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The Supreme Court of Canada provides guidance for corporate directors, shareholders, creditors and their advisers | BY JOHN L. FINNIGAN

The Supreme Court of Canada (SCC) released its Reasons for Judgment in *BCE Inc. v. 1976 Debentureholders et al* on 19 December 2008, bringing a conclusion to what some observers called the most important commercial law case decided in Canada in the last 35 years. The Court was called on to rule on the nature and scope of directors' fiduciary duties in a change of control transaction. The importance of the case to the Canadian legal and business communities was underscored by the unprecedented speed with which it proceeded through the court system. The case went through trial and two levels of appeal, including the SCC, in just nine months – the legal equivalent of the speed of light.

The SCC held that under s.122(1)(a) of the Canada Business Corporations Act (CBCA) corporate directors owe their fiduciary duty to the corporation and not to any particular stakeholder group. The Court ruled that directors are obliged to look to the long-term best interests of the corporation and consider a broad set of stakeholder interests including the interests of shareholders, employees, creditors, consumers, government and the environment. While directors of a Canadian corporation are obliged to consider a broad range of stakeholder interests, board decisions enjoy the protection of a powerful rule of deference known as the business judgment rule. This rule provides that if the board is properly informed and acts in good faith, the Court will defer to the directors' decision, so long as it lies within a range of reasonableness. In the result, directors of Canadian corporations have a wide scope to resolve conflicts between stakeholder interests as they see fit, as long as all relevant interests are considered in a robust process.

BCE was Canada's largest telecommunication company with annual sales in excess of $15bn. BCE was one of Canada's most widely held public companies with over 600,000 shareholders. At the time this transaction occurred, there had been widespread disappointment with the performance of BCE's share price, which for years had languished in a range between $28 to $32.

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BCE was put in play in April 2007 when its largest shareholder, the Ontario Teachers' Pension Plan Board indicated that it intended to become an active investor. In response BCE created and ran a competitive auction process. A buyers' consortium led by Teachers' submitted the winning bid to purchase all the outstanding shares of BCE for $42.75 per share. This represented a 40 percent premium to the trading value of the shares and created $10bn in incremental shareholder value. The Teachers' offer translated into a BCE enterprise value of approximately $52bn which, at the time, made the takeover the world's largest leveraged buyout. BCE's shareholders voted 98 percent in favour of acceptance of the Teachers' offer.

A much different result was visited on bondholders of BCE's primary operating subsidiary, Bell Canada. The LBO was to be financed by $34bn in new debt and the credit rating of Bell's debentures fell six notches from solid investment grade well into 'junk' status. The trading value of the relevant Bell debentures fell by more than $1bn.

A group of institutional bondholders comprised of some of Canada's largest financial institutions challenged the LBO. Many of the contesting bondholders acted as fiduciaries to their own customers and held the bonds as conservative long term investments. The heart of the complaint was that an iconic 'widows and orphans' investment would be fundamentally transformed into a speculative junk grade investment by the proposed transaction.

The bondholders had received numerous representations over the years confirming Bell's intention to maintain conservative investment grade credit metrics. These representations were accompanied by safe harbour notices which warned that forward looking statements were subject to events beyond BCE's control. The relevant trust indentures did not contain covenants that protected the bondholders against a change of control or a decline in credit ratings.

BCE and Teachers' had structured the LBO using the plan of arrangement mechanism in s.192 of the CBCA. This mechanism allows fundamental corporate changes to be undertaken with Court approval provided that the applicant can demonstrate that the plan is fair and reasonable to affected stakeholders. The bondholders challenged the LBO on the grounds that the transaction was unfair to them and relied on the oppression remedy provisions contained in s.241 of the CBCA and the plan of arrangement provision.

The litigation raised important questions about the nature and extent of directors' duties in change of control transactions where stakeholder interests are often in conflict. The Court reiterated that, under Cana-

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dian law, directors owe their fiduciary duty to the corporation and not to the shareholders. The Court specifically declined to adopt a line of authority from the influential Delaware Chancery Courts known as the *Revlon* rule, emanating from the 1986 decision in *Revlon v. MacAndrew & Forbes Holdings Inc*., 506 A.2d 173 (Del. 1985). *Revlon* established that in a change of control transaction directors owe an overriding duty to maximise shareholder value. The SCC rejected the notion that there was any overriding duty to maximise shareholder value in Canadian law and held that the directors' fiduciary duty is a broad contextual concept that is not confined to short term profit or share value maximisation. Canadian corporate law requires a board to look to the long term best interests of the corporation and consider a broad range of stakeholder interests, including the interests of shareholders, employees, creditors, consumers, government and the environment – with no one interest prevailing over the others. In a surprising development the Court held that directors "need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen". The Court did not elaborate on the nature of a corporation's duties as a responsible corporate citizen.

Directors may be frustrated by the broad and general manner in which their obligations have been articulated and it will be left to subsequent cases to flesh out the full extent of these obligations. Consider, for example, the case where a board has before it two offers for the company, one which maximises shareholder value but would see the company close its Canadian operations, and another at a lower share price from a buyer who would maintain the Canadian operations. Does the duty to act as a responsible corporate citizen require the directors to favour the lower offer which maintains employment for Canadians? The answer is far from clear.

Perhaps in recognition of the onerous obligation on corporate directors to consider a broad range of stakeholder interests, the SCC signalled that decisions made after an informed and robust process will not be interfered with and will enjoy the protection of the business judgment rule. The Court ruled as follows on the deference to be given to business decisions made after a proper process: "Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the Court will not go on to determine whether their decision was the perfect one".

Accordingly, corporate directors in Canada are obliged to consider a broad range of stakeholder interests but have the power to resolve conflicts between these interests as they see fit so long as a proper process has been followed. ■

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John Finnigan is a founding partner of ThorntonGroutFinnigan LLP and is the head of the firm's litigation practice group. Mr. Finnigan has practised a broad range of complex commercial litigation. He has acted as counsel in breach of contract, breach of fiduciary duty, fraud, negligence, professional malpractice and shareholder disputes. Mr. Finnigan has appeared as counsel at trial and on appeal before every level of court in Ontario including in the Superior Court and Court of Appeal. He has also appeared as counsel in the Alberta Court of Queen's Bench, the Nova Scotia Supreme Court, the Quebec Superior Court, the Quebec Court of Appeal and the Supreme Court of Canada. Mr. Finnigan's clients regularly include major financial institutions, government agencies and professional accounting firms. Mr. Finnigan was called to the Bar of Ontario in 1984.

Mr. Finnigan has been counsel on a number of recent high profile cases, including: counsel to the Receiver, KPMG Inc., in the receivership and bankruptcy of the Portus Group of Companies (Canada's largest hedge fund scandal with over $800 million in investor funds at risk). The Portus case involved the execution of creative and complex litigation strategies to trace and recover investor funds through multiple jurisdictions across the world; counsel to the Receiver, RSM Richter Inc., in the Norshield hedge fund scandal (Canada's second largest hedge fund scandal). This mandate involved the investigation and recovery efforts on $400 million in investor funds through a complex multijurisdictional investment structure; counsel to a committee of unsecured bondholders of Calpine Corporation subsidiaries in oppression remedy proceedings in the Nova Scotia Superior Court and the subsequent cross-border restructuring cases of Calpine Corporation and its subsidiaries in Calgary and New York. The Calpine litigation involved appearing as counsel on a number of complex contested hearings in Nova Scotia and Alberta. The case was successfully concluded with the bondholders receiving full payment on their securities; counsel to a committee of contesting bondholders in the BCE privatization proceeding. BCE is the subject of the world's largest leveraged buyout with an enterprise value of $52 billion. Mr. Finnigan represented a group of institutional bondholders including some of Canada's largest insurers and financial institutions in opposing the proposed buyout by a consortium led by the Ontario Teachers' Pension Plan Board. This remarkable case drew international attention as it sped through three levels of Court, including the Supreme Court of Canada, in less than nine months. Mr. Finnigan is a member of the Civil Litigation Section of the Canadian Bar Association and the Advocate's Society. He is regularly invited to speak at continuing education conferences on a broad range of commercial litigation topics, including corporate governance and the obligations of corporate officers and directors. Mr. Finnigan is a director of the Worldwide Orphans Foundation of Canada, a charity dedicated to improving the lives of institutionalized orphans throughout the world. Mr. Finnigan lives in Oakville, Ontario, with his wife and four children.

Mr. Finnigan obtained his Bachelor of Laws from the University of Western Ontario in 1982 where he won the Carson-Killeen Award for Advocacy.