

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-018525-089
(500-11-031130-079)

DATE: MAY 21, 2008

CORAM : THE HONOURABLE J.J. MICHEL ROBERT, C.J.Q.
LOUISE OTIS, J.A.
JOSEPH R. NUSS, J.A.
FRANÇOIS PELLETIER, J.A.
PIERRE J. DALPHOND, J.A.

IN THE MATTER of a proposed arrangement concerning BCE Inc.
and

A GROUP OF 1976 DEBENTUREHOLDERS

composed of:

AEGON CAPITAL MANAGEMENT INC.,

ADDENDA CAPITAL INC.,

PHILLIPS, HAGER & NORTH INVESTMENT MANAGEMENT LTD.

SUN LIFE ASSURANCE COMPANY OF CANADA,

CIBC GLOBAL ASSET MANAGEMENT INC.,

**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, AS REPRESENTED BY THE
MINISTER OF FINANCE,**

MANITOBA CIVIL SERVICE SUPERANNUATION BOARD,

and

MANULIFE FINANCIAL, CORPORATION

and

CIBC MELLON TRUST COMPANY

APPELLANTS – Contesting Parties

(Re : 1976 Trust Indenture)

and

A GROUP OF 1996 DEBENTUREHOLDERS

composed of:

AEGON CAPITAL MANAGEMENT INC.,

ADDENDA CAPITAL INC.,

**PHILLIPS, HAGER & NORTH INVESTMENT MANAGEMENT LTD.,
SUN LIFE INSURANCE (CANADA) LIMITED,
CIBC GLOBAL ASSET MANAGEMENT INC.,
MANITOBA CIVIL SERVICE SUPERANNUATION BOARD
and
TD ASSET MANAGEMENT INC.
and
COMPUTERSHARE TRUST COMPANY OF CANADA**

APPELLANTS – Contesting Parties
(Re : 1996 Trust Indenture)

v.

BCE INC.

RESPONDENT – Petitioner

and

6796508 CANADA INC.

RESPONDENT – Impleaded Party

and

THE DIRECTOR APPOINTED PURSUANT TO THE CBCA

and

BELL CANADA

IMPLEADED PARTIES

JUDGMENT

[1] This is an appeal from a judgment of the Superior Court, District of Montreal (the Honourable Mr. Justice Joël A. Silcoff), rendered on March 7, 2008, which granted, in part, the *Motion for Final Order* presented by the respondent BCE Inc. and, *inter alia*, approved the Plan of Arrangement and reserved judgment on the costs to be dealt with according to an agreement between counsel.

1. INTRODUCTION

[2] In an Application entitled "Motion for Final Order" (S.C. Montreal 500-11-031130-079), Respondent BCE Inc. ("BCE") sought, pursuant to s. 192 *CBCA*,¹ the approval of the Superior Court for the Plan of Arrangement ("Plan") concluded with Respondent 6796508 Canada Inc. ("Purchaser"). The Plan, having a value of \$51.7 billion, is with respect to what would be the largest leveraged buyout (LBO) in Canada.

¹ *Canada Business Corporations Act*, R.S.C 1985, c. C-44 [*CBCA*].

[3] Contestations opposing the Motion for Final Order were filed on behalf of the following groups holding debentures issued by Bell Canada Inc. ("Bell Canada"), a wholly-owned subsidiary of BCE:

- a) Holders of debentures issued pursuant to the 1976 Trust Indenture ("76 Debentureholders") and their Trustee CIBC Mellon Trust Company ("CIBC Mellon");
- b) Holders of debentures issued pursuant to the 1996 Trust Indenture ("96 Debentureholders") and their Trustee Computershare Trust Company of Canada ("Computershare");
- c) Holders of debentures issued pursuant to the 1997 Trust Indenture ("97 Debentureholders").

[4] The Motion for Final Order was heard together with four related legal proceedings, namely:

- a) Motion for Declaratory Judgment ("76 Declaratory Motion") filed by CIBC Mellon (re: 76 Debentureholders) (S.C. Montreal 500-17-038866-078);
- b) Motion for Declaratory Judgment ("96 Declaratory Motion") filed by Computershare (re: 96 Debentureholders) (S.C. Montreal 500-17-038867-076);
- c) Motion, pursuant to s. 241 CBCA, for Order Based on Oppression ("76/96 Oppression Remedy") filed by 76 and 96 Debentureholders (S.C. Montreal 500-11-031677-079);
- d) Motion, pursuant to s. 241 CBCA, for Order Based on Oppression ("97 Oppression Remedy") filed by the 97 Debentureholders (S.C. Montreal 500-11-031672-070).

[5] On March 7, 2008, five separate judgments were rendered by the Honourable Mr. Justice Joël A. Silcoff of the Superior Court:

- a) The Motion for Final Order was granted in part. The Plan was declared, *inter alia*, to be fair and reasonable and was approved and ratified;
- b) The 76 and 96 Declaratory Motions were dismissed and it was declared that section 8.01 of the respective Trust Indentures "(...) does not apply by reason of the proposed Plan of Arrangement and Proposed Transaction (...)";
- c) The 76/96 and 97 Oppression Remedies were dismissed.

[6] On March 17, 2008, six appeals were filed with respect to these judgments. These reasons, given within the framework of the appeal of the 76/96 debentureholders from the judgment granting in part the Motion for Final Order, deal with all six appeals.

2. FACTUAL BACKGROUND

[7] BCE, Bell Canada and the Purchaser are described by the trial judge, in part, as follows:

[16] BCE, Canada's largest communications company, was incorporated in 1970 and continued under the *CBCA* in 1979. Its Articles of Incorporation were amended by: (i) a Certificate and Articles of Amalgamation dated August 1, 2004, (ii) a Certificate and Articles of Arrangement dated July 10, 2006, and (iii) a Certificate and Articles of Amendment dated January 25, 2007.

[17] There are more than 800 million BCE common shares and 110 million BCE preferred shares issued and outstanding in the hands of more than 600 thousand registered and beneficial shareholders.

[18] Bell Canada was incorporated in the late 19th century by Federal Charter and was subsequently continued under the *CBCA*. It became a wholly-owned subsidiary of BCE in April 1983 pursuant to a plan of arrangement approved by this Court and confirmed by the Court of Appeal of Quebec. There is no evidence that the 1983 plan of arrangement was opposed by any of the Contesting Parties.

[19] At the present time, Bell Canada represents, on a non-consolidated basis, approximately 56% of BCE's revenues and 77% of its assets. These percentages have changed significantly over time.

[20] BCE and Bell Canada are now, and have always been, separate legal entities with separate charters, Articles and by-laws. They have separate assets, debt obligations, liabilities, credit ratings, bank accounts, accounting, bookkeeping and investments. Accordingly, although Bell Canada is a wholly-owned subsidiary of BCE, the stakeholders of the two entities are not identical.

[21] While BCE and Bell Canada now share a common set of directors and some senior officers, this was not the case prior to January 2003. The operational officers of Bell Canada are not officers of BCE.

[22] The Trust Indentures governing the Bell Canada Debentures define the "Company" or "Corporation" to be Bell Canada. That phrase has never been modified to include BCE or any other affiliate of BCE.

[23] Purchaser is a corporation organized and incorporated under the *CBCA* by the Ontario Teachers' Pension Plan Board ("*Teachers*") as well as by affiliates of

Providence Equity Partners Inc. ("*Providence*") and Madison Dearborn Partners, LLC ("*Madison Dearborn*") (collectively the "*Purchaser Parties*") for the purpose of entering into the Definitive Agreement and consummating the Plan of Arrangement.

[8] The dispute involves debentures issued by Bell Canada under three separate trust indentures (and supplementary indentures thereunder) identified as 1976 Trust Indenture, 1996 Trust Indenture and 1997 Trust Indenture. Each Trust Indenture provides for the issuance of debentures in separate series.

[9] Debentures issued pursuant to the 1976 Trust Indenture are long-term debt with maturities in the range of 15 to 60 years. Debentures issued pursuant to the 1996 Trust Indenture have maturities of 30 and 35 years. Debentures issued pursuant to the 1997 Trust Indenture are also referred to as Medium Term Notes and have maturities in the range of 10 to 31 years.

[10] Excluding those debentures with maturities by August 2010 which, according to the Plan, would be redeemed, the outstanding debentures issued under the 1976, 1996 and 1997 Trust Indentures, as at the date of the hearing in the Superior Court, had a total face value of approximately \$5.1 billion, of which the holdings of the appellant Debentureholders are set out in the following table:

Debentures issued under	Total outstanding debentures maturing after August 2010	Debentures held by the appellants
1976 Trust Indenture	\$1.794 billion	\$230 million (12.80%)
1996 Trust Indenture	\$0.275 billion	\$184 million (66.91%)
1997 Trust Indenture	\$3.1 billion	\$992 million approx. (32% approx.)
	TOTAL: \$5.169 billion	\$1.4 billion (27.2% approx.)

[11] Bell Canada's debentures were rated by credit rating agencies as investment grade.² While this does not constitute a guarantee for future maintenance of investment

² Credit rating agencies such as Moody's, Standard & Poor's (S&P) and Dominion Bond Rating Service Limited (DBRS) rate bonds based on their evaluation of the issuer's credit worthiness and capacity to meet financial commitments as they come due. While the language of different ratings agencies varies slightly, debt instruments are usually rated in one of the categories: investment grade and speculative grade (also referred to as non-investment grade or as "junk bonds"). In the case of DBRS, a rating of BBB (low) or higher, in the case of S&P, a rating of BBB- or higher and, in the case of Moody's a rating of Baa3 or higher are investment grade.

grade ratings, it was an important consideration for investors and enhanced Bell Canada's ability to sell long term debt on the market.

[12] Over the years, Bell Canada made representations to the investment community regarding the importance it attached to maintaining investment grade ratings and protecting the credit quality of the company. Michael Sabia, President and Chief Executive Officer of BCE and Chief Executive Officer of Bell Canada, confirmed on different occasions a commitment to maintaining investment grade ratings and described it as a core part of Bell Canada's financial strategy. The trial judge writes:

[159] The particular representations upon which the Contesting Debentureholders rely are referred to at length in the various documents produced in evidence and summarized in their respective *Factums*. In those documents, subject to such *caveats* as may be contained therein, Bell Canada assured the market from time to time **and at such times**, *inter alia*, that it was:

[...] "committed" to investment grade ratings; "totally focussed" on investment grade ratings; that there was "no doubt about their ability" to maintain investment grade ratings; that investment grade ratings were part of Bell's "financial architecture"; that relationships with bondholders would be based on "fairness," not literal interpretation of contracts; and that stakeholder interests would be balanced.³

[Emphasis added by trial judge]

[13] While such statements were accompanied by warnings and safe harbour provisions, they were "designed to give comfort to investors" as confirmed by Michael Boychuk, Senior Vice-President and Treasurer of BCE and Bell Canada. BCE's expert witness on the bond market, Dr. Marlene Puffer, confirmed that such assurances given by companies are factors that debentureholders rely on in making their investment decisions. Mr. Sabia also acknowledged that, while they should examine other elements, investors can also place some reliance on Bell Canada's statements.

[14] Starting in February 2007, BCE was approached by private equity investors requesting the opportunity to review privatization options. The BCE Board of Directors ("Board") decided not to pursue consideration of a transaction at that time. In March 2007, meetings were held between BCE and private equity investors who reaffirmed their interest, which was once again declined.

[15] Media speculation concerning a potential privatization of BCE ensued, highlighted by a front page headline and article in *The Globe and Mail* on March 29,

³ Judgment on the 76/96 Oppression Remedy at para. 159.

2007.⁴ On the same day, at the request of the Toronto Stock Exchange Market Regulation Services, BCE issued a statement to "confirm the fact that there are no ongoing discussions being held with any private equity investor with respect to any privatization of the Company or any similar transaction", further stating that "the company has no current intention to pursue such discussions".⁵

[16] On April 9, 2007, Teachers', the largest shareholder of BCE,⁶ filed with the United States Securities and Exchange Commission ("SEC") a Schedule 13D Statement, "informing the market that it had changed its investment intent with respect to BCE from 'passive' to 'active'".⁷ The filing mentioned that Teachers' was "closely monitoring developments and is exploring its options" and reserving the right to, *inter alia*, purchase additional shares of BCE and "encourage [...] extraordinary transactions [...] or changes to [BCE]'s capitalization".

[17] Considering that the company was thus put "in play",⁸ the Board set up an independent Strategic Oversight Committee ("SOC") to evaluate different alternatives and to "consider and review any Potential Transaction".⁹ The trial judge found that "the overriding objective of the strategic review and auction process was to maximize shareholder value, while respecting the corporation's legal and contractual obligations."¹⁰

[18] With regard to the privatization alternative, the Board determined that it was in the best interests of BCE and its shareholders to have competing bidding groups. The SOC and the Board took action to facilitate a competitive multi-party private equity auction.

[19] In a press release dated April 17, 2007, BCE announced that it was "reviewing its strategic alternatives with a view to further enhancing shareholder value".¹¹

[20] Following that announcement, several debentureholders sent letters to the Board voicing their concerns about a potential LBO transaction. They sought assurance that the best interests of the bondholders were being considered and offered to meet the Board. By way of illustration, in a letter dated April 27, 2007 addressed to Mr. Sabia, one of the appellant debentureholders, Phillips, Hager & North, wrote:

⁴ Eric Reguly & Andrew Willis "U.S. equity firm stalks BCE, plots takeover" *The Globe and Mail* (29 March 2007).

⁵ BCE Press Release dated March 29, 2007.

⁶ Holding approximately 5.3% of the outstanding shares at that time.

⁷ Judgment on the Motion for Final Order at para. 47.

⁸ In *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 (Ont. Ct. J. (Gen. Div.)) at 768, Blair J., as he then was, defined the "in play" concept as "where it is apparent there will be a sale of equity and/or voting control".

⁹ Minutes of the Board, April 20, 2007.

¹⁰ Judgment on the Motion of Final Order at para. 147.

¹¹ Press Release of BCE dated April 17, 2007, entitled "BCE reviewing strategic alternatives: Includes privatization talks with Canadian-led consortium".

[...]

There is clearly a great deal of uncertainty concerning the outcome of your strategic review. That said, we take comfort from the protection afforded to bondholders under the Trust Indentures and expect BCE/Bell Canada bondholders will be given proper and due consideration - especially given the longstanding support the Canadian bond market has provided BCE and the need for BCE to tap Canadian markets in the future.

We have a fiduciary duty to our investors and, as such, must vigorously defend bondholder rights as provided in the trust indentures. We have been consulted informally by other like-minded bondholders and we seek assurance from you that the best interests of bondholders will be considered as part of your deliberations.

To that end, we have a number of ideas on how a fair and equitable treatment of bondholders could be affected without jeopardizing some of the value enhancing alternatives being contemplated. We would be pleased to discuss these ideas with you at your convenience. Please refer any questions or comments you may have to [...].

[Emphasis added]

[21] On May 4, 2007, BCE responded by sending a standard reply letter, which it had also sent to other debentureholders, confirming that a copy of the letter was provided to the SOC and that BCE intended to respect the terms of the applicable trust indentures:

[...]

As you may appreciate, we are unable to comment as to what may or may not transpire in connection with the company's review of strategic alternatives. We can however confirm that we intend to respect the terms of the applicable trust indentures which govern the bonds.

[...]

[22] Despite these approaches by debentureholders, no meeting or discussion occurred between them and BCE, the Board having concluded that their "overriding duty is to maximize shareholder value and obtain the highest value for the shareholders, while respecting the contractual obligations of the corporation and its subsidiaries".¹²

¹² Judgment on the 76/96 Oppression Remedy at para. 132.

[23] The strategic review and auction process continued from April 20, 2007 until the end of June 2007. Guidelines relating to the auction process were put in place by BCE in early June 2007.

[24] On June 13, 2007, Goldman, Sachs & Co., acting on behalf of BCE, sent a letter to all potential participants in the auction process, providing them with the bidding rules and the form of a proposed definitive transaction agreement. The bidding rules set out the details required for the submission of offers by the participants in the auction process as well as the criteria to be considered in evaluating any bids that were received. The deadline for the submission of offers was fixed at 9:00 a.m., June 26, 2007.

[25] The auction process resulted in three offers. They are described by the trial judge, in part, as follows:

[69] All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada would be liable, either as borrower or as guarantor. In addition, all three offers would have resulted in BCE having a consolidated debt/EBITDA ratio of at least 5.8 and, accordingly, all would likely have resulted in a downgrade of the Bell Debentures to below investment grade. As well, all three of the offers left the Bell Canada Debentures issued under the various Trust Indentures in place except for those with near term maturities.¹³

[26] The Purchaser submitted an offer on June 26, 2007 of \$42.25 per common share. It contemplated, among other things, an amalgamation of Bell Canada to be effected following the acquisition of the BCE shares, to permit tax savings. BCE's advisors informed the Purchaser that "the proposed amalgamations introduced unnecessary transaction risks into the acquisition and, accordingly, advised Purchaser that its bid was less competitive from a structural standpoint relative to the other bidders".¹⁴ These "unnecessary transaction risks" refer to the triggering of protection mechanisms for debentureholders stipulated in the 1976 and 1996 Trust Indentures in case of an amalgamation.

[27] On June 29, 2007, the Purchaser submitted a revised proposal that provided an alternative transaction structure (spider structure) that could preserve tax savings while avoiding the amalgamation of Bell Canada with another entity and the risk of triggering the protection mechanisms. The Purchaser's revised proposal also increased its initial offer of \$42.25 per common share to \$42.75.

[28] That same day, after comparing the three offers, the Board determined, on the recommendation of the SOC, that Purchaser's revised offer of \$42.75 per common share was better than the other offers. It instructed its advisors to conclude negotiations

¹³ Judgment on the 76/96 Oppression Remedy at para. 69.

¹⁴ Judgment on the Motion for Final Order at para. 79.

with the Purchaser on the remaining outstanding issues with a view to concluding the Definitive Agreement that evening or by no later than June 30, 2007. Under this offer, BCE would "have \$38.5 billion of debt which represents [approximately] 6.2x debt/EBITDA"¹⁵ and Bell Canada would guarantee the approximately \$30 billion acquisition debt.

[29] On June 30, 2007, BCE entered into the Definitive Agreement with the Purchaser for the acquisition of its outstanding common and preferred shares, at a price of \$42.75¹⁶ per common share in cash and at varying prices per preferred share. The Definitive Agreement also involved Pre-Acquisition and Post-Acquisition Reorganization transactions such as the provision of guarantees by Bell Canada for the acquisition debt to enable the purchase of the shares contemplated by the LBO.

[30] The Board unanimously recommended that BCE shareholders vote to approve the Plan.

[31] BCE, in an application entitled "Motion for Interim and Final Orders in Connection with a Proposed Arrangement" dated August 9, 2007, sought, pursuant to s. 192 CBCA, an order approving the Plan, as well as, *inter alia*, an interim order.

[32] On August 10, 2007, the trial judge issued an interim order authorizing BCE to hold a special shareholders' meeting in order to submit the Plan to the vote of the shareholders. The Interim Order also set out the delays for contesting the Motion for Final Order.

[33] On September 21, 2007, BCE shareholders approved the Plan. A majority holding 97.93% of the outstanding shares voted in favour.

[34] The two sets of appellants filed contestations to the approval of the Plan alleging that it adversely affected their interests. They also filed the two Declaratory Motions and the two Oppression Remedies referred to above, which were heard together with the Motion for Final Order.

3. RELEVANT LEGISLATIVE PROVISIONS

**Loi canadienne sur les sociétés par
actions (« LCSA »)**

**Canada Business Corporation Act
("CBCA")**

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

2. (1) In this Act,

¹⁵ Judgment on the Motion for Final Order at para. 96. The acronym EBITDA means "Earnings Before Interest, Taxes, Depreciation and Amortization".

¹⁶ This price represents a premium of approximately 40.1% to the average closing price of the common shares for the three-month period ending March 28, 2007, being the last trading day prior to any public speculation of a potential privatization transaction involving BCE.

[...]

«valeur mobilière»

"security"

«valeur mobilière» Action de toute catégorie ou série ou titre de créance sur une société, y compris le certificat en attestant l'existence.

[...]

122. (1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir :

a) avec intégrité et de bonne foi au mieux des intérêts de la société;

b) avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

[...]

192. (1) Au présent article, «arrangement » s'entend également de :

a) la modification des statuts d'une société;

b) la fusion de sociétés;

c) la fusion d'une personne morale et d'une société pour former une société régie par la présente loi;

d) le fractionnement de l'activité commerciale d'une société;

e) la cession de la totalité ou de la quasi-totalité des biens d'une société à une autre personne morale moyennant du numéraire, des biens

[...]

"security"

«valeur mobilière »

"security" means a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation;

[...]

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.

[...]

192. (1) In this section, "arrangement" includes

(a) an amendment to the articles of a corporation;

(b) an amalgamation of two or more corporations;

(c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act;

(d) a division of the business carried on by a corporation;

(e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange

ou des valeurs mobilières de celle-ci;

f) l'échange de valeurs mobilières d'une société contre des biens, du numéraire ou d'autres valeurs mobilières soit de la société, soit d'une autre personne morale;

f.1) une opération de fermeture ou d'éviction au sein d'une société;

g) la liquidation et la dissolution d'une société;

h) une combinaison des opérations susvisées.

[...]

(3) Lorsqu'il est pratiquement impossible pour la société qui n'est pas insolvable d'opérer, en vertu d'une autre disposition de la présente loi, une modification de structure équivalente à un arrangement, elle peut demander au tribunal d'approuver, par ordonnance, l'arrangement qu'elle propose.

(4) Le tribunal, saisi d'une demande en vertu du présent article, peut rendre toute ordonnance provisoire ou finale en vue notamment :

a) de prévoir l'avis à donner aux intéressés ou de dispenser de donner avis à toute personne autre que le directeur;

b) de nommer, aux frais de la société, un avocat pour défendre les intérêts des actionnaires;

for property, money or securities of the body corporate;

(f) an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate;

(f.1) a going-private transaction or a squeeze-out transaction in relation to a corporation;

(g) a liquidation and dissolution of a corporation; and

(h) any combination of the foregoing.

[...]

(3) Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

(4) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order determining the notice to be given to any interested person or dispensing with notice to any person other than the Director;

(b) an order appointing counsel, at the expense of the corporation, to represent the interests of the shareholders;

c) d'enjoindre à la société, selon les modalités qu'il fixe, de convoquer et de tenir une assemblée des détenteurs de valeurs mobilières, d'options ou de droits d'acquérir des valeurs mobilières;

(c) an order requiring a corporation to call, hold and conduct a meeting of holders of securities or options or rights to acquire securities in such manner as the court directs;

d) d'autoriser un actionnaire à faire valoir sa dissidence en vertu de l'article 190;

(d) an order permitting a shareholder to dissent under section 190; and

e) d'approuver ou de modifier selon ses directives l'arrangement proposé par la société.

(e) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct.

[...]

[...]

238. Les définitions qui suivent s'appliquent à la présente partie.

238. In this Part,

[...]

[...]

«plaignant»
"complainant"
«plaignant »

"complainant"
«plaignant »
"complainant" means

a) Le détenteur inscrit ou le véritable propriétaire, ancien ou actuel, de valeurs mobilières d'une société ou de personnes morales du même groupe;

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

b) tout administrateur ou dirigeant, ancien ou actuel, d'une société ou de personnes morales du même groupe;

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

c) le directeur;

(c) the Director, or

d) toute autre personne qui, d'après un tribunal, a qualité pour présenter les demandes visées à la présente partie.

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

[...]

[...]

241. (1) Tout plaignant peut

241. (1) A complainant may apply to a

demander au tribunal de rendre les ordonnances visées au présent article.

(2) Le tribunal saisi d'une demande visée au paragraphe (1) peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;

c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

(3) Le tribunal peut, en donnant suite aux demandes visées au présent article, rendre les ordonnances provisoires ou définitives qu'il estime pertinentes pour, notamment :

a) empêcher le comportement contesté;

b) nommer un séquestre ou un séquestre-gérant;

c) réglementer les affaires internes de la société en modifiant les statuts ou les règlements administratifs ou en établissant ou en modifiant une

court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or

convention unanime des actionnaires;

d) prescrire l'émission ou l'échange de valeurs mobilières;

e) faire des nominations au conseil d'administration, soit pour remplacer tous les administrateurs en fonctions ou certains d'entre eux, soit pour en augmenter le nombre;

f) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, d'acheter des valeurs mobilières d'un détenteur;

g) enjoindre à la société, sous réserve du paragraphe (6), ou à tout autre personne, de rembourser aux détenteurs une partie des fonds qu'ils ont versé pour leurs valeurs mobilières;

h) modifier les clauses d'une opération ou d'un contrat auxquels la société est partie ou de les résilier avec indemnisation de la société ou des autres parties;

i) enjoindre à la société de lui fournir, ainsi qu'à tout intéressé, dans le délai prescrit, ses états financiers en la forme exigée à l'article 155, ou de rendre compte en telle autre forme qu'il peut fixer;

j) indemniser les personnes qui ont subi un préjudice;

k) prescrire la rectification des registres ou autres livres de la société, conformément à l'article 243;

l) prononcer la liquidation et la

exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 243;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XIX to be made; and

dissolution de la société;

m) prescrire la tenue d'une enquête conformément à la partie XIX;

(n) an order requiring the trial of any issue.

n) soumettre en justice toute question litigieuse.

Code civil du Québec

Civil Code of Quebec

1425. Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

1426. On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.

1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

1428. Une clause s'entend dans le sens qui lui confère quelque effet plutôt que dans celui qui n'en produit.

1428. A clause is given a meaning that gives it some effect rather than one that gives it no effect.

4. ANALYSIS

PRELIMINARY REMARKS

The standing of the appellants

[35] The respondents contested the appellants' standing to oppose the Plan. The trial judge ruled that they had the necessary standing. The respondents appear to have abandoned their contention. In any event, the ruling of the trial judge was correct.

[36] Respondents also submitted, with respect to the two Oppression Remedies, that the appellants did not have standing before the Superior Court to institute the proceedings. They argued that there is a prohibition in the text of the Trust Indenture that prevents them from taking action unless certain conditions are met. The trial judge concluded that the 76 and 97 Debentureholders did not have standing, and he

expressed doubt regarding the standing of the 96 Debentureholders, while recognizing that their Trustee did have standing.

[37] The appellants are securityholders pursuant to ss. 2 and 238 *CBCA*. In none of the Trust Indentures does one find a renunciation by the appellants to their invoking the oppression remedies available under the *CBCA*, assuming, solely for the purpose of the argument, that such a prior renunciation is legally possible. The "no action" clause found in two of the Trust Indentures explicitly covers only the recourses further to an event of default under their provisions. The issue invoked in the Oppression Remedies is not based on an event of default. It follows that the appellants had standing to file a motion alleging oppression pursuant to the *CBCA*.

[38] Accordingly, the trial judge should have ruled that the appellants had standing to initiate their Oppression Remedies. They had standing in the Superior Court, both with respect to contesting the Motion for Final Order and for instituting proceedings under the Oppression Remedy, and they likewise have standing before this Court.

A. THE MOTIONS FOR DECLARATORY JUDGMENT

[39] In their respective Motions Introductory of Suit for Declaratory Judgment, the appellants CIBC Mellon and Computershare, who are the Trustees pursuant to the 1976 and 1996 Trust Indentures, seek a declaration as to whether section 8.01 of their respective Trust Indentures are applicable by reason of the Plan, and in particular, that part where the requirement of the Trustees for approval is triggered. Sections 8.01 and 8.02 read in part:

SECTION 8.01. *General Provisions* Nothing in this Trust Indenture shall prevent, if otherwise permitted by law, the reorganization or reconstruction of the Company or the consolidation, amalgamation or merger of the Company with any other corporation, including any affiliate, or shall prevent the transfer by the Company of its undertaking and assets as a whole or substantially as a whole to another corporation, including any affiliate, lawfully entitled to acquire and operate the same [...]

Provided that every such reorganization, reconstruction, consolidation, amalgamation, merger or transfer shall be made on such terms and at such times and otherwise in such manner as shall be approved by the Company and by the Trustee as being in no wise¹⁷ prejudicial to the interests of the Debentureholders and, upon such approval, the Trustee shall facilitate the same in all respects [...]

SECTION 8.02. *Status of Successor Corporation*. In case of any reorganization, reconstruction, consolidation, amalgamation, or merger as aforesaid, the

¹⁷ In the 1996 Trust Indenture, the word "way" replaces the word "wise".

corporation formed by such consolidation or with which the Company shall have been amalgamated or merged, upon executing an indenture or indentures as provided in section 8.01, shall succeed to and be instituted for the Company (which may then be wound up, if so desired by its shareholders), with the same effect as if it had been named herein as the Party of the First Part, hereto, and shall possess and may exercise each and every right of the Company hereunder.

[Emphasis added]

[40] Interpreting the above provision, the trial judge states:

[45] In interpreting complex corporate agreements such as the Trust Indentures, and when faced with ambiguity, the Courts have generally favoured an interpretation that is commercially reasonable and that gives effect to the intention and reasonable expectations of the parties at the time the agreements were negotiated.¹⁸

[41] The trial judge found that many of the provisions of the Trust Indentures had been modeled after the 1967 Model Debenture Indenture Provisions ("Model Provisions") published by the American Bar Foundation. He also noted that the expression "reorganization or reconstruction" was not originally included in the wording of article 8 of the Model Provisions and was specifically added by the 76 Debentureholders at the time the 1976 Trust Indenture was entered into.

[42] Examining the definition given to the words "reorganization" and "reconstruction" added to section 8.01, the trial judge held that these concepts have essentially the same meaning in that they refer to the transfer of a corporation's undertaking (or part of it) to a new entity that is intended to carry on substantially the same business and that will be ultimately owned by substantially the same shareholders.

[43] The trial judge also concluded that in light of other provisions contained in the 1976 and 1996 Trust Indentures, it is clear that section 8.01 was not intended to restrict Bell Canada from incurring additional indebtedness.

[44] For these reasons, the trial judge ruled that the Plan and the Definitive Agreement do not trigger the application of the substantive and procedural mechanisms of section 8.01. In other words, the approval of the Trustees stating that the Plan was in no way prejudicial to the rights of the Debentureholders was not required.

[45] The author William K. Fraser expressly defines the term "reconstruction" to mean the "transfer of the assets (or the major part thereof) of one company to a new company formed for that purpose, in exchange for shares in the new company which are

¹⁸ Judgment on the 76 Declaratory Motion at para. 45, referring to *Eli Lilly & Co. v. Novopharm Ltd.*; *Eli Lilly & Co. v. Apotex Inc.*, [1998] 2 S.C.R. 129.

distributed among the shareholders of the old company".¹⁹ The term "reorganization" is also commonly applied to a transaction of this nature. This description of the term "reconstruction" was adopted by *The Dictionary of Canadian Law*.²⁰

[46] The authors J.L. Stewart and M. Laird Palmer,²¹ for their part, explain that in English law the term "reconstruction" is applied to a certain type of reorganization involving a transfer of the undertaking of one company to a new company, formed for this purpose, in consideration of shares of the new company that are distributed to the shareholders of the old company or offered to the shareholders of the old company on certain terms. The authors also state: "In this country the term "reconstruction" is not in common use [...]".²² However, they acknowledge that a "reconstruction" under English law falls within the meaning of s. 126 of the *Companies Act*:

Under a common type of reconstruction, the undertaking and assets of a company (or the major part) are sold to a new company formed for the purpose. The transfer is made in consideration of the issuance of shares of the purchaser company to the vendor company which distributes the shares among its own shareholders. The vendor company then passes out of existence and its business is carried on by the new company.²³

[47] In the case of *R. v. Santiago Mines Ltd.*,²⁴ the Court of Appeal for British Columbia, determining whether a sale by a company of a large block of its shares, without being registered as a broker, took place in the course of the reorganization of the company, affirmed that the term "reorganization" is a commercial term rather than a legal term, and that it is not a word of art and has no technical meaning in law. Smith J.A., writing for the majority, held that "the word "reorganization", applied to company affairs, has substantially the same meaning as "reconstruction", the word mostly used in the English authorities".²⁵

[48] In *Kennedy v. Minister of National Revenue*,²⁶ Cattanach J. had to determine whether the fact that a company conducted its business from rented premises rather

¹⁹ William K. Fraser, *Fraser's Handbook on Canadian Company Law*, 7th ed. (Toronto: Carswell, 1985) at 348-349.

²⁰ Daphne A. Dukelow, *The Dictionary of Canadian Law*, 3d ed. (Toronto: Thomson Carswell, 2004) at 1106.

²¹ J.L. Stewart & M. Laird Palmer, *Company Law of Canada*, 5th ed. (Toronto: Carswell, 1962) at 703 *et seq.*

²² *Ibid.* at 730.

²³ *Ibid.*

²⁴ [1946] B.C.J. No. 56 (B.C.C.A.).

²⁵ *R. v. Santiago Mines Ltd.*, *supra* note 24, referring to *Hooper v. Western Counties and South Wales Telephone Company Limited*, (1893) 68 L.T. 78 (Ch.D.) [*Hooper*] and *In re South African Supply and Cold Storage Company*, [1904] 2 Ch. 268.

²⁶ *Kennedy v. Minister of National Revenue*, 72 D.T.C. 6357 (F.C.T.D.), *rev'd* 73 D.T.C. 5359 (F.C.A.). In this case, the Federal Court of Appeal approved of Cattanach J.'s conclusion on this issue but reversed the decision on other grounds.

than from premises that it owned amounted to a reorganization of its business. He held that, even though what was referred to as a reconstruction in *Hooper*²⁷ is illustrative of what is normally done in the context of reorganization, namely that a new entity is created and another ceases to exist, it does not mean that it must be so in every case:

If an undertaking of some definite kind is being carried on but it is concluded that this undertaking should not be wound up but should be continued in an altered form in such manner that substantially the same persons will continue to carry on the undertaking, that is what I understand to be a reorganization. It is that the same business is carried on by the same persons but in a different form.²⁸

[49] Interpreting the term "reorganization" in light of the concepts contained in the other terms of the provision, namely "winding-up" and "discontinuance", Cattanach J. concluded that an element of finality was presupposed: the termination of the conduct of the business in one form and its continuance in a different form. The facts of the case involving simply the sale by the company of a capital asset that did not result in the end of its business, was held not to be included in the meaning of the term "reorganization".

[50] A number of Canadian judgments with respect to the interpretation of the term "reorganization", in the context of taxation law, have followed this reasoning.²⁹

[51] The Court agrees with the interpretation consistently given to the term "reorganization" by the aforementioned line of authorities in the context of commercial and corporate law.

[52] When considering the text of section 8.01 of the Trust Indentures in its entirety, all commercial terms pertinent to our analysis refer to the transactions involving consolidation, amalgamation, merger, transfer of undertaking or assets which necessitate the presence of two entities. Therefore it would be inconsonant and inconsistent to come to any conclusion other than that the terms "reorganization" and "reconstruction" in the context of section 8.01 both refer to transactions that involve separate corporate entities. The proposed Plan does not.

[53] Such a finding, contrary to the assertion of appellants, is not inconsistent with the trial judge's conclusion that section 8.01 was added to the Trust Indentures by the 76 and 96 Debentureholders specifically for their benefit. Even if both terms refer to the same type of transaction, their insertion in section 8.01 provides the Debentureholders with additional protection in that it contemplates transfers that although to the same group, are not caught by the terms already there such as consolidation, amalgamation, merger, transfer of undertaking or assets.

²⁷ *Supra* note 25.

²⁸ *Supra* note 26.

²⁹ See e.g. *McMullen v. Canada*, 2007 D.T.C. 286 (T.C.C.); *Felray Inc. v. Canada*, 97 D.T.C. 5349 (F.C.T.D.).

[54] Furthermore, this interpretation is consistent with the rule of interpretation that states that each term of a clause must be interpreted in light of its context, especially when dealing with a very general term. In particular, the *noscitur a sociis* principle provides that a word can have a limited meaning by reason of the words with which it is associated:

La règle *noscitur a sociis* est utile dans la mesure où elle attire l'attention de l'interprète sur le fait qu'un mot peut avoir, en raison du contexte formel, un sens plus restreint que son « sens du dictionnaire ». ³⁰

[55] Considering the foregoing, the trial judge came to the correct conclusion in deciding that section 8.01 is in fact a *successor obligor* provision.

[56] Regarding the interpretation of the provisions contained in the Model Provisions, the American Bar Foundation explains the *raison d'être* of article 8, the origin of sections 8.01 and 8.02:

The decision to invest in the debt obligations of a corporation is based on the repayment potential of a business enterprise possessing specific financial characteristics. The ability of the enterprise to produce earnings often depends on particular assets which it owns. Obviously, if the enterprise is changed through consolidation with or merger into another corporation or through disposition of assets, the financial characteristics and repayment potential on which the lender relied may be altered adversely. Furthermore, in the case of a consolidation or a merger into another corporation, the borrowing corporation will, in fact, disappear. For these reasons, and because the lender may also expect to be paid from the physical assets of the enterprise if financial difficulty does arise, debenture indentures often contain some limitations on consolidations, mergers and dispositions of assets by the borrowing enterprise. ³¹

[57] This interpretation is consistent with the wording used in section 8 in its entirety.

[58] As to the intent of section 5.09 ³² of the 1976 and 1996 Trust Indentures, it serves to limit the amount of funded debt that may be incurred by Bell Canada. Such a

³⁰ Pierre-André Côté, *Interprétation des lois*, 3rd ed. (Montreal: Éditions Thémis, 1999) at 396.

³¹ American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions 1965, Model Debenture Indenture Provisions All Registered Issues 1967 and Certain Negotiable Provisions which may be Included in a Particular Incorporating Indenture* at 290.

³² SECTION 5.09 *Limitations on Issuance of Additional Funded Debt* (a) The Company will not issue, assume or guarantee any Funded Debt (other than Funded Debt secured by Purchase Money Mortgages and other than Funded Debt issued as an extension, retirement, renewal or replacement of Debt which was Funded Debt at time of original issuance, assumption or guarantee without increasing the principal amount thereof) ranking equally with the Debentures unless Earnings Available for Payment of Interest Charges during any period of 12 successive calendar months selected by the Company out of 18 such months next preceding the date of the proposed issuance, assumption or guarantee of the new Funded Debt shall have been not less than one and three-

provision is intended to "preserve a margin of safety for the loan by preventing a dilution of the Debentureholders' position and a weakening of its financial structure through the creation of what is considered in the particular case to be an excessive amount of additional debt".³³

[59] This is in essence the situation the 76/96 Debentureholders are seeking to prevent. The trial judge noted that section 5.09 of the 1976 and 1996 Trust Indentures "impose very strict limitations on the ability of Bell Canada to issue *Additional Funded Debt*".³⁴ However, 76/96 Debentureholders do not dispute that the conditions set out in section 5.09 are met in this instance.

[60] The Court therefore agrees with the trial judge's conclusion expressed in these terms:

[56] Reading Articles Five and Eight of the 1976 Trust Indenture together and in context, it is clear that the intention of Section 8.01 is not to restrict Bell Canada from incurring additional indebtedness, which is essentially the principal complaint of the 1976 Debentureholders in these proceedings. Such interpretation would be in contradiction with and render superfluous the specific restrictions on incurrence of indebtedness contained in Section 5.09.³⁵

[61] Furthermore, the debentureholders have failed to show any error in the trial judge's finding that the past conduct of the parties is consistent with this interpretation of the word "reorganization".

[62] Their contention with respect to the interpretation of sections 8.01 and 8.02 is unfounded and was correctly rejected by the trial judge.

quarters times the sum of (i) annualized interest charges on all Funded Debt outstanding at the date of such proposed issuance, assumption or guarantee (except Funded Debt held in any purchase, sinking, amortization or analogous fund and Funded Debt to be retired by the Funded Debt proposed to be issued or to be retired by Funded Debt issued since the beginning of such 12 month period) plus (ii) annualized interest charges on the Funded Debt proposed to be issued, assumed or guaranteed.

(b) The Company will not issue, assume or guarantee any Funded Debt (other than Funded Debt secured by Purchase Money Mortgages and other than Funded Debt issued as an extension, retirement, renewal or replacement of Debt which was Funded Debt at time of original issuance, assumption or guarantee without increasing the principal amount thereof) ranking equally with the Debentures unless all Funded Debt of the Company outstanding at the date of such proposed issuance, assumption or guarantee (except Funded Debt held in any purchase, sinking, amortization or analogous fund) shall not exceed 66 2/3% of the Tangible Property of the Company (after giving effect to such issuance, assumption or guarantee and the receipt and application of the proceeds thereof).

³³ American Bar Foundation, *supra* note 31 at 370.

³⁴ Judgment on the 76 Declaratory Motion at para. 74.

³⁵ *Ibid.* at para. 76.

[63] The Trustees raise an issue as to the form of the conclusions by the trial judge. In their Motions Introductory of Suit for Declaratory Judgment, they seek the following conclusions:

GRANT and MAINTAIN the present Motion.

[...]

DECLARE whether Section 8.01 of the Trust Indenture between Bell Canada and Plaintiff as trustee applies by reason of the proposed Plan of Arrangement and proposed transaction summarily described in the present Motion and Court Record herein.

[...]”³⁶

[Emphasis added]

[64] The Court agrees with the submission of the Trustees that since the Superior Court concluded that a declaration as to the meaning of section 8.01 was warranted and proceeded to give its interpretation, the declaratory motions should have been granted rather than dismissed. All the criteria required in order to succeed on such motions under article 453 of the *Code of Civil Procedure* were met and the trial judge, as requested, issued a declaration regarding the interpretation of section 8.01. The Trustees took no position as to what was the correct interpretation. In these circumstances, the Motions should have been granted.

[65] The appeals will therefore be allowed for the sole purpose of replacing the word "DISMISSES" by the word "GRANTS" in the trial judge's conclusions regarding the Motions for Declaratory Judgment.

B. MOTIONS FOR OPPRESSION IN THE CONTEXT OF THE MOTION FOR FINAL ORDER

[66] A corporation is comprised of different stakeholders. Shareholders are stakeholders, as are creditors, in this case the debentureholders. Shareholders and debentureholders are securityholders within the terms of the *CBCA*.³⁷ From time to time, their interests may differ. The Supreme Court of Canada in *Peoples*,³⁸ stated at paragraph 47 that "[i]n resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation [...] and not to favour the interests of any one group of stakeholders". If the

³⁶ CIBC Mellon's Re-amended Motion Introductory of Suit for Declaratory Judgment of November 23, 2007, Computershare's Amended Motion Introductory of Suit for Declaratory Judgment of September 27, 2007.

³⁷ Section 2 *CBCA*.

³⁸ *Peoples' Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461 [*Peoples*].

Board fails in that task, stakeholders may invoke various statutory remedies available under the *CBCA*. Some are specific, as in the case of amalgamation (s. 185 *CBCA*), or arrangement (s. 192 *CBCA*), others are of broad application, such as the oppression remedy (s. 241 *CBCA*).

[67] With regard to creditors, a class of stakeholders, the Supreme Court stated in *Peoples*:

[48] The Canadian legal landscape with respect to stakeholders is unique. Creditors are only one set of stakeholders, but their interests are protected in a number of ways. Some are specific, as in the case of amalgamation: s. 185 of the *CBCA*. Others cover a broad range of situations. The oppression remedy of s. 241(2)(c) of the *CBCA* and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction: see D. Thomson, "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000), 58 *U.T. Fac. L. Rev.* 31, at p. 48. One commentator describes the oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world": S. M. Beck, "Minority Shareholders' Rights in the 1980s", in *Corporate Law in the 80s* (1982), 311, at p. 312. While Beck was concerned with shareholder remedies, his observation applies equally to those of creditors.

[Emphasis added]

[68] Thus, one of the possible remedies of creditors is found in s. 241 *CBCA*. It authorizes a complainant who has been oppressed or whose interests have been unfairly prejudiced or unfairly disregarded by a corporation, its directors or its shareholders to apply for redress to a Superior Court. Debentureholders are a class of creditors who hold securities of a corporation, and as such they are specifically identified as complainants in s. 238(a) *CBCA* and have made use of the remedy from time to time.³⁹

[69] The thwarted reasonable expectations of a complainant are an important element of establishing its right to a remedy. The reasonable expectations of a holder of a publicly issued debenture are derived from the trust indentures, debentures in their hands, the prospectuses, public statements of the company and the various other representations made from time to time.⁴⁰ Various factors can be examined, as stated by the author Kevin McGuiness:

³⁹ See e.g. *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 7 B.L.R. (4th) 276 (N.S.S.C) [*Calpine*]; *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (Ont. Ct. J. (Gen. Div.)) [*Oxford Properties*].

⁴⁰ *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. Sup. Ct. J.), aff'd (2004) 40 B.L.R. (3d) 112 (Ont. C.A.); *Oxford Properties*, *supra* note 39; *Themadel Foundation v. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (Ont. C.A.).

[...] The identification of what were the reasonable expectations of the parties is a question of fact. In determining that fact, there is no error in principle in looking at prior statements and drawing an inference based on the respective weight of all the individual pieces of evidence. In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the complainant, the type of rights affected and general corporate practice are material. Test of unfair prejudice or unfair disregard encompasses the protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor. The reasonable expectations of a shareholder or other potential complainant are not assessed in the abstract. They must be construed by reference to the context in which the complainant acquired his or her rights, and the context in which the conduct complained of transpired. [...] ⁴¹

[70] This concept was also expressed by the Alberta Court of Appeal in *Westfair Foods v. Watt* ⁴² as follows:

[...] one clear principle that emerges is that we regulate voluntary relationships by regard to the expectations raised in the mind of a party by the word or deed of the other and which the first party ordinarily would realize it was encouraging by its words and deeds. This is what we call reasonable expectations, or expectations deserving of protection. Regard for them is a constant theme, albeit variously expressed, running through the cases on this section or its like elsewhere. I emphasize that all the words and deeds of the parties are relevant to an assessment of reasonable expectations, not necessarily only those consigned to paper, and not necessarily only those made when the relationship first arose. ⁴³

[71] In other words, these reasonable expectations are not limited to the legal rights spelled out in the contractual terms of the trust indentures. However, these expectations, to remain reasonable, cannot run contrary to the express terms of the relevant contracts.

[72] The concept of fairness is central to the application of s. 241 *CBCA*. ⁴⁴

[73] The *CBCA* requires a corporation to apply for approval to a Superior Court when it wishes to carry out certain specific transactions, such as an amalgamation (s. 182 *CBCA*) or an arrangement (s. 192 *CBCA*).

⁴¹ Kevin Patrick McGuiness, *The Law and Practice of Canadian Business Corporations* (Markham: Butterworths, 1999) at para. 9. 241.

⁴² (1991), 79 D.L.R. (4th) 48 (Alta. C.A.), leave to appeal to S.C.C. refused, [1991] 2 S.C.R. viii.

⁴³ *Ibid.* at 54.

⁴⁴ *First Edmonton Place v. 315888 Alta. Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.); *Calpine*, *supra* note 39.

[74] In the present case, BCE chose to proceed by way of a plan of arrangement. It is not disputed that the contemplated Plan constitutes an arrangement within the meaning of s. 192 *CBCA*.

[75] Amongst the securityholders affected by an arrangement, there can be shareholders as well as debentureholders.⁴⁵

[76] It is now settled law that the court will approve a plan of arrangement only if it is fair and reasonable. Once more, the concept of fairness is crucial.

[77] Both the approval procedure under s. 192 *CBCA* and the oppression remedy under s. 241 *CBCA* are measures that Parliament designed to assure fairness in the conduct of the affairs of a corporation. In the first case, the proceedings are instituted by the corporation and in the second, they are generally taken against the corporation.

[78] The relationship between these two provisions has been discussed in various judgments. In *Re Canadian Pacific Ltd.*,⁴⁶ Austin J., as he then was, writes at p. 233:

In my view, much the same tests apply in the present case. If anything, the standard is higher under s. 192. It does not specify what standard must be attained, whereas under s. 241 the conduct must be "oppressive" before it will be struck down. Although s. 192 provides no standard, the jurisprudence has established that for an arrangement to get court approval it must not only be not oppressive, it must be fair and reasonable.

[79] If a plan of arrangement is found to be fair and reasonable, it could generally not be argued that the implementation of the plan as approved is oppressive to a complainant. In *Re Pacifica Papers Inc.*,⁴⁷ Lowry J. states at paragraph 156:

It becomes unnecessary to say very much about the claim of oppression made by Cerberus because, as indicated, an Arrangement that is fair cannot be oppressive.

[80] In *Re Canadian Airlines Corp.*,⁴⁸ Paperny J., as she then was, in the context of a bankruptcy matter, writes at paragraph 145:

It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness.

⁴⁵ *Amoco Canada Petroleum Co. v. Dome Petroleum Co.*, [1988] A.J. No. 68 (Alta. Q.B.).

⁴⁶ (1990), 73 O.R. (2d) 212 (Ont. H.C.J.) [*Re Canadian Pacific Ltd.* (1990)].

⁴⁷ (2001), 15 B.L.R. (3d) 249 (B.C.S.C.), aff'd (2001), 19 B.L.R. (3d) 62 (B.C.C.A.).

⁴⁸ (2001), 9 B.L.R. (3d) 41 (Alta. Q.B.), leave to appeal to the C.A. refused, (2001), 9 B.L.R. (3d) 86 (Alta. C.A.).

the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

[Emphasis added]

[81] However, the rejection of a motion alleging oppression is not conclusive on the fairness of a plan of arrangement. In *3017970 Nova Scotia Co. v. Johnstone*,⁴⁹ Cameron J. states at paragraph 15:

The fairness hearing is open to consideration of all relevant issues, including good faith, the availability of fairness opinions, adequacy of disclosure in the information circular, the results of the shareholder vote and the right to exercise dissenting appraisal rights. The standard of fairness and reasonability for approval of the Arrangement under CBCA s. 192 is clearly higher than merely "not oppressive" or "not unfair". If CBCA s. 241 is breached, the Arrangement cannot be approved.

[Emphasis added]

[82] In *Scion Capital, LLC v. Gold Fields Ltd.*,⁵⁰ Veale J. says at paragraph 72:

The petition for oppression has been heard at the same time as the application for approval of the plan of arrangement. There is some relationship between the two proceedings in that a plan of arrangement cannot be approved if it is oppressive. However, if the oppression proceeding fails, it does not automatically result in approval of the proposed arrangement; the applicant must demonstrate that the requirements of s. 195 of the Y.B.C.A.⁵¹ have been met; *Re Canadian Pacific Ltd.*, cited above.

[83] Finally, if an arrangement has an oppressive result, it cannot be approved as fair.⁵²

[84] The trial judge, correctly, agreed with the principles enunciated in the foregoing cases.⁵³

[85] It follows that when a contemplated transaction is an arrangement under s. 192 CBCA, there would, in most cases, likely be no need for an affected

⁴⁹ [2001] O.J. No. 1809 (Ont. Sup. Ct. J.).

⁵⁰ (2006), 16 B.L.R. (4th) 17 (Y.S.C.), aff'd (2006), 16 B.L.R. (4th) 10 (Y.C.A.) [*Scion Capital*].

⁵¹ Section 195 of the *Yukon Business Corporations Act*, R.S.Y. 2002, c. 20, regarding Court-Approved Arrangements is the equivalent of s. 192 CBCA [citation added].

⁵² *Scion Capital*, supra note 50 at 31.

⁵³ See the judgment on the Motion for Final Order at para. 129 to 132.

securityholder to assert an oppression remedy under s. 241 *CBCA* to protect its interests. The affected securityholder could rather participate in the plan of arrangement proceedings and oppose the approval of the plan.

[86] In the case before the Court, the appellants acknowledged that their motions for an oppression remedy were made *ex abundante cautela*, after BCE asserted that they had no standing to participate in the arrangement proceedings. The principal remedy sought by the appellants under their oppression motions is refusal of the approval of the plan. In fact, their contestations of the motion for the approval of the plan of arrangement and their oppression motions are similar in their content, and seek to achieve the same result.

[87] Having regard to these circumstances, the Court will deal only with the plan of arrangement proceedings because if the plan is fair and reasonable, it cannot be said to be oppressive to securityholders, or unfairly prejudicial to, or unfairly disregard their interests. Therefore, the Motions for Oppression Remedy become moot and the appeals from the judgment of the Superior Court will accordingly be dismissed, but without costs, given the circumstances.

C. THE PLAN

[88] The trial judge correctly stated⁵⁴ that the burden to prove that the plan is fair and reasonable rests squarely on BCE, the applicant under s. 192 *CBCA*.

[89] As for the persons affected by the Plan, the trial judge in answering the question "Fairness to whom?"⁵⁵ included the debentureholders as a class of affected securityholders, even if their legal rights are not being arranged.⁵⁶ His answer is consistent with Policy Statement 15.1⁵⁷ issued by the *CBCA* Director, at s. 3.08:

3.08 Section 192 of the Act does not require security holder approval as a pre-condition to a court order approving an arrangement. However, the Director is of the view that, at a minimum, all security holders whose legal rights are affected by a proposed arrangement are entitled to vote on the arrangement. The Director is also of the view that, notwithstanding that a proposed arrangement may not affect the legal rights of holders of securities of a particular class, it may nevertheless be appropriate in cases where a proposed arrangement fundamentally alters the security holders' investment, whether economically or otherwise, that the right to vote on the arrangement should be provided to these security holders. For example, in an arrangement involving a divestiture of significant assets, the Director will review the financial statements, looking at

⁵⁴ Judgment on the Motion for Final Order at para. 129.

⁵⁵ Judgment on the Motion for Final Order at para. 133.

⁵⁶ Judgment on the Motion for Final Order at para. 151 to 154.

⁵⁷ *Policy of the Director Concerning Arrangements under Section 192 of the CBCA* – [Policy Statement 15.1], online: <<http://www.ic.gc.ca/epic/site/cd-dgc.nsf/en/cs01073e.html>>.

such factors as the percentage of assets being "dividend-out", credit ratings and the rights of participation of any referred shareholder classes. At the same time, the Director recognizes that in determining whether debt security holders should be provided with voting and approval rights, the trust indenture or other contractual instrument creating such securities should ordinarily be determinative absent extraordinary circumstances.

[Emphasis added]

[90] The Court agrees with the proposition that any securityholder whose legal rights or economic interests are affected by an arrangement presented pursuant to s. 192 *CBCA* has standing to contest it, even if such securityholder was not granted voting rights.

[91] The Plan is summarized by the trial judge as follows:

[96] The essential elements of the Plan of Arrangement and the Definitive Agreement are not contested. The details are accurately described, in summary form, in Part 7 of the *BCE Factum*. Except for some self-serving characterizations expressed by BCE counsel, (all of which have been deleted from the following extract by the undersigned), the summary reflects accurately the essence of the Plan of Arrangement and the Definitive Agreement as described in the Circular.

The price to be paid by the Teachers' Consortium of \$42.75 per common share represents a premium of approximately 40% over the price of BCE's common shares on the day prior to it first becoming publicly speculated that BCE might be subject to a change of control. This 40% premium represents approximately \$10.2 billion in additional value to BCE common shareholders. The transaction proposed by the Teachers' Consortium contemplates a [...] new capital structure that will facilitate ongoing investment in BCE. The total capital required for the privatization transaction amounts to approximately \$50 billion. Pro Forma for the transaction and acquisition financing, BCE will have \$38.5 billion of debt which represents [approximately] 6.2x debt/EBITDA. This debt is supported by nearly \$8 billion of new equity capital which is being committed to the transaction (one of the largest LBO equity commitments in history). [...]

The senior secured debt will be unconditionally guaranteed by certain of the Purchaser's wholly-owned subsidiaries. This will include BCE and Bell Canada. However, with respect to Bell

Canada, in compliance with the terms of the 1976 Trust Indenture and the 1997 Trust Indenture, the guarantee to be given by Bell Canada will rank equally with the debentures issued pursuant to the 1976 Trust Indenture and the 1997 Trust Indenture as well as the master lease and certain other senior debt obligations of Bell Canada but only to the extent that the total amount of senior secured first lien debt of Bell Canada does not exceed the maximum amount permitted by section 5.09 of the 1976 Trust Indenture (the "**Pari Passu Guarantee**"). Otherwise, the guarantee will be on a senior subordinated basis, with respect to both the *Pari Passu* Guarantee and the existing debt under the 1976 and 1997 Trust Indentures (the "**Senior Subordinated Guarantee**"). The *Pari Passu* Guarantee and the Senior Subordinated Guarantee will rank senior with respect to Bell Canada's Subordinated Debentures issued under the 1996 Trust Indenture.

In very general terms, the various steps in the Plan of Arrangement will result in: (i) the transfer of all common and preferred shares of BCE (collectively, the "**Shares**") to the Purchaser in exchange for \$42.75 per common share with the consideration paid to the preferred shareholders varying depending upon the particular series of preferred shares; (ii) the Purchaser will then transfer the Shares to one of its Subsidiaries ("**Subco**"), designated in writing prior to the Effective Time in consideration for the issuance of certain promissory notes and shares of Subco; and (iii) following the completion of the transfer of the Shares by the Purchaser to Subco as described above, Subco and BCE will amalgamate under section 192 of the *CBCA* to form BCE Amalco. None of the steps in the Plan of Arrangement involves Bell Canada, and none of the steps arranges or alters the rights of the Bell Debentureholders under the Trust Indentures.⁵⁸

[...]

[Emphasis added]

[92] The trial judge concluded that the Plan affects the appellants, because it is dependent on a number of post-reorganization steps, including Bell Canada providing

⁵⁸ Judgment on the Motion for Final Order at para. 96.

guarantees for approximately \$30 billion to be borrowed by the Purchaser to buy the shares of BCE:

[122] More particularly, BCE contends that the Contesting Debentureholders should not be given standing because the Plan of Arrangement does not involve Bell Canada or the proposed \$30 billion guarantee of the debt which Bell Canada is to assume. While in the strict sense and from a narrow non-commercial perspective, this may be true, there can be no doubt that in reality, this guarantee forms an integral part of the Plan of Arrangement. The full consequences of the implementation of the Plan of Arrangement cannot be analyzed in isolation and with commercial "blindness". They must be analyzed in the context of the concurrent obligations assumed by BCE to cause Bell Canada to assume \$30 billion of the acquisition debt necessary to complete the Plan of Arrangement. Implementation of the Plan of Arrangement would not be possible without the Bell Canada guarantee.⁵⁹

[Emphasis added]

[93] The Court agrees with this analysis. The completion of all the steps described in the Definitive Agreement, including the Bell Canada guarantee, is part and parcel of the implementation of the Plan. BCE acknowledged that reality at paragraph 43 of its "Motion for Interim and Final Orders in Connection with a Proposed Arrangement" where it stated:

[...] the Arrangement is dependent upon the completion of a number of interrelated and sequenced corporate steps and it is essential that no element of the Arrangement occur unless there is certainty that all other elements of the Arrangement occur within the strict time periods provided and in the correct order.

[94] The appellants, who hold unsecured debentures issued by Bell Canada, opposed the approval of the Plan by contending that the addition of \$34 billion of new debt fundamentally alters and adversely affects their investment. It materially increases the risk of default on their loans. This is reflected in the downgrading of their debentures. They submit that this credit downgrade will force some of the debentureholders to dispose of their debentures, at a loss. They also contend that the Board did not consider the effect on them of an approximately 20% drop in the market value of their debentures. They complain that the original offer of the Purchaser was restructured, at the request of BCE, to avoid seeking their approval, as would have been required in the event of an amalgamation of Bell Canada with another entity, as contemplated in the original offer.⁶⁰

⁵⁹ Judgment on the Motion for Final Order at para. 122.

⁶⁰ *Supra* para. 25.

D. THE CRITERIA FOR COURT APPROVAL

[95] As pointed out by the trial judge, to obtain approval of the Plan BCE must show: (1) that the statutory requirements have been fulfilled; (2) that the Plan is put forward in good faith; (3) that it complied with the interim order; and (4) that the Plan is fair and reasonable given all the circumstances.⁶¹

[96] There is no dispute that the first and the third elements have been satisfied. The appellants contend however that the second and fourth elements are not satisfied.

[97] With regard to the second element, the trial judge concluded that the Board was acting in good faith, a finding of fact on which there is no basis for this Court to intervene. He stated:

[147] Moreover, there is no evidence whatsoever susceptible of creating any reasonable doubt in the minds of an informed investor in that regard [the wisdom, sincerity and good faith of the SOC and the Board in recommending the approval of the Plan of Arrangement]. The uncontradicted evidence supports BCE's contentions that the Plan of Arrangement is the result of an extensive, complex strategic review and auction process, whose overriding objective was to maximize shareholder value, while respecting the corporation's legal and contractual obligations.⁶²

[98] As mentioned by the trial judge, the process supervised by the SOC, the independent oversight committee, was based on the premise that once BCE was in play, the overriding duty of the Board was to maximize the value for the shareholders, while complying with their obligations under the Trust Indentures. Moreover, the SOC was advised that the interests of the appellants were limited to their rights under the Trust Indentures and no more. The transaction was structured to avoid dealing with them or their interests. Therefore, the SOC did not take into consideration the adverse financial impact of the potential transaction on the debentureholders. No detailed analysis was made of the costs and benefits of the LBO insofar as it affects the securityholders other than the shareholders. From that point on, the process was fatally vitiated. This is in contrast with what occurred *Re Canadian Pacific Ltd. (1996)*, a case where a cost benefit analysis regarding all affected securityholders was made.⁶³

⁶¹ Judgment on the Motion for Final Order at para. 134.

⁶² Judgment on the Motion for Final Order at para. 147.

⁶³ [1996] O.J. No. 2412 (Ont. Ct. (Gen. Div.)), aff'd [1998] O.J. No. 3699 (Ont. C.A.). In this case, the Ontario Court of Appeal stated:

[6] The third argument was that what was offered to the U.S. C.D.S. holders was not fair and reasonable when compared with what was available to other security holders. The judge below made a detailed analysis of the costs and benefits of the arrangement insofar as it applied to holders of various securities, including the U.S. C.D.S. holders. We agree with his approach and with his conclusion that, in all of the circumstances, the

[99] It is clear from the principles enunciated by the Supreme Court in *Peoples* that at no time do the directors have an overriding duty to act only in the best interests of the shareholders and to ignore the adverse effect on the interests of the debentureholders.

[100] In *Peoples*, the Supreme Court stated that "'the best interests of the corporation' should be read not simply as the 'best interests of the shareholders'"⁶⁴ and enunciated:

[43] The various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(a) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.⁶⁵

[101] In a recently published book entitled "Les devoirs des administrateurs lors d'une prise de contrôle, étude comparative du droit du Delaware et du droit canadien", the authors Stéphane Rousseau and Patrick Desalliers write at paragraphs 342 to 349:

342. La position adoptée par la Cour suprême dans l'arrêt *Peoples* remet en question l'application des devoirs *Revlon* au Canada. En effet, les devoirs *Revlon* sont difficiles à réconcilier avec l'opinion de la Cour selon laquelle les administrateurs doivent agir de manière à maximiser la valeur de la société, concept ne se limitant pas à maximiser la valeur pour les actionnaires. De plus, la Cour a souligné que les administrateurs devaient éviter de favoriser les intérêts de parties prenantes en particulier, incluant ceux des actionnaires.

343. À la lumière de l'arrêt *Magasins à rayons Peoples Inc.*, il devient possible de faire valoir que les administrateurs ont l'obligation d'évaluer l'offre et d'y répondre en cherchant à maximiser la valeur de l'entreprise, plutôt que la valeur du prix offert aux actionnaires à court terme. Pour ce faire, ils pourraient considérer les intérêts des autres parties intéressées et ne pas se limiter au seul prix offert pour les titres. En bout de ligne, les administrateurs auraient la possibilité de retenir l'offre qui, sans être celle qui propose le prix le plus élevé pour les titres des actionnaires, maximise la valeur de l'entreprise en tenant compte des intérêts des autres parties prenantes. De même, les administrateurs pourraient mettre en place une mesure défensive de type *Just Say No* empêchant une prise de contrôle ne maximisant pas la valeur de la société.

344. Un regard du côté du droit américain permet de constater que cette interprétation ne sera pas dénuée de fondement. L'intérêt du droit américain réside dans les lois sur les parties prenantes (*Constituency Statutes*) adoptées durant les années 1980 par environ une trentaine d'États américains, mis à part

proposed arrangement was fair and reasonable to all parties, including the U.S. C.D.S. holders.

⁶⁴ *Peoples*, *supra* note 38 at para. 42.

⁶⁵ *Ibid.* at para. 43.

le Delaware. Ces lois particulières ont modifié la législation sur les sociétés pour reconnaître le pouvoir des administrateurs de considérer les intérêts des autres parties prenantes lors de la prise de décision. À titre d'exemple, depuis l'adoption d'une telle législation, la loi sur les sociétés de la Pennsylvanie édicte que :

§ 1715. Exercise of powers generally

(a) General rule. – In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider to the extent they deem appropriate:

- (1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.
- (2) The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.
- (3) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.
- (4) All other pertinent factors.

345. Comme nous pouvons le remarquer, il y a une grande similitude entre cette disposition et la position de la Cour suprême du Canada dans *Magasins à rayons Peoples Inc.* De fait, on serait tenté de considérer que la Cour a créé par voie jurisprudentielle une situation similaire à celle qui prévaut dans le droit des sociétés de la Pennsylvanie.

346. Encore plus intéressant, la législation de la Pennsylvanie prévoit en outre que :

(b) Consideration of interest and factors. – The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor [...]

Ici encore, l'arrêt *Peoples* fait écho à cette disposition lorsque la Cour souligne que les administrateurs ne doivent pas donner prépondérance aux intérêts d'une partie prenante.

347. L'intérêt de cette comparaison entre la législation américaine et l'arrêt *Peoples* réside dans l'impact de ces lois particulières sur l'applicabilité des devoirs *Revlon*. Selon la majorité des commentateurs, la modification de la législation sur les sociétés a eu pour effet d'empêcher à toutes fins pratiques l'application des devoirs *Revlon* dans les États concernés. C'est ce que soulignait le professeur Orts :

Under constituency statutes, there is no magical time in control contests when directors must switch to an exclusive, unidimensional goal of "maximization of shareholder profit" and must jettison "considerations" of other corporate interests. The statutes recommend instead that decision making for complex modern business corporations must not degenerate, especially in corporate control situations, into "a simple mathematical exercise." Just as deciding important issues of corporate control should not be reduced to simplistic auctions, courts should restrict review of "lock-ups" and other defensive measures to assuring rational, informed, and considered business judgment, which may include considering interests beyond those of shareholders.

348. Les rares décisions où les tribunaux se sont penchés sur cette question supportent l'opinion des commentateurs. [...]

349. Les opinions jurisprudentielles et doctrinales américaines supportent donc la thèse selon laquelle les devoirs *Revlon* sont difficiles à réconcilier avec l'interprétation du devoir de loyauté proposée par la Cour suprême dans *Magasins à rayons Peoples Inc.* Lorsqu'un changement de contrôle est imminent, les administrateurs doivent agir de manière à maximiser la valeur de la société, sans favoriser une partie prenante (les actionnaires) en particulier. Selon cette interprétation, il n'y aurait donc plus de transformation de l'objectif guidant les administrateurs dans un contexte de changement de contrôle.⁶⁶

[Emphasis added]

[102] The Court agrees with this analysis and concludes that the premise advanced by BCE that, once the corporation was in play, the Board could only consider ways to maximize the value for the shareholders, is erroneous. From a reading of all the

⁶⁶ Stéphane Rousseau & Patrick Desalliers, *Les devoirs des administrateurs lors d'une prise de contrôle : une étude comparative du droit du Delaware et du droit canadien* (Montréal: Éditions Thémis, 2007) at 195-199.

judgments under appeal, it appears that the trial judge accepted this premise. By so doing, the trial judge erred and conducted his assessment of the conduct of the SOC and the Board and the fairness of the Plan from an erroneous perspective.

[103] Besides looking to the contractual rights flowing from the Trust Indentures, the Board should have considered the interests (including reasonable expectations) of the debentureholders.

[104] Even if the Board did not consider the aspect of reasonable expectations, the trial judge concluded that the debentureholders could have no reasonable expectation that there would be no LBO, which necessarily involves an additional debt for the corporation.

[105] The complaint of the appellants, however, is not that an LBO was not to be envisioned by the Board but rather that in structuring the guidelines for the offers from prospective purchasers and in negotiating the terms of the LBO, the Board gave no consideration to their interests, in particular the adverse situation in which the contemplated LBO would place them. The value of the debentures they were holding would diminish in market value by about 18%, the assets of the corporation which covered their loans would be burdened by an additional debt of approximately \$30 billion, a very substantial increase. This in turn leads to a greater risk of default on their loans and results in the debentures losing the investment-grade status.

[106] The interests of the debentureholders, which are wider than their contractual legal rights flowing from the Trust Indentures, should have been considered by the Board. Having regard to the finding of fact that the Plan adversely affected the interests of a class of securityholder (debentureholders), it was incumbent on the Board to look at their interests with a view to examining whether it was possible to alleviate or attenuate all or some of the adverse effects. Could this have been accomplished? The answer is unknown, because the Board did not examine the issue. They operated on the principle expressed in *Revlon v. MAC Andrew & Orbes Holdings Inc.*⁶⁷ This, indeed was the finding of fact by the trial judge:

In the present case, relying on the principles described by the Supreme Court of Delaware in *Revlon*, the Board determined that they had an overriding duty to maximize shareholder value and obtain the highest value for the shareholders, while respecting the contractual obligations of the corporation and its subsidiaries.⁶⁸

[107] This approach by the Board was mistaken. In Canada, the directors of a corporation have a more extensive duty. This more extensive duty embodied in the statutory duty of care encompasses, depending on the circumstances of the case,

⁶⁷ 506 A. 2d 173 (Del. Sup. Ct. 1986) [*Revlon*].

⁶⁸ Judgment on the 76/96 Oppression Judgment at para. 132.

giving consideration to the interests of all stakeholders, which, in this case includes the debentureholders. They must have regard, *inter alia*, to the reasonable expectations of the debentureholders, and those may be more extensive than merely respecting their contractual legal rights.

[108] Notwithstanding the fact that the Board and the SOC acted in good faith, the process was flawed. It follows that the Board's decisions are no longer entitled to the deference otherwise due in virtue of the business judgment rule.⁶⁹

[109] Could the Court conclude nevertheless that the Plan is fair and reasonable, given all the circumstances? The answer could be affirmative, provided that the applicant at the hearing so proves. Since the trial judge did not assess the issue according to the applicable principles as enunciated in *Peoples*, his erroneous approach could not lead to a proper evaluation of the fairness and reasonableness of the Plan. In the circumstances, deference is not due to the evaluation of the trial judge, and the Court must perform its own assessment.

E. BCE DID NOT DISCHARGE ITS BURDEN OF PROVING THAT THE PLAN IS FAIR AND REASONABLE

[110] The trial judge acknowledged the existence of what the Court considers a significant negative impact on the debentureholders when he wrote "based on prevailing market prices during the hearing on the merits of these proceedings, they will see the value of their debentures decline by an average of some 18%",⁷⁰ and "that the implementation of the Plan of Arrangement and Definitive Agreement will no doubt expose the Contesting Debentureholders to an increased risk of default."⁷¹

[111] BCE never attempted to justify the fairness and reasonableness of an arrangement that results in a significant adverse economic impact on the debentureholders while at the same time it accords a substantial premium to the shareholders. Once there is, as in this case, a significant adverse effect on a class of securityholder (debentureholders), while other securityholders (shareholders) derive

⁶⁹ Recently, in *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*, [2006] O.J. No. 27 (Ont. C.A.), leave to appeal to S.C.C. refused, [2006] 2 S.C.R. x, the Ontario Court of Appeal concluded that once the trial judge had found that the board did not act on reasonable grounds, there was an insufficient understanding of the transfer pricing system and its impact on the company, the board "was disentitled to the deference ordinarily accorded by the operation of the business judgment rule". In the present instance, clearly the SOC and the directors acted upon incorrect legal principles.

⁷⁰ See the judgment on the 76/96 Oppression Remedy at para. 204 to which the trial judge referred at para. 162 of the judgment on the Motion for Final Order.

⁷¹ Judgment on the 76/96 Oppression Remedy at para. 184.

substantial benefits by an arrangement, the corporation has the burden of demonstrating that the arrangement is, nonetheless, fair and reasonable.⁷²

[112] When one attempts to define what is a fair and reasonable arrangement, it may be useful to refer to what was said more than 100 years ago, by Bowen L.J. of the English Court of Appeal, in *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*:⁷³

[E]verybody will agree that a compromise or agreement which has to be sanctioned by the Court must be reasonable, and that no arrangement or compromise can be said to be reasonable in which you can get nothing and give up everything. A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it. Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation.⁷⁴

[113] What are the relevant circumstances that a reasonable business person would consider here? Among those of particular importance are the following:

- (i) The debentureholders had a reasonable expectation that the Board would set up an independent process that would examine the impact on them of any potential transaction;
- (ii) An LBO was a reasonable business option to be considered by the SOC and the Board;
- (iii) A feature of the LBO was the addition of approximately \$30 billion of additional debt;
- (iv) An LBO was likely to cause a significant downgrade in the credit ratings of the debentures;
- (v) Pursuant to numerous representations from BCE, debentureholders had a reasonable expectation that the Board would have concern for their particular interests in the investment-grade quality of these ratings;

⁷² In *Re Canadian Pacific Ltd.* (1990), *supra* note 46, *Calpine*, *supra* note 39, *Palmer v. Carling O'Keefe Breweries of Canada Ltd.*, [1989] O.J. No. 32 (Ont. H.C.J.), it was found that it was unfair to a class of securityholders to expose them to an increased vulnerability as a result of a plan of arrangement for the sole benefit of another group of securityholders.

⁷³ [1891] 1 Ch. 213 (C.A.).

⁷⁴ *Ibid.* at 243.

(vi) The price that the Purchaser was ready to pay, \$42.75 per share, was in the upper range of fairness viewed from a shareholder standpoint, as demonstrated by the fairness opinions received by the SOC.

[114] It is noteworthy that in this case the debentureholders took the initiative of offering to discuss with the Board a number of ideas expressed, for example, in a letter dated April 27, 2007, in the following terms:

To that end, we have a number of ideas on how a fair and equitable treatment of bondholders could be affected without jeopardizing some of the value enhancing alternatives being contemplated. We would be pleased to discuss these ideas with you at your convenience.⁷⁵

[115] This letter and other like approaches were summarily refused. Having regard to the offers by the debentureholders to consider their ideas on how it might be possible to structure a transaction that could in some way attenuate the adverse effects on them, the burden was clearly on BCE to prove that, without giving consideration to this request, the arrangement was nevertheless fair and reasonable.

[116] The circumstances in this case contrast with those in *Re Canadian Pacific Ltd. (1996)*,⁷⁶ where, after consultation, various conversion options were added to the debentures and a major bank provided a letter of credit to secure the payment of interest and capital. As a result, debentures' ratings were restored, and even improved.

[117] It may be that there is no way that an arrangement could have been structured to provide a satisfactory price for the shares, while avoiding an adverse effect on the debentureholders. However the burden was on BCE to make that proof. It failed to do so. If it was possible to structure an arrangement so that a satisfactory price could be obtained for the shares, while attenuating the adverse effect to the debentureholders, then the Board had a duty to examine it.

[118] The failure of BCE to present evidence on this issue precludes the Court from determining whether or not it is possible. BCE must bear the consequence of its failure to attempt to discharge this burden.

[119] The Court invited counsel at the hearing, in the event that it reached the conclusion that the Plan is not fair and reasonable, how it could be amended to achieve that objective. Appellants and respondents submitted that the arrangement was either to be approved or not, and that the Court should not envision any amendment.

[120] Accordingly, the appeals should be allowed and BCE's Motion for Final Order must be dismissed.

⁷⁵ *Supra* para. 20.

⁷⁶ *Supra* note 63.

[121] There are likely no absolutes in considering the interests of the various securityholders in the event of an LBO.

[122] The Board's effort to obtain the best value reasonably available to the shareholders⁷⁷ cannot be considered in isolation from other factors, such as proper consideration for the interests of debentureholders. Similarly, the elimination of adverse effects on debentureholders cannot be examined in isolation from the proper consideration of the interests of the shareholders. As between obtaining the highest price for the shareholders and the elimination of all adverse effects on the debentureholders it might be possible, through accommodation or compromise, to reach a solution that is fair and reasonable; one that is in the best interests of the corporation and that gives proper consideration to the interests of the shareholders and the debentureholders, taking into account all the circumstances, including the relative weight of their interests.

[123] The interests of the various securityholders are not necessarily of the same weight. It is likely that the weight of the interests of the shareholders, in the event of an LBO, is appreciably higher than the weight of the interests of the debentureholders. In other words, if there are benefits flowing from the contemplated arrangement, the Court does not state that all the securityholders are *a priori* on an equal footing, and that the advantages have to be equally distributed. It is up to the Board to consider the relative weight and importance of the various interests and in its best business judgment to structure an arrangement that takes into account, and to the extent reasonably possible, satisfies the interests of the various securityholders.

FOR THESE REASONS, THE COURT:

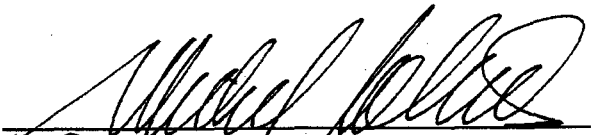
[124] **ALLOWS** the appeal, with costs to the appellants;


[125] **SETS ASIDE** the judgment of the Superior Court dated March 7, 2008;

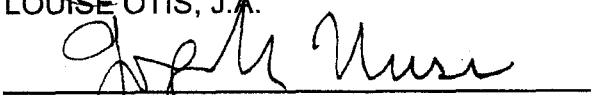
[126] **DISMISSES** the *Motion for Final Order*;

[127] **RETURNS** the file to the Superior Court for the determination of the costs in the Superior Court, in accordance with the agreement of the parties.

⁷⁷ See *Maple Leaf Foods Inc. v. Schneider Corporation*, [1998] O.J. No. 4142 (Ont. C.A.).


J.J. MICHEL ROBERT, C.J.Q.


LOUISE OTIS, J.A.


JOSEPH R. NUSS, J.A.


FRANÇOIS PELLETIER, J.A.


PIERRE J. DALPHOND, J.A.

Mtre Avram Fishman
Mtre Mark E. Meland
Mtre Fabrice Benoit
Mtre Suzanne Villeneuve
Mtre Genevieve Cloutier
Mtre Jason Dolman
Mtre Ponora Ang
FISHMAN, FLANZ, MELAND, PAQUIN, L.L.P.

And
Mtre John L. Finnigan
Mtre John T porter
Mtre Ray Thapar
Mtre Seema Aggarwal
Mtre Kim Ferreira
THORNTON, GROUT, FINNIGAN L.L.P. (Toronto)
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For CIBC Mellon Trust Company and Computershare Trust Company of Canada

Mtre Guy Du Pont
Mtre William Brock
Mtre Kent E. Thomson
Mtre James Doris
Mtre Louis-Martin O'Neill
Mtre Nick Rodrigo
DAVIES, WARD, PHILLIPS & VINEBERG L.L.P.
For Bell Canada and BCE Inc.

Mtre James A. Woods
Mtre Christopher L. Richter
Mtre François Touchette
Mtre Bogdan Catanu
Mtre Sarah Woods
WOODS L.L.P.
and
Mtre Benjamin Zarnett
Mtre Jessica A. Kimmel
GOODMANS L.L.P. (Toronto)
For 6796508 Canada Inc.

Mtre Markus Koehnen
Mtre Max Mendelsohn
Mtre Emmanuelle Saucier
Mtre Erin Cowling
McMILLAN, BINCH, MENDELSON L.L.P.
For the appellants 1997 Debentureholders

Dates of hearing: April 28, 29, 30 and May 1, 2008