any third party, can proceed directly against negligent directors on general negligence principles.

**Conclusion**

In the end, a deeper analysis ought to have been forthcoming from the Supreme Court. In the fiduciary analysis, the mischaracterization of the best interest duty, and the seeming negation of the strict quality of fiduciary liability, are serious concerns. Fiduciary regulation is narrow, generic and strict. It regulates even the possibility of conflicted or self-regarding action. It does not accept that particular circumstances might justify the conflict or benefit. There is no business judgment defence to conventional fiduciary responsibility. The duty to act in the best interest of the corporation, on the other hand, is a broader fact-sensitive regulation that accommodates the exercise of business judgment. The categorical error of treating the best interest duty as a fiduciary duty necessarily distorts both corporate regulation and fiduciary regulation. As for the duty of care discussion, while a number of concerns remain, the exposition of the court’s view of the standard of care is useful.

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49 *Supra* note 1 at 491.
50 *Ibid.* at 495.