Université de Montréal

A Comprehensive Analysis of the Legal Issues Relating to Nominee Directors

par
Sarah Samara Sekouti

Faculté de droit

Mémoire présenté à la Faculté des études supérieures en vue de l'obtention du grade de maîtrise en droit, option recherche

septembre 2009

© Sarah Samara Sekouti, 2009

Université de Montréal
Faculté des études supérieures

Ce mémoire intitulé:

A Comprehensive Analysis of the Legal Issues Relating to Nominee Directors

présenté par:
Sarah Samara Sekouti

a été évalué par un jury composé des personnes suivantes :

Nabil Antaki
président-rapporteur

Stéphane Rousseau
directeur de recherche

Geneviève Dufour
membre du jury

SUMMARY

Following the wave of corporate scandals that have surfaced over the past decade, significant attention has been showered on the efficiency of corporate governance practices, with particular scrutiny on the issue of director independence. One specific category of directors frequently nominated to sit on corporate boards is the nominee director. However, these directors often lack veritable independence given their extraneous loyalty towards their appointer, usually either a shareholder or stakeholder of the corporation. Furthermore, while legal principle requires that all company directors exercise their statutory duties with a view to the best interests of the corporation, in practice nominee directors are expected to follow the instructions or wishes of their appointer, resulting in their inherent position of conflict.

This text focuses on the nominee director and the conflict of interest resulting from such director's position of dual loyalty. Its objective is to provide a comprehensive examination of the various difficulties arising from, and associated with the appointment of nominee directors as well as the judicial and legislative responses to these difficulties. In examining the various complications associated with nominee directors, the legal framework in several foreign jurisdictions, particularly the United Kingdom, Australia and New Zealand is also explored throughout this text to provide further insight and perspective on the different issues analysed herein.

KEYWORDS:

Nominee director, representative director, constituency director, appointment, independence, conflict of interest, dual loyalty.

RÉSUMÉ

Dans la foulée des scandales financiers ayant secoué le milieu des affaires ces dernières années, l'efficacité des pratiques de régie d'entreprise, et, en particulier celles liées à l'indépendance des administrateurs, a été passée au crible. L'administrateur désigné par une partie pour la représenter est un type d'administrateur que l'on rencontre fréquemment au sein des conseils d'administration des entreprises. Toutefois, l'on peut se questionner sur l'indépendance réelle de ces administrateurs, considérant leur loyauté envers la personne les ayant désignés, laquelle détient habituellement un intérêt à titre d'actionnaire ou de partie prenante dans l'entreprise visée. En outre, alors que les principes légaux requièrent que les administrateurs agissent dans le meilleur intérêt de l'entreprise, la réalité pratique est parfois toute autre: aux prises avec les instructions ou les souhaits de la personne les ayant nommés, les administrateurs désignés se retrouvent placés en situation inhérente de conflit d'intérêts.

Ce texte vise à offrir une analyse détaillée au sujet de l'administrateur désigné et du conflit d'intérêts résultant de cette double exigence de loyauté. L'objectif est de présenter un examen approfondi des diverses difficultés résultant de la nomination d'un administrateur désigné ou associées à celle-ci, ainsi que des réponses judiciaires et législatives liées à cette problématique. Cette réflexion mènera à une exploration de certains systèmes législatifs et légaux, en particulier ceux du Royaume-Uni, de l'Australie et de la Nouvelle-Zélande, afin d'obtenir une meilleure compréhension et d'offrir une perspective éclairée quant aux enjeux analysés par la présente.

MOTS CLÉS :

Administrateur désigné, désignation des administrateurs, devoir d'indépendance, conflit d'intérêts, double loyauté.

TABLE OF CONTENTS

SUMMARY III

RÉSUMÉ.. IV

LIST OF ABBREVIATIONS VII

ACKNOWLEDGMENTS... XII

1. INTRODUCTION 1

1.1 Defining nominee directors 4

1.2 Identifying appointers 6

1.3 Motives for appointment 7

1.4 The principal impediment: dual loyalty 8

1.5 Common difficulties 9

2. THE ECONOMIC AND LEGAL LANDSCAPE 10

2.1 The economic landscape 10
2.1.1 Concentrated corporate ownership 10
2.1.2 The rise of institutional investors 13
2.1.3 Corporate structural patterns 15

2.2 Overview of directors' statutory duties 17
2.2.1 Duty to act in the *bona fide* best interests of the company and to exercise their powers for a proper purpose 19
2.2.2 Duty not to fetter their discretion 24
2.2.3 Avoidance of conflicts of interest 26

2.3 Chapter summary 26

3. JUDICIAL APPROACHES TOWARDS NOMINEE DIRECTORSHIP....... 28

3.1 The strict view 29

3.2 The pragmatic view 42

3.3 Looking to the corporations' constituent documents 52

3.4 Chapter summary and the possible reconciliation of the different views 58

4. COMMON DIFFICULTIES ASSOCIATED WITH NOMINEE DIRECTORSHIP 61

4.1 Access and disclosure to corporate information 61
4.1.1 Nominee directors' access to corporate information 63
4.1.2 Nominee directors' disclosure of corporate information 67
4.1.3 Possibility of disclosure without breach? 70
4.1.4 Duty to report back to the company? 74

4.2 Nominee directors in corporate groups 75
4.2.1 The entity approach 79
4.2.2 The enterprise approach 81
4.2.3 A proper purpose test? 92
4.2.4 Statutory exceptions 95

4.3 Appointer liability 96
4.3.1 Shadow directorship 98
4.3.2 Vicarious liability of the appointer 102
4.3.3 Liability of the nominee director towards his appointer? 107

4.4 Chapter summary 108

5. CONCLUSION 110

BIBLIOGRAPHY 117

LIST OF ABBREVIATIONS

LEGISLATIVE ABBREVIATIONS

c.	Chapter
CBCA	Canada Business Corporations Act
C.C.Q.	Civil Code of Québec
Cth.	Commonwealth
r.	Rule number
R.S.A.	Revised Statutes of Alberta
R.S.C.	Revised Statutes of Canada
R.S.O.	Revised Statutes of Ontario
S.Q.	Statutes of Québec

JURISPRUDENTIAL ABBREVIATIONS

A.C.	Law Reports, Appeal Cases (Third series) (England & Wales)
A.C.L.C.	Australian Company Law Cases
A.C.L.R.	Australian Company Law Reports
A.C.S.R.	Australian Corporations and Securities Reports
All E.R. Rep.	All England Reports Reprints
A.L.D.	Administrative Law Decisions (Australia)
A.L.R.	Australian Law Reports
Alta. L.R. (3d)	Alberta Law Reports (Third edition)
A.Q.	Arrêts du Québec
B.C.C.	British Company Cases
B.C.L.C.	Butterworths Company Law Cases (U.K.)
B.L.R.	Business Law Reports (Canada)

B.L.R. (2d)	Business Law Reports (Second edition) (Canada)
B.L.R. (3d)	Business Law Reports (Third edition) (Canada)
B.L.R. (4th)	Business Law Reports (Fourth edition) (Canada)
CanLII	Canadian Legal Information Institute
C.B.R. (4th)	Canadian Bankruptcy Reports (Fourth series)
Ch. D.	Law Reports, Chancery Division (Second series) (England & Wales)
C.L.R.	Commonwealth Law Reports (Australia)
C.P.C. (3d)	Carswell's Practice Cases (Third series) (Canada)
D.L.R. (2d)	Dominion Law Reports (Second series) (Canada)
D.L.R. (4th)	Dominion Law Reports (Fourth series) (Canada)
E.R.	English Reports
E.W.C.A. Civ.	England & Wales Court of Appeal (Civil Division)
E.W.H.C. (Ch.)	England & Wales High Court (Chancery Division)
F.C.A.	Federal Court of Australia
F.C.A.F.C.	Federal Court of Australia: Full Court
F.C.R.	Federal Court Reports (Australia)
I.R.	Irish Law Reports
L.R. Ch.	Law Reports, Chancery Division (England & Wales)
N.S.R.	Nova Scotia Reports
N.S.W.C.A.	New South Wales Court of Appeal

N.S.W.L.R.	New South Wales Law Reports
N.S.W.R.	New South Wales Reports
NSWSC	New South Wales Supreme Court
N.Z.C.L.C.	New Zealand Company Law Cases
N.Z.L.R.	New Zealand Law Reports
O.L.R.	Ontario Law Reports
On S.C.	Ontario Superior Court of Justice
ON S.C.D.C.	Ontario Superior Court of Justice – Division Court
O.R.	Ontario Reports
Q.B.	Queen's Bench Reports
QCCA	Québec Court of Appeal
Qc. Sup. Ct.	Québec Superior Court
R.J.Q.	Recueils de jurisprudence du Québec
S.A.S.R.	South Australian State Reports
SCC	Supreme Court of Canada
S.C.R.	Canada Supreme Court Reports
S.R. (NSW)	New South Wales State Reports
V.R.	Victorian Reports (Australia)
W.A.S.C.	Western Australia Supreme Court
W.L.R.	Weekly Law Reports (U.K.)
W.N. (NSW)	New South Wales Weekly Notes
W.W.R.	Western Weekly Reports (Canada)

DOCTRINAL ABBREVIATIONS

Alta. L. Rev.	Alberta Law Review
Austl. Bus. L. Rev.	Australian Business Law Review
Austl. J. Corp. L.	Australian Journal of Corporate Law
Austr. L. J.	Australian Law Journal

B.F.L.R.	Banking and Finance Law Review (Canada)
Bond L. R.	Bond Law Review
Bus. Law.	Business Lawyer (U.S.)
C. & S.L.J.	Company and Securities Law Journal (Australia)
Can. Bus. L.J.	Canadian Business Law Journal
Can. L.J.	Canada Law Journal
Conn. J. Int’l L.	Connecticut Journal of International Law
Conn. L. Rev.	Connecticut Law Review
C.L.J.	Cambridge Law Journal
Corp. L.	Corporation Law Review (U.S.)
Fordham J. Corp. & Fin. L.	Fordham Journal of Corporate and Finance Law
Geo. Wash. L. Rev.	George Washington Law Review
Harvard L. Rev.	Harvard Law Review
Hastings L.J.	Hastings Law Journal
Houston L. Rev.	Houston Law Review
J. Corp. L.	Journal of Corporation Law (U.S.)
J. Bus. L.	Journal of Business Law (U.K.)
L.M.C.L.Q.	Lloyd’s Maritime and Commercial Law Quarterly (U.K.)
Man. L.J.	Manitoba Law Journal
Mich. L. Rev.	Michigan Law Review
Melbourne U. L. Rev.	Melbourne University Law Review
Mod. L. Rev.	Modern Law Review (U.K.)
OECD	Organization for Economic Co-operation and Development
Rev. D. U.	Revue de droit uniforme
R.J.T.	La Revue Juridique Thémis
Sing. J.L.S.	Singapore Journal of Legal Studies

S. Cal. L. Rev.	Southern California Law Review
S.U.L. Rev.	Southern University Law Review
Tul. L. Rev.	Tulane Law Review
U.B.C.L. Rev.	University of British Columbia Law Review
U. Chicago L. Rev.	University of Chicago Law Review
U.N.S.W.L.J.	University of New South Wales Law Journal
U.T.L.J.	University of Toronto Law Journal
V.U.W.L.R.	Victoria University of Wellington Law Review
Windsor Rev. Legal Soc. Issues	Windsor Review of Legal and Social Issues

ONLINE LEGAL DATABASE ABBREVIATIONS

AUSTLII	Australasian Legal Information Institute
BAILII	British and Irish Legal Information Institute
CANLII	Canadian Legal Information Institute
HEIN	HeinOnline
QL	LexisNexis Quicklaw (LexisNexis Canada Inc.)
REJB	Répertoire Électronique de Jurisprudence du Barreau
SSRN	Social Science Research Network
WEST	Westlaw eCarswell

ACKNOWLEDGMENTS

First and foremost, I would like to thank my thesis supervisor, Professor Stéphane Rousseau, for his valuable insight, observations and guidance.

I would also like to thank my colleagues at Lapointe Rosenstein, L.L.P. for understanding the importance of this project and for permitting me to take the necessary time off to finish it.

Additionally, I would like to thank Me Mindy Paskell-Mede for taking the time to meet with me and for providing me with interesting doctrinal commentary that served to develop some of the key content contained herein.

Finally, I would also like to thank my fiancé, Sébastien Ghantous, for his continued patience, support and encouragement.

1. INTRODUCTION

There is no universal definition that can comprehensively recapitulate the concept of corporate governance. Broadly defined, corporate governance may be described as being concerned with the "*system by which companies are directed and controlled*."[1] In light of the numerous corporate scandals that have surfaced in recent years[2], significant attention has been showered on the efficiency of current corporate governance practices particularly in the U.S.[3] However, despite discrepancies with the U.S. corporate culture; the efficiency of corporate governance practices has also been questioned in Canada[4] and in other foreign jurisdictions.[5]

At the summit of the "*system by which companies are directed and controlled*" sits the board of directors.[6] Therefore, it comes as no surprise that scrutiny has been placed on the board[7], making it a key target for corporate governance reforms. It has been contended that the conduct of the board was undoubtedly one of the pivotal factors resulting in the Enron crisis.[8] As one commentator has suggested, the Enron saga is a powerful reminder that "*good governance comes down to directors making good*

---

[1] U.K., Committee on the financial aspects of corporate governance, *Report of the committee on the financial aspects of corporate governance* (London: Gee, a division of Professional Publishing Ltd., 1992) at 14.
[2] By way of example, the corporate scandals involving: (i) Enron, WorldCom, Adelphi and Global Crossings in the U.S.; (ii) Bre-X, Hollinger and Nourbourg in Canada; and (iii) HIH Insurance and OneTel in Australia. A more recent example is the "Madoff scandal" that has also created ripples far beyond the borders of the U.S.
[3] Robert W. Hamilton, "The Crisis in Corporate Governance: 2002 Style" (2003) 40 Houston L. Rev. 1 at 35 (HEIN); Robert Wright, "Enron: The Ambitious and the Greedy" (2003) 16 Windsor Rev. Legal Soc. Issues 71 at 3 (QL) [Wright]; Cheryl L. Wade, "The Interplay between Securities Regulation and Corporate Governance: Shareholder Activism, the Shareholder Proposal Rule, and Corporate Compliance with Law" in Janis Sarra, ed., *Corporate Governance in Global Markets* (Vancouver: UBC Press, 2003) 156 at 157.
[4] Sukanya Pillay, "Forcing Canada's Hand? The Effect of the Sarbanes-Oxley Act on Canadian Corporate Governance Reform" (2004) 30 Man. L.J. 285 (QL); Janis Sarra, "The Corporation as Symphony: Are Shareholders First Violin or Second Fiddle?" (2003) 36 U.B.C.L. Rev. 403 (QL).
[5] Oliver Krackhardt, "New Rules for Corporate Governance in the United States and Germany – A model for New Zealand?" (2005) 36 V.U.W.L.R. 319 (QL); Jennifer Hill, *Regulatory Responses to Global Corporate Scandals* (Legal Studies Research Paper No. 06/35) (Sydney: Sydney Law School, 2005), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886104>.
[6] Carol Hansell, *What Directors Need to Know: Corporate Governance* (Toronto: Thomson Carswell, 2003) at 2 [Hansell, *Corporate Governance*].
[7] William W. Bratton, "Enron and the dark side of shareholder value" (2002) 76 Tul. L. Rev. 1275 (HEIN) [Bratton]; Wright, s*upra* note 3.
[8] Bratton, *ibid* at 1287.

decisions".[9] Moreover, comprehensive research has suggested that independent boards may contribute to improved corporate decision-making.[10]

Director independence has become an integral aspect of corporate governance reform, particularly following the emergence of the aforementioned corporate scandals.[11] An independent director has been defined by the (Canadian) Joint Committee on Corporate Governance[12] as "*an outside and unrelated director who is also not affiliated with the significant shareholder*".[13] A director is necessarily disqualified from being independent when social, professional or financial ties between the director, and the company or, a significant interest, may influence the director's conduct.[14] Perhaps, an explanation for the focus on director independence may stem from the fact that most of the corporations absorbed in the wave of corporate scandals lacked *truly* independent directors.[15]

One specific category of directors frequently nominated or appointed to sit on corporate boards are commonly referred to as either nominee, representative or constituency directors. While these directors may sometimes qualify as independent, based on the literal definitions of "*independence*" as set forth in various corporate governance guidelines, they are necessarily disqualified from ever being considered *truly*

---

[9] Michael Useem, "Corporate Governance is Directors Making Decisions: Reforming the Outward Foundations for Inside Decision Making" (2003) 7:3 Journal of Management and Governance 241 at 249.

[10] Stéphane Rousseau, "La gouvernance d'entreprise à la croisée des chemins: comment restaurer la confiance des investisseurs à la suite de l'affaire Enron?" in Service de la formation permanente du Barreau du Québec : *Développements récents en droit des affaires* (Cowansville: Yvon Blais, 2003) at para. 2.2.2. (REJB); Canada, *Beyond Compliance: Building a Governance Culture* (Final Report) (Ottawa: Joint Committee on Corporate Governance, November 2001) at 13, online: Canadian Institute of Chartered Accountants <http://www.cica.ca/multimedia/Download_Library/Research_Guidance/Risk_Management_Governance/Governance_Eng_Nov26.pdf> [Joint Committee on Corporate Governance]. However, *compare* D.M. Nachane, Saibal Ghosh & Partha Ray, "Bank nominee directors and corporate performance: micro evidence for India" (19 March 2005) Economic and Political Weekly 1216 at 1217, online: Munich Personal RePEc Archive (Munich University Library) <http://mpra.ub.uni-muenchen.de/1714/> [Nachane, Ghosh & Ray].

[11] Hansell, *Corporate Governance*, *supra* note 6 at 77; John F. Olsen & Michael T. Adams, "Composing a Balanced and Effective Board to Meet New Governance Mandates" (2004) 59:2 Bus. Law. 421 (QL); Cary Coglianese & Michael L. Michael, *After the Scandals: Changing Relationships in Corporate Governance* (Regulatory Policy Program Report RPP-09, John F. Kennedy School of Government, Harvard University, 2006) at 19, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911653 >.

[12] The Joint Committee on Corporate Governance was mandated by the Toronto Stock Exchange and the Canadian Institute of Chartered Accounts to review the state of corporate governance practices in Canada and recommend changes to Canadian corporate governance standards.

[13] Joint Committee on Corporate Governance, *supra* note 10 at 17.

[14] Hansell, *Corporate Governance*, *supra* note 6 at 76.

[15] Rachel A. Fink, "Social Ties in the Boardroom: Changing the Definition of Director Independence to Eliminate 'Rubber Stamping' Boards" (2005-2006) 79 S. Cal. L. Rev. 455 at 456 (HEIN).

independent.[16] This is predominantly due to the nominee director's relationship with the person or entity who appointed him.[17]

This thesis is centered on nominee directorship and the particularities that result from their lack of independence and conflict of interest. Specifically, its objective is to provide a comprehensive examination of the difficulties arising from, and associated with, the position of nominee directors as well as the judicial and legislative responses to these difficulties. The legal framework in connection with nominee directorship in several foreign jurisdictions, particularly the United Kingdom, Australia and New Zealand have also been researched, to provide further insight and perspective on the different issues in connection with nominee directors. To this author's knowledge, elaboration on the particularities of nominee directors and the different matters relating thereto, have not been the subject of any comprehensive scholarly research or doctrinal commentary within the Canadian context.

The bulk of the research and analysis contained herein is rooted in the common law, perhaps because the subject matter is so intrinsically related to the fiduciary duty owed by directors to the corporation, which originates from the common law.[18] However, it is important to note that although the *C.C.Q.* and civil law generally is of primordial importance and application in the province of Québec, many of the rules contained in the *C.C.Q.* were inspired and influenced by the common law.[19] Furthermore, it is evident that Québec courts are not reticent towards the use of the common law as a viable instrument in interpreting and evolving the law in Québec,[20] particularly as regards corporate governance. By way of example, in the recent decision of *Gravino v. Enerchem Transport Inc.*, the Québec Court of Appeal undertook an elaborate analysis of various

---

[16] Austl., Commonwealth, Companies and Securities Law Review Committee, *The Duties and Liabilities of Nominee Directors and Alternate Directors* (Discussion Paper - No. 7) Chaired by Professor Harold A.J. Ford (Sydney: Australian Government Takeovers Panel, 1987) at para. 103ff, online: Australian Government Takeovers Panel < http://www.takeovers.gov.au/content/Resources/cslrc/cslrc_discussion_paper_no_7.aspx> [Discussion Paper No. 7, 1987].

[17] *Ibid.*

[18] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 37 (CANLII) [*BCE 1976*].

[19] Robert Leckey, "Harmoniser le droit dans un espace multilingue et pluri-juridique : un point de vue canadien" (2008) Rev. D. U. 39 at 41-42.

[20] Department of Justice Canada, "*Some Thoughts on Bijuralism in Canada and the World*" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism* (Booklet 2) by Marie-

influential common law decisions in determining whether the subject directors had breached their fiduciary duties owed to the company.[21] As such, despite an emphasis on doctrine and case law emanating from the common law, most of the analysis contained herein applies to both common and civil law jurisdictions.

Prior to commencing this analysis, a brief description of the chapters to follow is provided. Firstly, the remainder of this introductory chapter shall formally introduce and define the notion of nominee directors, identify their most common appointers as well as the objective of their appointment. It shall also introduce the inherent conflict relating to nominee directorship as well as the practical issues resulting therefrom. The second chapter is divided between: (i) a description of the Canadian economic landscape that may contribute to increased nominee directorship; and (ii) an overview of the most significant directors' duties as well as the conduct that is lawfully expected from all directors, with no exception as regards nominee directors. This will naturally lead to an illustration of the tension between nominee directors' statutory duties owed to the company and what is expected from them in commercial practice. The third chapter turns to an examination of the contrasting judicial trends fashioned in response to the conflict-riddled position of nominee directors with a view to the reconciliation of these trends. The fourth chapter describes the most common difficulties associated with nominee directorship and also examines the different judicial and legislative responses formulated to address these difficulties. The concluding chapter will provide an overview of the different proposals in connection with the adoption of legislation to regulate the position of nominee directors, as well as the legislative commentary in connection with same, followed with this author's final conclusions on the subject.

1.1 Defining nominee directors

A nominee director may be defined as a person appointed to a corporate board of directors with an underlying understanding that he will represent the particular interests

---

Claude Gervais & Marie-France Séguin (Ottawa : Department of Justice Canada, 24 June 2003) at 2, online: Department of Justice Canada < http://www.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b2-f2/bf2a.html#general>.

[21] *Gravino v. Enerchem Transport Inc*, 2008 QCCA 1820 at para. 39ff (CANLII) [*Gravino v. Enerchem*].

of a person or group of persons, most often the interests of his appointer.[22] As such, nominee directorship is frequently characterized by an "*extraneous loyalty*" towards an outside interest.[23] While a separate law for nominee directors does not exist *per se*[24], legal recognition of nominee directorship is evident in various legislative sources. In Canada, such recognition may be evidenced by way of Section 124 of the *Canada Business Corporations Act*[25] (the "**CBCA**"). Section 124 deals with the indemnification of a director or officer who has acted in the best interests of "*another entity*" at the request of the corporation. Thus, Section 124 permits the indemnification of directors appointed by one corporation to sit on the board of another corporation. Therefore under this provision, it would appear that a nominee director appointed, at the request of the parent company, to sit on the board of a subsidiary, or an affiliate company, is entitled to director indemnification.[26]

Implicit reference to nominee directorship is also evident in the legislation of the different jurisdictions researched. A provision in the (Australian) *Corporations Act 2001*[27] states that the resolution for the removal of a director "*appointed to represent the interests of particular shareholders*" shall not take effect until a replacement has been appointed to represent said shareholders. It has been put forth that this provision evidences recognition of the practice of appointing nominees onto corporate boards.[28] A more explicit recognition of nominee directorship may be found in the (Australian) *Duties Act 2000*[29], a provision which grants an exemption from duties payable in circumstances where the transfer of marketable securities was effected "*for the sole purpose of qualifying the transferee as nominee director to act and vote on behalf of the*

---

[22] Paul Redmond, "Nominee Directors" (1987) 10 U.N.S.W.L.J. 194 at 194 [Redmond].
[23] Harold Arthur John Ford, Robert P. Austin & Ian M. Ramsay, *Ford's principles of Corporations Law*, 11th ed., (Sydney, Australia: LexisNexis Butterworths, 2003) at para. 9.420 [Ford *et al.*].
[24] *Ibid.*
[25] *Canada Business Corporations Act,* R.S.C. 1985, c. C-44 [CBCA].
[26] Canada, *Canada Business Corporations Act Discussion Paper on Directors' Liability* (Ottawa: Industry Canada, November 1995) at 32, online: Government of Canada < http://dsp-psd.pwgsc.gc.ca/Collection/C2-280-7-1995E.pdf> [*Canada Business Corporations Act, Discussion Paper*]. However, the appointing corporation must have a financial interest in the company on whose board it is appointing a director.
[27] *Corporations Act 2001* (Cth.), Section 203(d) [*Corporations Act*].
[28] Austl., Commonwealth, Company Securities and Advisory Committee, *Corporate Groups* (Final Report) (Sydney: Company Securities and Advisory Committee, 2000) at 68, online: Corporations and Markets Advisory Committee < http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/$file/Corporate_Groups,May_2000.pdf> [*Corporate Groups* (Final Report)].
[29] *Duties Act 2000*, Act. No. 79/2000, subsection 66(2)(b).

holding company it directs." More explicit references to the appointment of nominee directors are found in various other company law statutes, particularly in those of New Zealand which shall be highlighted in the fourth and fifth chapters.

In light of the foregoing, both implicit and explicit recognition of nominee directorship by way of legislation is another indication that the practice of appointing such directors is not illegitimate; rather it is the inherent conflict faced by these directors that poses the problem.[30]

1.2 Identifying appointers

Appointers of nominee directors are often holders of a significant share interest in the company, whether an individual, a group of shareholders or even an entity.[31] The appointer may also be an institutional investor, a joint venture partner, or a group of employees.[32] Even creditors may request board representation as comfort that their specific interests are being protected.[33] Hence, the appointer is generally any person, or group of persons, legal or moral, with an identifiable interest in the corporation.

Interestingly, various doctrinal commentators have voiced their support for the imposition of liability on appointers for the wrongful conduct of their nominees. Doctrinal commentary has put forth various grounds upon which an appointer may be held liable.[34] The question of whether an appointer can be held liable for the conduct of its nominee has also been opined in situations where a parent company appoints a nominee onto the board of its subsidiary. In addition to doctrinal commentary, the possibility of appointer liability has also surfaced in case law. However, for the most part, the law on this issue remains uncertain. Appointer liability will be elaborated upon in the fourth chapter hereof.

---

[30] Redmond, s*upra* note 22 at 197.
[31] John De Lacy, "The concept of a company director: Time for a new expanded and unified statutory concept" (2006) J. Bus. L. 267 at 284 [De Lacy].
[32] Redmond, *supra* note 22 at 195; E. Norman Veasey & Christine T. DiGuglielmo, "How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors" (2007-2008) 63 Bus. Law. 761 (HEIN) [Veasey & DiGuglielmo].
[33] Ford *et al*., *supra* note 23 at para. 9.420.
[34] Robert P. Austin, Harold Arthur John Ford & Ian M., Ramsay, *Company Directors: Principles of Law & Corporate Governance* (Sydney: LexisNexis, 2005) at para. 14.35 [Austin *et al*., *Company Directors*].

1.3 Motives for appointment

Nominee directors are often appointed on an informal basis, on the mere understanding that they will act in favour of their appointer. However, appointment may also result from rights stipulated in the corporation's articles, a joint venture agreement or even a shareholders' agreement. Moreover, financing agreements often contain, as a condition precedent to advancing the necessary funds, the lender's right to nominate one or several board members.

As such, the motives for appointment may vary. In the case of a majority, or controlling shareholder, the primary motive for the appointment is often to ensure representation and protection of such shareholder's particular interests. In the case of an institutional investor, a nominee director shall likely be expected to ensure the adequate protection of the investment.

However, it is important to note that there are many associated incentives with the appointment of nominee directors. By way of example, their appointment may provide effective solutions to various difficulties that are often faced by corporations, such as ensuring harmonious operation of group companies, protection of strategic interests such as those of institutional investors who agree to lend funds on condition that they are granted board representation, and finally to fill in for shareholders who do not necessarily possess the adequate expertise to personally serve as directors.[35] As such, a nominee director should not necessarily be viewed as a negative force on the corporate board. To the contrary, often times the nominee director may be the foreign member on the board, who provides the fresh perspective or the innovative insight with respect to the business.[36] However, despite the positive impact that a nominee director may provide, it is difficult to ignore the conflict of interest faced by individuals in these positions.

---

[35] De Lacy, *supra* note 31 at 284-285.

[36] Stéphane Rousseau & Bastien Gauthier, "Le devoir de loyauté de l'administrateur désigné par un investisseur institutionnel" in Service de la formation continue du Barreau du Québec : *Développements Récents en litige commercial*, (Cowansville: Yvon Blais, 2007) 33 at 6-7 (REJB) [Rousseau & Gauthier].

1.4 The principal impediment: dual loyalty

> *"The director who is a nominee of a substantial shareholder is between the devil and the deep blue sea. Happily perhaps for his peace of mind he is most often unaware of the company law principles. No doubt he will only remain a director while he furthers the wishes of the shareholder by whom he was appointed."*[37]

The aforementioned passage, authored by Professor Ross Parsons, has been repeatedly cited by doctrinal commentators that have undertaken an analysis of the principal predicament faced by nominee directors: the position of dual loyalty.[38] The problem lies in that the very nature of nominee directorship is *prima facie* incompatible with a board of director's fiduciary duty to the company. As Professor Redmond notes:

> "*Is not the duty of loyalty to the general shareholder interests compromised where a nominee director is appointed for the very purpose of acting partially, whether by subordinating the interests of the general body of members to those of the appointer or by identifying company interests with those of the appointer?*"[39]

Thus, several important questions arise with respect to the position of nominee directors, primarily, how to reconcile the legal principle dictating the nominee director's duties towards the company, with the commercial reality of how his appointer shall expect him to govern. In a report commissioned by the federal government of Canada, authors and attorneys, Nicholl and Paskell-Mede eloquently state:

> *"From a practical viewpoint, shareholders and creditors appoint their nominees to the board of directors precisely because they want their special interests to be looked after. On the other hand, once appointed, if the nominee director is to look to the best interests of the corporation, even when those interests differ from those of the appointing shareholder or creditor, he or she is almost certainly going to disappoint his appointer".*[40]

---

[37] Ross W. Parsons, "The Directors' Duty of Good Faith" (1967) 5 Melbourne U. L. Rev. 395 at 418 [Parsons].
[38] See e.g. Pey-Woan Lee, "Serving two masters – The dual loyalties of the nominee director in corporate groups" (2003) J. Bus. Law 449 at 450 (WEST) [Lee].
[39] Redmond, s*upra* note 22 at 197.
[40] Mindy Paskell-Mede & John Nicholl, "*Directors' Liability from Private Rights of Action"* (Final Report presented to Industry Canada, Ottawa) (25 May 1994) at 74 [unpublished] [Paskell-Mede, *Directors' Liability*].

Hence, where the nominee director does not govern with a faithful commitment to his appointer's interest, the director's appointment shall most likely be brief. However, where the director ignores his obligations towards the company, he shall be in breach of his directors' duties and more importantly face the liability that may flow from such breach. This tension between legal principle and commercial reality gives rise to the central difficulty faced by nominee directors, being the extent to which a nominee may give consideration to the interests of his appointer in governing the corporation and exercising his discretion. Evidently, in situations where the nominee acts as a puppet in the hands of his appointer, oblivious of his fiduciary duties, the nominee shall clearly be in breach.[41] However, in most situations, the extent of the nominee director's allegiance to his appointer is unclear.

1.5 Common difficulties

Most of the legal literature, particularly in Australia, involving nominee directorship, debates the impediment of dual loyalty and contemplates the different judicial approaches, so as to propose a proper formulation of the nominee director's duties. However, a myriad of other difficulties associated with nominee directorship also exist and have given rise to litigation. By way of example, one frequent issue is the nominee director's access to confidential corporate information and the possibility of reporting such information back to his appointer. In fact, it is often expected of the nominee to report back corporate information regarding matters of importance to the appointer.[42] Additional difficulties involve the appointment of nominee directors to boards in the corporate group or joint venture context, and whether they may act in the interests of their appointer, who is most often the parent or the joint venture partner. Prior to examining the different judicial approaches, the common difficulties and the legislative endeavours associated with nominee directorship, it is important to begin with an understanding of the economic and legal landscape in which nominee directorship arises.

---

[41] *Selangor United Rubber Estates Ltd. v. Cradock and Others* (No. 3.), (1968) 1 W.L.R. 1555 (QL) [*Selangor v. Cradock*].

[42] Leigh Thomson, "Nominee and multiple directors and confidential information" in John H. Farrar, ed., *Contemporary Issues in Company Law* (Auckland: Commerce Clearing House (New Zealand), 1987) 161 at 162 [Thomson].

2. THE ECONOMIC AND LEGAL LANDSCAPE

As noted in the introduction, this second chapter's objective is to provide an overview of the relevant economic and legal aspects of the Canadian corporate environment in which nominee directorship arises. The first part of this chapter presents certain characteristic of the economic landscape, particularly corporate ownership and structural patterns, that likely contribute to both the prevalence of nominee directorship and the difficulties associated therewith. The second part of this chapter contains a selective overview of particular duties that are in conflict with the position of a nominee director.

2.1 The economic landscape

2.1.1 Concentrated corporate ownership

Economic research illustrates that the diffused ownership structure characteristic of the American corporate model, as suggested back in 1932 by professors Berle and Means is not descriptive of the Canadian corporate environment.[43] Although it appears that the "widely held firm" was preponderant in the middle of the twentieth century; the last thirty to forty years have resulted in a reappearance of concentrated corporate ownership.[44] In fact, with the exception of the U.S. and the U.K., the majority of other countries are equally characterized by a concentration of corporate ownership.[45] Dispersed ownership characteristic of U.S. and U.K. corporations may be attributable to the size of the

---

[43] Yoser Gadhoum, "Power of Ultimate Controlling Owners: A Survey of the Canadian Landscape" (2006) 10 Journal of Management Governance 79 at 180-181 [Gadhoum]; Ronald Daniels & Paul Halpern, "Too Close for Comfort: The Role of the Closely Held Public Corporation in the Canadian Economy and the Implications for Public Policy" (1995) 26 Can. Bus. L.J. 11 at 12 (HEIN) [Daniels & Halpern].

[44] Randall Morck, Michael Percy, Gloria Tian & Bernard Yeung, "The Rise and Fall of the Widely Held Firm" in Randall Morck, ed., *A History of Corporate Governance Around the World*, by the National Bureau of Economic Research (Chicago: University of Chicago Press, 2005) 65 at 66. Interestingly, see also Calin Valsan, "2007: A Canadian Corporate Ownership Survey" (Working Paper Series) (Lennoxville: Williams School of Business – Bishop's University, 2008) at 14ff, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158544>. Valsan provides recent empirical evidence illustrating a decrease in concentrated corporate ownership over the past ten years, particularly in Western Canada.

[45] Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "Corporate Ownership Around the World" (1999) LIV:2 Journal of finance 471 at 471-472; Aviv Pichhadze, "Mergers, Acquisitions, and Controlling Shareholders: Canada and Germany Compared" (2003) 18 B.F.L.R. 341 at 343-346; Randall Morck, Gloria Tian and Bernard Yeung, "Who owns whom? Economic nationalism and family controlled pyramidal groups in Canada" in Lorraine Eden & Wendy Dobson, eds., *Governance, Multinational and Growth* (Cheltenham: Edward Elgar Publishing Limited, 2005) 44 at 44.

corporations in these countries that tend to be much larger than corporations in countries such as Canada.[46]

In Canada, a 2006 report indicated that over half of the country's largest corporations have controlling shareholders, ranging from families, affiliated corporations to large financial institutions.[47] Economic studies have provided considerable empirical evidence in support of the foregoing; for example, one particular study revealed that families control 56.17% of Canadian corporations.[48] Furthermore, in approximately 70% of these family-controlled companies, the controlling shareholder generally appoints members of his or her family into executive positions.[49]

Given that there is no obligation to register the appointment of nominees, there is no effective method of monitoring the prevalence of nominee directorship in Canada. Nonetheless, it is quite rational to infer a positive correlation between concentrated corporate ownership and nominee directorship.[50] Furthermore, Australia, a jurisdiction in which a considerable amount of legal literature in connection with nominee directorship has been published, is also characterized by a corporate environment with condensed ownership.[51] As Hansell notes, "*it is common practice for persons who have significant interest in the corporation to nominate certain individuals to act as directors*."[52] In other words, it is a logical inference that a controlling shareholder of a firm, whether an individual or a family, shall likely appoint directors to the board with a view to ensuring that such shareholder's wishes are respected.

---

[46] Gadhoum, *supra* note 43 at 200; Canada, Task Force to Modernize Securities Legislation in Canada, *Some Obstacles to Good Corporate Governance in Canada and How to Overcome Them* (Final Report) by Randall Morck & Bernard Yeung (Ottawa: Canada Steps Up, 2006) 281 at 311, online: Task Force to Modernize Securities Legislation in Canada <http://www.tfmsl.ca/docs/V4(5)%20Morck.pdf> [Morck & Yeung].
[47] Morck & Yeung, *ibid* at 293.
[48] Gadhoum, *supra* note 43 at 180.
[49] *Ibid*.
[50] *Accord* Robert P. Austin & Minter Ellison, "Representatives and Fiduciary Responsibilities – Notes on Nominee Directorships and Life Arrangements" (1995) 7 Bond L. R. 19 at 24 [Austin & Ellison].
[51] Ian M. Ramsay & Mark Blair, "Ownership Concentration, Institutional Investment and Corporation Governance: An Empirical Investigation of 100 Australian Companies" (1993-1994) 19 Melbourne U. L. Rev. 153 at 165-169; Alan Dignam & Michael Galanis, "Australia Inside-Out: The Corporate Governance System of the Australian Listed Market" (2004) 28 Melbourne U. L.R. 623 at 628-629 (QL).
[52] Hansell, *Corporate Governance*, *supra* note 6 at 111.

High concentrated ownership has been arguably linked with increased firm performance.[53] By way of example, a controlling shareholder is arguably beneficial for the corporation in circumstances where such shareholder is decidedly sophisticated, business oriented and ethical.[54] Moreover, where a shareholder is actively involved in the business, management will be under such shareholder's direct supervision and misconduct will likely be detected.[55] A controlling shareholder's presence may equally provide comfort for smaller investors.[56] Hence, one of the most popular arguments in favour of concentrated ownership in the hands of a controlling shareholder is the promotion of a more proficient administration in view of the controlling shareholder's personal economic investment in the corporation.[57]

Conversely however, equity control often translates into a shareholder's increased control over the board.[58] As such, it contributes to the difficulties, and more precisely, the conflict of interest, associated with nominee directorship. As Daniels and Waitzer note:

> *"Knowing full well that controlling shareholders can vote a stubborn board out of office at the next annual meeting, directors will faithfully implement the controlling shareholders' desires."*[59]

Hence, in commercial practice, a nominee director cannot defy the wishes of his appointer who is often the controlling shareholder, particularly in circumstances where the latter will terminate the former if he disobeys his appointer's instructions. One may once again refer to Parsons' passage, cited in the introductory chapter so as reiterate this predicament: "*no doubt [the nominee] will only remain a director while he furthers the wishes of the shareholder by whom he was appointed."*[60]

---

[53] Morck & Yeung, *supra* note 46 at 295.
[54] *Ibid.*
[55] *Ibid.*; Ronald J. Daniels & Edward J. Waitzer, "Challenges to the Citadel: A brief Overview of Recent Trends in Canadian Corporate Governance" (1994) 23 Can. Bus. L.J. 23 at 26 [Daniels & Waitzer].
[56] Morck & Yeung, *supra* note 46 at 295.
[57] *Ibid.*
[58] Ronald J. Daniels & Edward M. Iacobucci "Some Causes and Consequences of Corporate Ownership Concentration in Canada" in Randall Morck, ed., *Concentrated Corporate Ownership*, by the National Bureau of Economic Research (Chicago, University of Chicago Press, 2000) 81 at 83-84; Daniels & Halpern, *supra* note 43 at 16.
[59] Daniels & Waitzer, *supra* note 55 at 26.
[60] Parsons, *supra* note 37.

In consequence of the foregoing, jurisdictions such as Canada, characterized by condensed corporate ownership likely also contain a prevalence of nominee directors. Furthermore, concentrated ownership, often in the hands of one controlling shareholder, contributes to the conflict of interest faced by the nominee director appointed by such shareholder.

2.1.2 The rise of institutional investors

Institutional investors may be categorized as financial institutions that invest savings of individuals and non-financial entities into the financial markets.[61] In Canada, institutional investors comprise banks, *caisses populaires*, mutual funds, life insurance companies as well as public and private sector pension plans.[62]

Interestingly, institutional investors have considerably increased their investments over the last quarter of a century; in fact, by 1998, pension and mutual funds owned almost 50% of the shares in publicly traded Canadian corporations.[63] Moreover, this trend is not exclusive to Canada; a remarkable increase in institutional shareholdings is also evident in OECD jurisdictions world-wide.[64] There have been various explanations for this exponential growth, such as the aging population who have become increasingly concerned with insurance and savings.[65]

Concurrently with their extraordinary growth, institutional investors have become progressively more involved in the corporate affairs of the companies into which they have invested funds.[66] To a certain extent, support for greater institutional investor activism has been reflected in legal literature; however there does not appear to be a

---

[61] Hans J. Blommestein & Norbert Funke, *Institutional Investors in the New Financial Landscape,* (Paris: OECD Publications, 1997) at 69.
[62] Canada, *The Governance Practices of Institutional Investors* (Ottawa: Report of the Senate Committee on Banking, Trade and Commerce, 1998) (Chair: Hon. Michael Kirby), online: Parliament of Canada <http://www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/bank-e/rep-e/rep16nov98-e.htm#TABLE%20OF%20CON TENTS>.
[63] *Ibid.*; Jeffrey G. MacIntosh "Institutional Shareholders and Corporate Governance in Canada" (1996) 26 Can. L.J. 145 at 145 [MacIntosh].
[64] E. Philip Davis, "Institutional investors, corporate governance and the performance of the corporate sector" (2002) 26 Economic Systems 203 at 204.
[65] MacIntosh, *supra* note 63 at 150.
[66] *Ibid.*

consensus on the precise degree and manner in which such activism should be exercised.[67]

Institutional investor activism has materialized into several different methods, including the institutional investor's request for board representation.[68] It has been contended that certain institutional investors do not favour this latter method of activism in view of the potential conflict of interest faced by the nominee director as well as other factors such as the onerous and time-consuming commitment, legislative constraints and liability that are linked with the position of a board director.[69] Furthermore, often times, the nominee director of the institutional investor may not possess sufficient industry knowledge as well as the necessary expertise to sit on the board.[70]

However, notwithstanding the foregoing aversions, for many institutional investors, board representation has become routine, particularly in circumstances where they have invested substantial funds.[71] Furthermore, it has been put forth that nominee directors appointed by financial institutions could in fact contribute to enhanced corporate governance in view of such directors' expert knowledge of the financial system.[72]

In light of the foregoing, the rise of institutional investors in many jurisdictions world-wide and particularly in Canada has resulted in increased institutional investor activism. Given that requesting board representation is a form of such activism, one can infer that this also contributes to an increase in nominee directors. Despite the positive role that a nominee director of an institutional investor may play, the risk of conflict is high. In fact, it is difficult to ignore the conflict of interest faced by nominees of institutional investors,

---

[67] Jennifer Hill, *Institutional Investors and Corporate Governance in Australia* (Legal Studies Research Paper No. 08/37) (Sydney: Sydney Law School, 2008).

[68] Kathryn E. Montgomery "Market Shift – The role of Institutional Investors in Corporate Governance" (1996) 26 Can. Bus. L.J. 189 at 195.

[69] *Ibid.*

[70] *Ibid*. Although according to Rousseau & Gauthier, *supra* note 36 at 8, at least one study appears to conclude that in Canada, officers of institutional investors who are appointed as nominee directors make a valuable contribution to the company they have been appointed to govern. See also John Erickson, Yan W. Park & Hyun-Han Shin "Board composition and firm value under concentrated ownership: the Canadian evidence" (2005) 13 Pacific-Basin Finance Journal 387 at 401.

[71] Rousseau & Gauthier, *supra* note 36 at 3.

[72] Nachane, Ghosh & Ray, *supra* note 10 at 1217. See also Randall S. Kroszner & Philip E. Strahan "Bankers on boards: monitoring conflicts of interests and lender liability" (2001) 62 Journal of Financial Economics 415.

particularly in circumstances where the nominee is already director or officer of the institutional investor, as may be the case.[73]

2.1.3 Corporate structural patterns

Another imperative characteristic of the Canadian corporate landscape and also the result of corporate concentration[74] is the prevailing corporate structural pattern, namely the corporate or business groups, also referred to as the *group enterprise*.[75] Corporate groups differ significantly from the classic model of the corporation as a single independent entity. Rather, a corporate group is often comprised of a network of intertwined companies; related by common ownership and control, often in the hands of a parent or holding company that sits at the summit of the corporate pyramid.[76] Moreover, corporate groups in Canada generally differ from those in the U.S. or the U.K.[77] In these latter jurisdictions, the corporate group shall likely consist of a single listed firm with several wholly-owned subsidiaries.[78] However, this is not the case in Canada where a corporate group is usually comprised of numerous separately listed firms, often controlled indirectly, by a sole shareholder, usually a family.[79] Hence, as Blumberg notes "*in the modern economy, business of large or moderate size, is typically conducted not by a single corporation but by a group of affiliated companies under the "control" of a parent corporation*".[80] This structure often creates a "pyramid-like" configuration, a situation that is also illustrative in Australia, even among smaller privately-held entities.[81] Smaller

---

[73] Rousseau & Gauthier, *supra* note 36 at 5.
[74] Neil C. Sargent, "Corporate Groups and the Corporate Veil in Canada: A Penetrating Look at Parent-Subsidiary Relations in the Modern Corporate Enterprise" (1988) 17 Man. L.J. 156 at 160 [Sargent].
[75] Morck & Yeung, s*upra* note 46 at 299.
[75] *Ibid*.
[76] Sargent, s*upra* note 74 at 158.
[77] The corporate group structure is also apparent in these jurisdictions, particularly in the U.K, see e.g. Daniel D. Prentice "Some Aspects of the Law relating to Corporate Groups in the United Kingdom" (1998) 13 Conn. J. Int'l L. 205 at 314 (HEIN) [Prentice]; Julian Franks, Colin Mayer & Stefano Rossi, "Spending less time with the family – The decline of family ownership in the United Kingdom" in Randall Morck, ed., *A History of Corporate Governance Around the World*, by the National Bureau of Economic Research (Chicago: University of Chicago Press, 2005) 581.
[78] Morck & Yeung, *supra* note 46 at 296.
[79] *Ibid.*; Randall Morck & Bernard Yeung "Agency Problems in Large Family Business Groups" (2003) 27:4 Entrepreneurship Theory and Practice 367 at 372-375.
[80] Phillipe I. Blumberg, "The Transformation of Modern Corporations Law: The Law of Corporate Groups" (2004-2005) 37:3 Conn. L. Rev. 605 at 606 (HEIN) [Blumberg].
[81] Tom Hadden, "The Regulation of Corporate Groups in Australia" (1992) 15 U.N.S.W.L.J. 61 at 64 [Hadden]. Accordingly, Haden states: "*In some jurisdictions, of which Australia and Canada are good examples, it is more common for major groups to be structured in a more complex manner, with interlocking webs of majority and minority holdings which make it more difficult to assess accurately the profitability and solvency either of the group as a whole or of its constituent companies or to identify those who are formally responsible for their operations.*"

privately-held companies may opt for a corporate group structure for various motives, including the limitation of liability for new ventures or for tax planning purposes.[82]

The corporate group structure is particularly important in any analysis involving the conflict of interest faced by nominee directors as such conflict appears to be relatively frequent within these structures.[83] Nominee directors face distinct difficulties in the corporate group context.[84] The difficulties involving nominee directors within corporate groups stem from the fact that within these structures, it is the holding or parent company that generally harmonizes and governs the group.[85] Thus, decision-making often depends on the best interests of the group as a whole. As author Strasser notes:

> "*a parent company creates, operates and dissolves subsidiaries primarily as part of a business strategy in pursuit of the business goals of the larger enterprise, which the parent and all the subsidiaries are pursuing together*. […] *The various companies in the corporate group are really fragments that collectively conduct the integrated enterprise under the coordination of the parent*."[86]

Consequently, in view of the fact that the parent company needs to maintain control over the group, a frequently used method to ensure control is the appointment of nominees to the boards of each subsidiary.[87] However, the nominees of corporate group subsidiaries will evidently be expected to govern each of the companies with a view to promoting the interests of the parent, or the corporate group as a whole, particularly in circumstances where the group operates as a single entity.[88]

When there is no conflict between the interests of all the entities involved, operation is often harmonious and in the best interests of each entity; however, in circumstances where there is a conflict between the interests of the parent and those of one of its

---

[82] *Ibid*.
[83] Robert Baxt & Timothy Lane "Developments in Relation to Corporate Groups and the Responsibility of Directors – Some Insights and New Directions" (1998) 16 C. & S.L.J. 628 at 629.
[84] Simon Haddy, "A Comparative Analysis of Directors' Duties in a Range of Corporate Structures" (2002) 20 Company and Securities Law Journal 138 [Haddy].
[85] Sargent, *supra* note 74 at 158.
[86] Kurt A. Strasser, "Piercing the veil in Corporate Groups" (2004-2005) 37 Conn. L. Rev. 637 at 638-639 (HEIN); *accord* Jonathan M. Landers, "A unified approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy" (1975) 42:4 U. Chicago L. Rev. 589 (HEIN).
[87] Karen Yeung, "Corporate groups: legal aspects of the management dilemma" (1997) L.M.C.L.Q. 208 at 213 [Yeung].
[88] Sargent, *supra* note 74; *accord* Hadden, *supra* note 81 at 77.

subsidiaries, the parent may instruct their nominee directors on the board of the subsidiary to act in a manner that does not coincide with the best interests of the subsidiary.[89] Conversely, where a subsidiary nears insolvency, the parent may expressly instruct the directors not to rescue the subsidiary.[90] Moreover, in circumstances where the subsidiary is partly-owned, minority shareholders and creditors may be unjustly treated. As Hadden notes, in practice, it will be arduous for minority shareholders of a subsidiary to ascertain that their interests have been disregarded in preference of the group's interest.[91]

Theoretically, the difficulty lies in that traditional legal principle, historically rooted in the case of *Solomon* v. *Solomon and Company*[92], requires that the directors of a company, regardless of whether such company is part of a group, discharge their duties in the best interests of the company that they have been appointed to govern and must not subordinate them to any other interest, including those of a parent or affiliate company.[93] However, in practice, nominee directors will be expected to follow the instructions of the appointing parent.

As such, traditional corporate law characterized by the "*individual corporation*" no longer reflects the realities of the modern day commercial entity.[94] Hence, the reoccurring question and theme of this thesis resurfaces: how to reconcile legal principles with commercial reality? These legal principles are translated into the nominee director's statutory and common law duties owed to the company he has been appointed to govern.

2.2 Overview of directors' statutory duties

In Canada, with the possible exception of Alberta[95], nominee directors do not appear to benefit from any attenuated standards with respect to their duties and obligations as

---

[89] *Scottish Co-operative Wholesale Society Ltd. v. Meyer,* (1959) A.C. 324 (QL) [*Scottish Wholesale*].
[90] Paul L. Davies, *Gower and Davies' Principles of Modern Company Law*, 7th ed. (London: Sweet and Maxwell, 2003) at 203 [Davies].
[91] Hadden, *supra* note 81 at **77**.
[92] *Solomon v. Solomon and Company,* [1897] A.C. 22.
[93] Tom Hadden, Robert E. Forbes & Ralph L. Simmonds, *Canadian Business Organizations Law* (Toronto: Butterworths, 1984) at 620 [Hadden *et al*.].
[94] Blumberg, *supra* note 80 at 605.
[95] *Business Corporations Act*, R.S.A. 2000, c. B-9, subsection 122(4) [Alberta Act].

company directors[96] and like any other director, must govern with a view to the best interests of the company as a whole.[97] As such, nominees are subject to the same duties and obligations required and expected of all company directors.

Directors' duties and obligations may be grouped into two general categories: (1) duties of care and skill; and (2) duties of loyalty and good faith.[98] While these responsibilities find their early roots in case law, they have now been translated into most corporate statutes. At the federal level, directors' duties have been laid down by way of Section 122(1) of the CBCA[99]:

> ***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.*

These duties are also reflected in provincial legislation across Canada. By way of example, a similar provision exists under Section 134(1) of the Ontario *Business Corporations Act*[100], or, in Québec, under Articles 321, 322 and 2138 of the *Civil Code of Québec* ("***C.C.Q.***").[101]

While the duty of care and skill obliges directors to attend board meetings, maintain an active stance in the affairs of the company, remain adequately informed and up-to-date on company affairs and fulfill their role as supervisors of the company,[102] it is the second group of duties that poses a particular problem to nominee directors. The second group of duties is associated with the director's position as a fiduciary of the company. Common law doctrinal commentary and case law has traditionally translated the

---

[96] Paskell-Mede, *Directors' Liability*, *supra* note 40 at 83.
[97] Kevin Patrick McGuinness, *Canadian Business Corporations Law*, 2nd ed. (Markham: LexisNexis Canada, 2007) at para. 11.135 [McGuinness].
[98] Paul Martel, *Business Corporations in Canada: Legal and Practical Aspects*, vol. 2 (Toronto: Thomson Carswell, 2007) at 23-2 [Martel, *Legal and Practical Aspects*].
[99] CBCA, *supra* note 25.
[100] *Business Corporation Act*, R.S.O. 1990, c. B.16 [Ontario Act].
[101] *Civil Code of Québec,* S.Q. 1991, c. 64 [*C.C.Q.*].
[102] Martel, *supra* note 98 at 23-6ff; McGuiness, supra note 97 at para. 11.10ff.

fiduciary duties into the director's obligation to: (1) act *bona fide* in the company's best interests; (2) not to fetter his discretion; (3) exercise his powers for proper purposes; and (4) avoid conflicts of interest.[103]

2.2.1 Duty to act in the *bona fide* best interests of the company and to exercise their powers for a proper purpose

The duty to act in the *bona fide* best interests of the company is unquestionably the most relevant with respect to nominee directors. This duty has long stood as a cardinal rule overshadowing the conduct of all corporate directors. In the 1854 House of Lords decision of *Aberdeen Rail Co*. v. *Blaikie Brothers,*[104] Lord Cranworth, in determining whether the director's conduct was in breach, reiterated this imperative duty to act, "*as best to promote the interests of the corporation whose affairs they are conducting*." However, the question arises as to what exactly constitutes the "best interest of the corporation"? As one author notes, the "best interests of the corporation" is not self-defining, and thus the phrase could either be equated with the best interests of a corporation's shareholders, or interpreted so as to include both shareholders as well as other corporate stakeholders.[105] Thus, the phrase encompasses a spectrum of possibilities:

> *"At one end of the spectrum is the most common account provided by law and economics scholars and other adopting a principal-agent model, where directors' sole duty is to maximize the wealth of the shareholders, who are the owners of the corporation. […] At the other end of the spectrum, less popular rival progressive accounts suggest that directors should owe duties to all the corporation's stakeholders."*[106]

From a Canadian perspective, it appears that the best interests of the company were traditionally equated with the collective body of shareholders.[107] While such a position appears to originate in late 19th to mid-20th century decisions rendered by the English

---

[103] Julie Cassidy, *Concise Corporations Law*, 5th ed. (Annandale: Federation Press, 2006) at Chapter 10 – Directors' Duties.
[104] *Aberdeen Rail Co. v. Blaikie Brothers,* (1843-1860) All E.R. Rep. 249 (QL).
[105] Eric W. Orts, "Beyond shareholders: Interpreting corporation constituency statutes." (1992) 61 Geo. Wash. L. Rev. 14 at 90 (HEIN).
[106] Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006) 44 Alta. L. Rev. 299 at para. 5 (QL) [Ben-Ishai].
[107] J. Anthony Vanduzer, *The Law of Partnerships and Corporations* (Toronto: Irwin Law, 2003) at 271-272.

Chancery division,[108] certain, although somewhat vague authority may also be evidenced in century-old Canadian decisions.[109]

Despite this contention, authority in English and Australian case law appears to support the theory that, in certain circumstances, notably in the context of insolvency, creditor interests must also be considered by directors when acting in the best interests of the company.[110] This consideration arguable challenges the traditional viewpoint that the best interests of the corporation are to be exclusively equated with those of the shareholders. A further evolution away from this shareholder primacy rule, has taken place in the U.S. in the form of legislative enactment. Particularly, many states in the U.S. have adopted legislation, commonly referred to as "constituency statutes" so as to allow directors to consider the interests of other corporate stakeholders.[111]

Although there has been no similar legislative enactment in Canada, a growing trend of case law appeared to reject the shareholder primacy theory. This cumulated with the 2004 Supreme Court of Canada decision in *Peoples Department Stores Inc. v. Wise*.[112] In this decision, the court appeared to reject the traditional theory and invited directors to factor in the interests of various stakeholders. However, in *Peoples v. Wise,* the Supreme Court did not provide any further guidance on how directors may, in practice, govern the corporation.[113]

More recently, the Supreme Court of Canada was given the opportunity to clarify their stance in connection with directors' duties in a litigation involving BCE Inc.[114] In brief,

---

[108] *Hutton v. West Cork Railway Company*, 2 (1883) 23 Ch. D. 654 at 662-669; *Greenhalgh v. Arderne Cinemas Ltd. and Others*, (1950) 2 E.R. 1120 at 1126; *Parke v. The Daily News Ltd. and Others*, (1962) Ch. D. 926 at 947-948. In the latter decision, it was held that although the consideration of employees seemed noble, no authority supported this premise, and thus the primary consideration for the directors was to remain the shareholders.

[109] *Martin v. Gibbons*, (1907) 15 O.L.R. 623.

[110] Austin *et al.*, *Company Directors*, *supra* note 34 at para. 7.10; Davies, *supra* note 90 at 372. This position must be distinguished with that in Canada where it appears that directors' fiduciary duties are not generally altered in the context of insolvency, see e.g. Paul Martel, "Harmonization of the Canada Business Corporations Act with Québec Civil Law - Revision Proposal: The Duties of Loyalty of Directors of Federal Business Corporations: Impact of the Civil Code of Québec" (2008) 42 R.J.T. 147 at para. 66 (QL) [Martel, "Harmonization"].

[111] Lynda J. Oswald, "Shareholders v. Stakeholders: Evaluating corporate constituency statues under the takings clause" (1998) 24 J. Corp. L. 1 at 1-2 (WEST).

[112] *Peoples Department Stores Inc. v. Wise*, [2004] 3 S.C.R. 461 [*Peoples v. Wise*]; Ben-Ishai, *supra* note 106 at para. 5.

[113] Ian B. Lee, "Peoples Department Stores v. Wise and the "Best Interests of the Corporation" (2005) 45 Can. Bus. L.J. 212 at 213.

[114] *BCE 1976, supra* note 18.

BCE Inc., a public corporation held by 600,000 shareholders was involved in a dispute with the debenture holders of debentures issued by its subsidiary, Bell Canada, under three separate trust indentures. In 2007, BCE entered into an agreement with Teachers' Group. The agreement was subsequently approved by BCE's shareholders and the transaction was scheduled to close in 2008. However, under Section 192 of the CBCA, the transaction was subject to the approval of the Superior Court of Québec. Upon filing a motion for approval of the agreement, certain debenture holders contested the motion, claiming that the agreement significantly hindered their interests. Concurrently, the debenture holders filed motions claiming oppression remedies under Section 241 of the CBCA as well as a declaration that would allow the trustees of the trust indentures a right of approval in connection with the transaction. At the Superior Court level, the debenture holders' contestation was dismissed and the transaction was approved. However, the Superior Court judgement was subsequently appealed.

At the appeal level, the Court of Appeal reversed the Superior Court's decision on the grounds that BCE had not shown that the transaction was fair and reasonable in light of the circumstances. On the issue of directors' duties, the Québec Court of Appeal cited the Supreme Court's decision in *Peoples v. Wise* and supported the premise that in acting in the best interests of the company, directors were not permitted to favour the interests of any one group of stakeholders but rather, they must act in the interests of the company as a whole.[115]

The Québec Court of Appeal judgement appeared to be in synch with the bulk of the legal literature derived from the *Peoples v. Wise* decision, namely that in conducting themselves with a view to the corporations' best interests, directors could no longer govern in the best interest of the shareholders.[116] However, on appeal to the Supreme Court of Canada, the latter reversed the Court of Appeal decision and reaffirmed the Superior Court's decision approving the transaction between BCE and the Teachers' Group.

---

[115] *BCE inc. (Arrangement relatif à)*, 2008 QCCA 953 at para. 66 (CANLII).

[116] *Peoples v. Wise, supra* note 112; see e.g. Darcy L. Macpherson, "The Supreme Court Restates Directors' Fiduciary Duty – A comment on Peoples Department Stores v. Wise" (2005) 43 Alta. L. Rev. 383 (QL); Wayne D. Gray, "A

Despite approving the transaction, the Supreme Court of Canada reiterated and endorsed its position in *Peoples v. Wise*, namely that the directors of a corporation owe their primary allegiance to the corporation and not to the shareholders, or any one particular stakeholder.[117] Although the Supreme Court again appeared to reject the shareholder primacy rule in favour of the fair and equitable treatment of all corporate stakeholders, it did note that the fiduciary duty is a broad and contextual concept that can vary depending on the circumstances. Moreover, perhaps in justification of its decision to allow the transaction to proceed, the court indicated that although a board may consider the impact of its corporate decision-making on a particular group of stakeholders, such consideration is not in fact mandatory.[118]

The Supreme Court also indicated that the business judgement rule and the reasonability of a corporate decision were primordial in determining whether a court should intervene. As such, so long as the decision lies within the "*range of reasonable choices*" the decision should not be challenged or overturned by the judiciary.[119]

In view of the foregoing, attempting to define what constitutes the "best interests of the company" and in whose interests should a director govern, remains an arduous task. However, despite the uncertainties in relation to the identification of what constitutes these interests, one may nevertheless conclude that the latter may not be equated with a particular sectional interest.[120] Although the *BCE 1976* decision indicates that corporate decisions of directors should be attributed a high level of deference, directors may never give preference to one individual or controlling shareholder, nor may they simply act so as to please any one particular shareholder or even a non-shareholder constituency such as a major institutional investor. Thus, in circumstances where a nominee director governs with a view to the best interests of his appointer, he is inherently in breach of his fiduciary duty to act in the best interests of the company, regardless of the underlying uncertainty as to whom this duty is owed. As put forth by Justice Thomas:

---

solicitor's perspective on Peoples v. Wise" (2005) 41 Can. Bus. L.J. 184 at 189; Mohamed F. Khimji, "Peoples v. Wise – Conflating Directors' Duties, Oppression, and Stakeholder Protection" (2006) 39 U.B.C.L. Rev. 209 (QL).

[117] *BCE 1976, supra* note 18 at para. 37.

[118] *BCE 1976, supra* note 18 at para. 39.

[119] *BCE 1976, supra* note 18 at para. 40.

> *"[The nominee directors'] ability to carry out their duties as a director in good faith, and in the interests of the company as a whole, is at once compromised by their divided loyalty. Indeed, it is largely undermined if, as I suggest, their ultimate allegiance is in fact reserved for their appointers."*[121]

It has also been put forth that the duty to act in the best interests of the company, as traditionally defined, may be the very motive for the appointment of nominee directors.[122] By way of example, in circumstances where the best interests of the company are equated with the best interests of shareholders generally, a non-shareholder constituency such as an institutional investor shall have every motive to appoint a director. Hence, in absence of protection rooted in the fiduciary duty, what better way to ensure the protection of ones' interest in a corporation?[123] On the other hand, this may also be the motive for majority shareholders to appoint nominees; in absence of benefiting exclusively from the fiduciary duty, a majority shareholder may opt for additional protection.[124]

The duty to exercise power for a proper purpose is also intrinsically linked to the duty to act in the best interests of the company. This duty requires that company directors exercise their powers exclusively for the particular purpose for which such powers were granted. Should a director exercise his powers for any other purpose, then he is guilty of an abuse of power and risks liability.[125] There is debate as to whether the proper purpose rule still exists in Canada.[126] Author Hansell notes that the Dickerson report's recommendation to codify the fiduciary duty served to permanently abolish the proper purpose rule in Canada.[127] Other doctrinal commentators also agree, noting that in Canada, the fiduciary duty approach (to act in the best interests of the corporation) has

---

[120] Ronald Davis, *Directors' Liability in Canada* (North Vancouver: Special Technical Publishers, 2006) at 1-5; see also *Re Palmer and Carling O'Keefe Breweries of Canada Ltd. et al.*, (1989) 67 O.R. (2d) 161.
[121] Justice E.W. Thomas, "The role of nominee directors and the liability of their appointers" in Ian Ramsay, ed., *Corporate Governance and the Duties of Company Directors,* Centre for Corporate Law and Securities Regulation (Melbourne : Faculty of Law of the University of Melbourne, 1997) 148 at 151 [Thomas].
[122] Jamie Darams, *Behind the Board: The Theoretical and Practical Concerns for the Nominee Director in Australia*, (Thesis, University of Adelaide, 1999) [unpublished] at 27 [Darams].
[123] *Ibid*.
[124] *Ibid*.
[125] Carol Hansell, *Directors and Officers in Canada: Law and Practice*, vol. 2 (Toronto: Carswell, 2009) at 9-28.3 [Hansell, *Directors and Officers*].
[126] *Ibid*. at 9-28.4.
[127] *Ibid*.

replaced the proper purpose doctrine.[128] Nonetheless, it appears that in certain cases, Canadian judges continue to apply the proper purpose rule.[129] The proper purpose rule evidently also poses a problem for the nominee director in the same manner as the duty to act in the best interests of the corporation. A nominee director who acts in the interest of his appointer cannot be acting exclusively for the purpose for which his powers were granted as a company director, even in circumstances where his appointer's interests coincide with those of the company. As such, nominee directors appear to be in constant conflict with the proper purpose rule when they conduct themselves in accordance with the interests of their appointer.

2.2.2 Duty not to fetter their discretion

This duty requires that directors exercise an active discretion and never agree, or contract, to exercise their future discretion in a certain way[130]: "*a director in exercising the duties of a director is a trustee for the company, and must go to a directors' meeting with a free mind and unbound.*"[131] The duty not to fetter discretion was reiterated in Lord Denning's dissenting opinion in *Boulting and Another v. Association of Cinematograph, Television and Allied Technicians* as follows:

> *"It seems to me that no one, who has duties of a fiduciary nature to discharge, can be allowed to enter into an engagement by which he binds himself to disregard those duties or to act inconsistently with them. No stipulation is lawful by which he agrees to carry out his duties in accordance with the instructions of another rather than on his own conscious judgment, or by which he agrees to subordinate the interests of those whom he must protect to the interests of someone else."*[132]

Notwithstanding that the foregoing constituted a dissenting opinion; Lord Denning appeared to assert that the very notion of the duty not to fetter one's discretion was incompatible with nominee directorship. Thus, it would constitute a breach of the duty not to fetter his discretion in circumstances where the nominee contracts, whether

---

[128] Martel, "Harmonization", *supra* note 110 at para. 68.
[129] Hansell, *Directors and Officers*, *supra* note 125 at 9-29.
[130] Davies, *supra* note 90 at 390.
[131] *Clark v. Workman*, (1920) 1. I.R. 107 at 109.

formally or informally, with an outsider, namely his appointer, to continuously vote or govern in accordance with his appointer's wishes, or to consistently prefer his appointer's interests to those of the corporation.[133]

It is important to note that despite the director's duty not to fetter his discretion, it is nonetheless frequent commercial practice that company directors enter into agreements in which they undertake to exercise their future discretion in accordance with such agreement.[134] By way of example, shareholder and joint venture agreements often comprise such provisions, and these agreements are not necessarily contrary to public order.[135]

It has been contended that a director's duty not to fetter his discretion must be nuanced with the proposition that directors may exercise their future powers in accordance with an agreement, provided that, in so doing, they are acting in the best interests of the company as a whole.[136] However, shareholder and joint venture agreements aside, the relationship between a nominee director and his appointer is generally not documented and thus the boundaries of their arrangement are often incalculable. Limitations aside, the nominee director's relationship with his appointer is generally governed by the primary duty of loyalty to the appointer that constitutes in and of itself an impediment to the nominee director's discretion.[137]

Thus, in view of the duty not to fetter his discretion, one may query the extent to which a nominee may formally undertake to exercise his future discretion harmoniously with the wishes of his appointer, even if the latter's wishes coincide with the best interests of the company.

---

[132] *Boulting and Another v. Association of Cinematograph, Television and Allied Technicians*, (1963) 2 Q.B. 606 (QL) [*Boulting*].
[133] Elizabeth Boros "The Duties of Nominee and Multiple Directors: Part I" (1989) 10:11 Company Lawyer 211 at 212 (HEIN) [Boros].
[134] Andrew Keay, "The Duty of Directors to Exercise Independent Judgment" (2008) 29:10 Company Lawyer 290 at 293 (HEIN).
[135] *Ringuet v. Bergeron*, [1960] S.C.R. 672 (QL).
[136] Thomas B. Courtney, "Fettering Director's Discretion" (1995) 16:8 Company Lawyer 227 at 234 (HEIN); Raymonde Crête & Stéphane Rousseau, *Droit des Sociétés par Actions,* 2nd ed. (Montréal : Thémis, 2008) at 418 [Crête & Rousseau]; Davies, *supra* note 90 at 390. See also *Thorby v. Goldberg*, (1964) 122 C.L.R. 597 at 605-606; *Fulham Football Club Ltd. & Ors v. Cabra Estates plc*, [1992] B.C.C. 863 at 876 (WEST).
[137] Boros, *supra* note 133 at 3-4.

2.2.3 Avoidance of conflicts of interest

As part of their fiduciary duties, directors must avoid putting themselves in positions of conflict as well as potential conflicts of interest between the duties owed to the corporation and any other interest to which a director may be bound to consider.[138] As such, conflicts of interest may be grouped into two basic categories: (1) conflicts between the interests of the company and a director's personal interests; and (2) conflicts between the interests of the company and the interests of an outside party for whom the director has undertaken to act for, or on behalf of.[139] A director who has a close personal relationship with an outside party with a conflicting interest is also considered offside for the purposes of this rule.[140] Given that nominee directors are most often implicitly bound by the interests of their appointer, they are inherently in breach of the duty to avoid conflicts of interest.

2.3 Chapter summary

This second chapter endeavoured to point out specific economic characteristics that may explain the prevalence of nominee directorship, particularly in Canada. Empirical evidence illustrating a corporate culture characterized by concentrated ownership and corporate group structures was emphasized. The succeeding half of this chapter provided a synopsis of those directors' duties that make the nominee director's position particularly problematic, predominantly the duty to act in the *bona fide* best interests of the company, the duty not to fetter their discretion and the duty to avoid conflicts of interest.

The overview of these economic and legal characteristics was provided so as to exemplify the unresolved difficulty at the heart of this analysis; specifically, that the company director's imperative duties contrast with the very nature of nominee directorship. The following chapter is devoted to examining the different judicial

---

[138] McGuinness, *supra* note 97 at para. 11.135; Martel, "Harmonization" *supra* note 128 at para. 46; Article 324 *C.C.Q.*
[139] McGuinness, *ibid*. at para. 11.128; Kevin P. McGuinness, *Halsbury's Laws of Canada: Business Corporations II*, 1st ed. (Markham: LexisNexis Canada, 2008) at 775.
[140] *Exide Canada Inc. v. Hilts*, (2005) 11 B.L.R. (4th) 311 at para. 11 (CANLII).

approaches that have been developed in response to the conflict of interest faced by nominee directors.

3. JUDICIAL APPROACHES TOWARDS NOMINEE DIRECTORSHIP

Despite the inherent difficulties associated with nominee directorship, the practice of appointing them does not appear to be in-and-of itself prohibited. As noted in the introductory chapter, such practice is implicitly recognized in various company statutes, as well as in judicial authority; as Lord Denning himself once stated, "*there is nothing wrong with it. It is done everyday.*"[141] Accordingly, the courts appear to have recognized that a director may, in certain circumstances, owe potentially conflicting duties.[142]

However, the reconciliation of these duties poses a serious theoretical problem. As noted in the preceding chapter, as a fiduciary, a director must always discharge his duties in the best interests of the company and abstain from fettering his discretion, both present and future; however, it would be absurd not to recognize that the nominee shall naturally govern with his appointer's interest in mind. Does this imply that nominee directorship is purely a psychological problem? Although the psychological decision-making process of nominee directors is undoubtedly affected,[143] various decisions do in fact illustrate that the dual loyalty faced by nominee directors does on occasion give rise to serious practical difficulties.[144]

In light of the foregoing, over the past several decades, different judicial approaches have emerged with the objective of resolving the inherent conflict characteristic of the position of nominee directors. These approaches may be identified as: (1) the "*strict view*"; (2) the "*pragmatic view*"; and (3) the view based upon an examination of the company's constituent and other related documents (such as a shareholders' or a joint venture agreement) so as to determine the appropriate scope of applicable duties.[145]

---

[141] *Boulting*, *supra* note 132 at 15.
[142] See e.g. *ibid.* at 22; *Millgate Financial Corp. v. BF Realty Holdings Ltd., Canadian Broadcasting Corp. Pension Plan (Trustee of)*, (2003) 47 C.B.R. (4th) 278 (QL) (Affirmed in Appeal); *Colborne Capital Corp. v. 542775 Alberta Ltd.*, (1999) 45 B.L.R. (2d) 21 (QL) [*Colborne Capital v. 542775*]; *Brant Investments Ltd. v. KeepRite Inc.,* (1991) 3 O.R. (3d) 289 (QL); *Trimac Ltd. v. C-I-L Inc*. 1989 (1990) 1 W.W.R. 133 (QL).
[143] Austin & Ellison, *supra* note 50 at 19.
[144] However, it has been contended that the majority of cases involving conflict of interest faced by nominee directors do not actually end up before the courts: Paskell-Mede, *Directors' Liability*, *supra* note 40 at 75.
[145] Philip Crutchfield, "Nominee Directors: The Law and Commercial Reality" (1991) 12:7 Company Lawer 136 at 139 (WEST) [Crutchfield].

While the aforementioned approaches have been structured and elaborated upon by various doctrinal commentators over the years, they nonetheless find their early roots in common law case law. The following paragraphs shall explore each of these different approaches, culminating with an attempt to reconcile them.

3.1 The strict view

In essence, the strict view requires that a nominee director act solely in the best interests of the company that he has been appointed to govern.[146] As such, this approach does not permit "*hindered judgement as to the best interests of the company and dictates that the duty to the company prevails*."[147] Furthermore, according to the strict view, the nominee director may never benefit from an attenuated or divergent scope of his fiduciary duties and is not to be treated any differently from directors at large.[148]

A starting point for the examination of this approach must necessarily commence with an overview of the 1959 House of Lords decision in *Scottish Co-operative Wholesale Society Ltd. v. Meyer.*[149] This decision is often designated as classic authority for application of the strict view.[150]

In this decision, the Scottish Co-operative Wholesale Society decided to form a subsidiary company for the exclusive purposes of its textiles operations, ranging from fabrication to retail inclusively. The subsidiary was formed between the society and two of the society's employees, named Meyer and Lucas, in view of the fact that Meyer and Lucas possessed the experience and connections required to successfully run the subsidiary. Upon its incorporation, the subsidiary issued a controlling share interest to the society, while Meyer and Lucas were each attributed with a minority interest. Moreover, the subsidiary's board was comprised of 5 directors, 3 of which were nominees of the society, appointed in accordance with the subsidiary's articles, while the

---

[146] Crutchfield, *ibid*. at 3; Pearlie Koh, "The Nominee Director's Tangled Lot" (2007) Sing. J.L.S. 148 at 153, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1074763> [Koh].
[147] Susanna Ayeung, "Nominee Directors: Sui Generis or Merely a Breed of Directors" (Paper presented to the One-Day Symposium on Accountability, Governance and Performance in Transition, 20 February 2004) at 37.
[148] McGuinness, *supra* note 138 at para. 11.139.
[149] *Scottish Wholesale*, *supra* note 89; Boros, *supra* note 133 at 3; Koh, *supra* note 146 at 153.
[150] Austin & Ellison, *supra* note 50 at 24.

other two board members were Meyer and Lucas themselves. The subsidiary essentially received its supplies directly from a division of the society and was responsible for all subsequent operations, from manufacturing the materials to merchandising of the final products.

Given that the subsidiary performed quite prosperously, the society attempted to procure the shares of Meyer and Lucas. However, in absence of Meyer and Lucas's collaboration to sell back their shares, the society resolved to bring down the subsidiary, through the conduct of its nominee directors. As such, the society formed its own division to carry out the same textile operations that were otherwise performed by the subsidiary and began diverting all of its materials and supplies to its new division for manufacturing, fabrication and merchandising. Furthermore, the society refused to continue supplying the subsidiary with the necessary materials at reasonable prices. As such, Meyer and Lucas instituted legal proceedings against the society, alleging oppression under the then *1948 Companies Act*.

Both the trial division and the House of Lords, in a unanimous judgment, held that the society and its nominee directors had engaged in oppressive conduct. In his motives, Viscount Simmons attributed particular blame to the society's nominee directors, given that they were well aware of the society's plan to destroy the subsidiary yet they chose to simply remain silent and refuse to take action.[151]

Concurrent with Viscount Simmons was Lord Denning, who described the position of nominee directors as follows:

> *"What, then, is the position of the nominee directors here? […] So long as the interests of all concerned were in harmony, there was no difficulty. The nominee directors could do their duty by both companies without embarrassment. But, so soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position. […] They probably thought that "as nominees" of the co-operative society their first duty was to the co-operative society. In this they were wrong. By subordinating the interests of the textile company to those of the co-operative society, they conducted*

[151] *Scottish Wholesale*, *supra* note 89 at 13.

> *the affairs of the textile company in a manner oppressive to the other shareholders."*[152]

Lord Denning also reproached the nominee directors for their inaction, stating that in such circumstances, their passivity towards the subsidiary amounted to oppressive conduct.[153]

It has been contended that the *Scottish Co-operative* decision is illustrative of the strict view in that the House of Lords did not acknowledge, nor did it permit any attenuation of the nominee director's duty to act in the best interests of the company.[154] Furthermore, it has been submitted that Lord Denning appears to advise that in circumstances of conflict, the nominee director has no other choice but to resign, given Denning's characterization of the nominee directors' situation as "*impossible*".[155] However, subsequent to this characterization, Lord Denning deliberated upon what the nominee directors may have done differently under such circumstances. Namely, the directors could have protested against the society's decision to open up a competing division and to focus on the protection of the subsidiary, even if this resulted in their termination or forced resignation as directors.

The strict approach has been categorized as irreconcilable with commercial reality, given that it is both unrealistic and unreasonable not to acknowledge that a nominee director shall always govern with his appointer's interests at heart, whether or not his appointer's interests coincide with the best interests of the company.[156] Moreover, requiring a director to resign in every case of conflict is an impractical alternative.[157] As author Crutchfield fluently notes:

> *"It is submitted that if [the strict approach] is the law, it imposes a standard which makes the position of nominee directors impossible. It ignores the commercial reality of the appointment of nominee directors and the reality that in making their decisions, they will often*

---

[152] *Scottish Wholesale*, *supra* note 89 at 30.
[153] *Ibid*.
[154] Austin & Ellison, *supra* note 50 at 24.
[155] A.S. Sievers, "Finding the Right Balance: The 2GB Case Revisited" (1993) 3:1 Austl. J. Corp. L. 1 at 3 [Sievers].
[156] Crutchfield, *supra* note 145 at 137.
[157] *Fitzsimmons v. R.*, (1997) 23 A.C.S.R. 355 at 357.

> *have regards to the interests and act upon the wishes of their appointer."*[158]

Crutchfield also contends that such an approach demonstrates a lack of trust in the powers of the equitable doctrine and its flexibility in adapting to the particularities of each case.[159]

Perhaps the motive behind their Lordships' particularly uncompromising stance in *Scottish Co-operative* was the blatantly transparent bad faith of the society and its nominee directors. Given the particular circumstances, it could be hypothesized that the court decided to highlight the intolerability of such conduct by the justice system. As one author notes, it is not certain whether Lord Denning's comments in the *Scottish Co-operative* decision where intended to apply beyond the scope of that decision, given the particular circumstances.[160]

However, subsequent to *Scottish Co-operative*, Lord Denning appeared to restate his support for the strict view in *Boulting and Another* v. *Cinematograph, Television and Allied Technicians.*[161] Conversely, the majority judges in this latter case did not adhere to Lord Denning's view and opted for a more relaxed stance towards the nominees.[162] In fact, in the *Boulting* decision, the majority judges indicated that, notwithstanding the potential for conflict, it may actually be in the corporation's advantage to have an outside nominee on the board. As per the majority: *"Directors, trustees or solicitors may sometimes be placed in such a position that though their interest and duty conflict, they can properly and honestly give their services to both sides and serve two masters to the great advantage of both.*"[163] The court did indicate that in such circumstances, full disclosure of the potential for conflict is evidently necessary.

---

[158] Crutchfield, *supra* note 145 at 137.
[159] *Ibid.* at 138.
[160] Koh, *supra* note 146 at 154: *"While there is no denying Lord Denning's own view of the position of the nominee director, it does not appear that his Lordship intended his comments to operate beyond the narrow compass of that particular context.*"
[161] *Boulting*, *supra* note 132 at 16.
[162] *Ibid.* at 22.
[163] *Ibid.*

Although, the strict view has been characterized as being the traditionally favoured approach towards nominee directors in the U.K.,[164] there are decisions involving nominee directors in the other jurisdictions researched, namely in Australia, New Zealand and Canada that also provide support for this view.

In Australia, despite the conception of a more liberal approach,[165] the strict view has nonetheless received a certain line of judicial support.[166] Historically illustrative of such support is the case of *Bennetts v. Board of Fire Commissioner of New South Wales.*[167] In brief, the case involved the Fire Commissions, a statutory corporation with the mandate of preventing and protecting against fires. Consistent with its governing legislation, the Fire Commissions' board consisted of 5 nominee directors, each having been mandated to represent a sectional interest, such as those of the insurance companies as well as those of the permanent firemen comprised in the employee union.

Subsequent to an unfavourable decision regarding the application for an award undertaken by the employee union, the Fire Commissions' finance committee, made up of select board members, held a meeting to decide whether or not to appeal the decision concerning the award. During the meeting, the finance committee met with legal counsel to discuss the prospects of such an appeal, and then met with the whole board and made a recommendation to appeal. Mr. Bennetts, the nominee director of the permanent firemen comprised in the employee union requested to consult the legal counsel's opinion on the appeal issue. The chairman of the board agreed, on condition that Mr. Bennetts would not disclose the legal opinion to the employee union. However, Mr. Bennetts refused, and thus the board resolved to adopt the finance committee's recommendation despite the dissent of two directors including Mr. Bennetts.

---

[164] Ayeung, *supra* note 147 at 36; Keay, *supra* note 134 at 295. See also *Cobden Investments Ltd. v. RWM Langport Ltd. & Ors,* [2008] E.W.H.C. (Ch.) 2810 at para. 65 (BAILII) [*Cobden v. RWM]*: "*The ordinary rule, of course, is that a director must act in the interests of the company; he must avoid conflicts of interest and not make an unauthorized profit; indeed, the strictness of the "no conflict" and "no profit" rules are well-established in English law whatever flexibility might be seen in the Australian cases*." However, in *Hawkes v. Cuddy & Ors* (2009) E.W.C.A. Civ. 291 (Supreme Court of Judicature Court of Appeal - Civil Division) at para. 33 (BAILII) [*Hawkes v. Cuddy*], the Court of Appeal appears to have relaxed its stance towards nominee directors indicating: "[…] *an appointed director, without being in breach of his duties to the company, may take the interests of his nominator into account, provided that his decisions as a director are in what he genuinely considers to be the best interests of the company* […]"

[165] Keay, *supra* note 134 at 294.

Mr. Bennetts instituted legal proceedings requesting that the board's decision to withhold the legal opinion in connection with the recommendation to appeal and the resolution to launch an appeal be invalidated by the court. Mr. Bennetts also requested an injunction prohibiting the board from launching an appeal.

The Supreme Court of New South Wales, presided by Justice Street, was quick to reject the proceedings. The court held that the overriding duty of the board members should always be to the company in absence of any possible concessions:

> *"[The nominee director's] position as a board member is not to be used as a mere opportunity to serve the group which elected him. […] Once the group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict might arise, to serving the interests of the group which appointed him. With this basic proposition there can be no room for compromise."*[168]

In spite of the foregoing, it is important to distinguish that this case dealt with a statutory corporation mandated with a public purpose. Justice Street gave particular attention to the status of the corporation in his analysis, referring to the primary consideration of the board as "*the advancement of the public purpose for which parliament has set up the board*", as well as the obligation to serve the community.[169] Hence, one may question whether the court's conclusions would have differed had the entity in question been private. Moreover, Mr Bennetts openly admitted to the fact that he would breach his duty of confidentiality as a director by reporting back to his appointer, a fact that likely influenced the court's stance against him.[170]

In Australia, the *Bennetts* decision does not stand alone in support of this stricter stance towards the position of nominee directors. In *Harkness v. Commonwealth Bank of Australia*, another decision involving an alleged breach of duty by certain nominee directors, Justice Young of the New South Wales Supreme Court noted that "*the law as*

---

[166] Ayeung, *supra* note 147 at 37. For recent support, see e.g. *The Bell Group Ltd. (In liq.) v. Westpac Banking Corporation* (No. 9) (2008) W.A.S.C. 239 (AUSTLII) [*Bell v. Westpac*].
[167] *Bennetts v. Board of Fire Commissioner of New South Wales,* (1967) 87 W.N. (NSW) 307 [*Bennetts*].
[168] *Ibid*. at 310-311.
[169] *Ibid*.

stated in the Bennett's case *has, as far as I am aware, been universally accepted.*"[171] Support, albeit scarce, is also apparent in New Zealand authority.[172] Although the favoured theoretical approach towards nominee directors is uncertain in the Canadian context, support for a stricter approach is also perceptible.[173]

Generally, in Canada, it has been contended that the nominee director must always serve the best interest of the corporation, irrespective of his appointer's wishes.[174] In one of the first reported cases that touched on this issue, *British Columbia Power Corporation Ltd. v. Attorney-General of British Columbia et al.,* the nominee directors of a power corporation were accused of having ignored the interests of the minority shareholders in favour of the wishes of their appointing shareholder, being the Government of British Columbia.[175] The Supreme Court of British Columbia referred to the *Scottish Wholesale* decision and concluded that the nominee directors had not satisfied their duties towards the shareholders generally in having acted exclusively for their appointer.[176] However, the court did not elaborate on the position or duties of nominee directors.

A wave of reported litigation involving nominee directors subsequently arose in both Québec and Ontario in the early to mid-1990s. In Québec, one of these decision, dealt with a certain nominee director who was refused director indemnification under the CBCA in view of his conduct.[177] The Québec Court of Appeal confirmed the trial judge's decision, essentially denying indemnification on the basis that the nominee director had acted in the interests of his appointer. In so doing, the nominee director had failed to fulfill his principal duty of loyalty to the corporation and as such, was denied all indemnification benefits. Moreover, the court condemned the nominee director's conduct as improper, dishonest and contrary to the benefit of the corporation as a whole and indicated that such conduct cannot be considered to have been in good faith.

---

[170] *Ibid*. at 312.
[171] *Harkness v. Commonwealth Bank of Australia*, (1993) 12 A.C.S.R. 165 at 174 (QL). See also *Bell v. Westpac, supra* note 166.
[172] *Kuwait Asia Bank E.C. v. National Mutual Life Nominees Ltd.*, [1990] 3 N.Z.L.R. 513 (QL) [*Kuwait v. National*].
[173] Sievers, *supra* note 155 at 16.
[174] McGuinness, *supra* note 138 at para. 11.138.
[175] *British Columbia Power Corporation Ltd. v. Attorney-General of British Columbia et al.,* (1964) 47 D.L.R. (2d) 754 (QL).
[176] *Ibid*. at 15.
[177] *Balesteri v. Robert* [1992] A.Q. No 495.

In Ontario, the courts appear to have taken a more compromising stance towards nominee directors, illustrative in a trilogy of cases that emerged in the early 1990s. Often cited as Canadian authority on the duties of nominee directors is the Ontario Court of Justice's decision in *820099 Ontario Inc. v. Harold E. Ballard Ltd.*[178] In this decision, E. Ballard Limited was created by the late Harold E. Ballard as a holding corporation to hold his interests in Maple Leaf Gardens Limited, a corporation he acquired in the early 1960s. Several years later, Mr. Ballard reorganized the capital structure of E. Ballard Limited with a view to transferring his holdings to his children, while retaining voting control of the company in the form of preferred shares.

However, in the late 1980's, Mr. Ballard desired to reacquire the interests in E. Ballard Limited that were then held by his three children in the form of common shares pursuant to the reorganization of the capital structure that he had conducted years earlier. Thus, Mr. Ballard, along with two of his nominee directors, also his employees and personal friends, concocted several transactions to allow Mr. Ballard to reacquire the majority of the outstanding common shares of E. Ballard Limited from his children.

Subsequent to these transactions, one of Mr. Ballard's children, William Ballard along with 820099 Ontario Inc., both minority shareholders of E. Ballard Limited launched an application seeking an oppression remedy under Section 247 of the *Business Corporations Act.*[179] The applicants essentially complained that the affairs of E. Ballard Limited were unfairly conducted by the directors in a manner that was oppressive to their interests. The applicants also alleged that Mr. Ballard's nominee directors owed their primary allegiance to Mr. Ballard and as such, they were conducting the affairs of E. Ballard Limited in breach of their fiduciary duties.

The Ontario Court of Justice granted the application with respect to the wrongful conduct of the nominee directors. The court, presided by Justice Farley, commenced its analysis by restating the applicable legislation with respect to directors' duties, and particularly their duty not to fetter their discretion and to act in the best interests of the company for

---

[178] *820099 Ontario Inc. v. Harold E. Ballard Ltd,* (1991) 3 B.L.R. (2d) 113 (QL) (Affirmed in Appeal) [*820099 v. Ballard*].

[179] Ontario Act, *supra* note 100.

which they were elected to govern.[180] Justice Farley applied the *Scottish Co-operative* case to ultimately conclude that the actions of the nominee directors were in breach of their fiduciary duties to the company. Specifically with respect to the issue of nominee directors, Justice Farley noted that:

> *"It may well be that the corporate life of a nominee director who votes against the interest of his 'appointing' shareholder will be neither happy nor long. However, the role that any director must play (whether or not a nominee director) is that he must act in the best interests of the corporation. […] The nominee director cannot be a 'Yes man'; he must be an analytical person who can say 'Yes' or 'No' as the occasion requires (or to put it another way, as the corporation requires)."*[181]

Justice Farley did indicate that a nominee director is not prohibited from considering the individual interests of his appointing shareholder with respect to corporate decision-making; rather, it is the director's preference of the appointing shareholder's interests to those of the company that should be sanctioned. Farley advised that the cautious approach to avoid such conflict would be for directors to simply govern in the best interests of the company. Furthermore, he appeared to suggest that the following query could determine whether the director was in breach of his duties: *What was it that the nominee director had uppermost in his mind after a reasonable analysis of the situation?*[182] If the answer to this question is the appointer's interest, then it appears that the director is in breach of his fiduciary duties.

Following the Ontario Superior Court of Justice's decision in *820099 v. Ballard*, the second decision in the trilogy of Ontario case law involving the conduct of nominee directors was *Deluce Holdings Inc. v. Air Canada.*[183] In this decision, the court was again quick to disapprove of the reprehensible conduct of the nominee directors involved in the litigation who had acted exclusively in the interests of their appointer.

In this case, Air Canada and the Deluce family held an indirect interest in Air Ontario Inc. by way of a holding company. Accordingly, Air Canada held a 75% indirect interest

---

[180] *820099 v. Ballard, supra* note 178 at 33ff.
[181] *Ibid.* at 36.
[182] *Ibid*. at 44.

in Air Ontario while the Deluce family, through Deluce Holdings Inc., held the remaining 25%. Air Canada had seven nominees on Air Ontario's board of directors while Deluce Holdings Inc. had three nominees. At the onset of the deal, it was decided that a member of the Deluce family, William Deluce would occupy the duties of president and chief executive officer, and would be responsible for running Air Ontario while Air Canada would remain dissociated from the day-to-day administration. It is important to note that a unanimous shareholders' agreement granted Air Canada an option of acquiring the interest of Deluce Holdings Inc. advent the termination of employment of Mr. Deluce and his father, Stanley Deluce.

In April 1991, Air Canada decided to acquire complete control of Air Ontario. Thus, in October 1991, Air Canada representatives met with Mr. Deluce and requested that the latter resign. Mr. Deluce rejected Air Canada's request. Thus, Air Ontario's board of directors, composed by a majority of Air Canada's nominees, passed a resolution to terminate Mr. Deluce's employment. Subsequently, Deluce Holdings Inc. launched an application for an oppression remedy under Section 241 of the CBCA. The issue of whether or not Air Canada's nominee directors had acted reasonably and in compliance with their fiduciary duties was at the heart of these proceedings.

Justice Blair, of the Ontario Superior Court of Justice, asserted agreement with both the *Scottish Co-operative* and *820099 v. Ballard* decisions to conclude that the Air Canada nominee directors' conduct was oppressive. Accordingly, Blair approved of the query, as cited by Justice Farley in *820099 v. Ballard*, namely what it was the directors "*had uppermost in their minds after a reasonable analysis of the situation*".[184] Under the circumstances, Justice Blair concluded that no reasonable analysis of the situation was undertaken from the perspective of Air Ontario's best interests. Rather the Air Canada nominee directors had unjustly disregarded the interests of Deluce Holdings Inc., as a minority shareholder, and had conducted themselves purely in favour of their appointer's interest:

---

[183] *Deluce Holdings Inc. v. Air Canada*, (1992) 12 O.R. (3d) 131 (QL) [*Deluce v. Air Canada*].
[184] *Ibid*. at 16.

"[...] the evidence here strongly supports a conclusion that, in causing the [Company's] Board to terminate the employment of [William], the Air Canada nominees were acting to carry out an Air Canada agenda and made little, if any, analysis of what was in the best interests of [the Company]. Whether, had they done so, such an analysis might have yielded sufficient reason from [the Company's] perspective to carry out the termination, is not the point."[185]

Interestingly, the resolution to terminate Mr. Deluce did not appear to directly harm Air Ontario in any way; rather, it appeared to be a viable business decision, likely undertaken by Air Canada executives as a strategy to retain control. Thus, contrary to the situation in *Scottish Co-operative*, where the nominee directors were mandated to bring down the subsidiary, the intent behind the nominee directors' conduct in the *Deluce Holdings* case could be categorized as a justified business decision. However, whether or not the nominee directors' decision was ultimately in the best interests of Air Ontario, did not appear to significantly influence the court. Rather, it was the fact that the directors had not conducted a "*reasonable analysis of the situation*" from that perspective.[186]

Merely one year later, the third decision concluding this trilogy, also emerged from the Ontario Court of Justice and again involved Air Canada.[187] In this decision, Air Canada and PWA Corporation, along with a third partner, Covia Canada Partnership Corp., together formed a limited partnership, Gemini Group Limited Partnership, for the purposes of implementing and operating a new reservations system. One of the main competitors of the new reservations system was the renowned American Sabre system. Each of the three limited partners held a 33% interest in Gemini, while the general partner, a company responsible for the management of Gemini, held the remaining 1%. Furthermore, Air Canada, PWA and Covia were each allotted the right to nominate three directors to Gemini's board.

Subsequently, PWA's nominee directors started negotiating with the parent company of American Airlines Inc., with the objective of switching PWA's reservations system to the American Sabre system. The PWA nominees on the Gemini board did not disclose these

---

[185] *Ibid*. at 17.
[186] *Ibid*. at 17.

negotiations to the rest of the Gemini board and subsequently launched proceedings requesting the dissolution of the limited partnership. PWA's proceedings were denied at both the trial and appeal levels. In both instances, the courts elaborated on the issue of nominee directors.

At the trial level, the court followed both *Scottish Co-operative* and *820099 Ontario* to conclude that the PWA nominees had clearly breached their fiduciary duties owed to Gemini by entering into the confidentiality agreement with American and subsequently failing to disclose to the Gemini board the negotiations with American.[188] Furthermore, Justice Callaghan, of the Ontario Superior Court of Justice, took on a rather uncompromising approach with respect to the conflict of interest faced by the nominee directors, stating that they were placed in an "*untenable position*" leaving them with no other choice but to resign as directors.[189] Callaghan also suggested that in such circumstances, namely where an appointer instructs his nominee directors to act in a manner that is inconsistent with their fiduciary duties, the appointer should also be held liable for the wrongful conduct of his nominees. However, the issue of appointer liability was not contemplated any further.

The *PWA* decision was appealed and although the Court of Appeal ultimately confirmed the trial decision, it appeared to take on a more compromising stance, particularly with respect to the issue of the nominee directors' breach of disclosure obligations to the Gemini board.[190] In fact, at the appeal level, the court appeared to conclude that the trial judge had imposed too high a standard with respect to the fiduciary duties owed by the nominee directors to Gemini.[191] Thus, the court appeared to restrict the unlawful conduct giving rise to the breach as the specific failure to disclose "*the part of the negotiations*

---

[187] *PWA Corporation v. Gemini Group Automated Distribution Systems Inc.*, (1993) 101 D.L.R. (4th) 15. (QL) (Affirmed in Appeal: *infra* note 190) [*PWA*].
[188] *Ibid*. at 26. Justice Callaghan equally reprimanded several other tactics initiated by the PWA nominees, namely their attempt to find "*legal escape routes*" out of the partnership and failing to advise the general partner of its findings of the alleged insolvency.
[189] *Ibid.* at 41.
[190] *PWA Corporation v. Gemini Group Automated Distribution Systems Inc.,* (1993) 15 O.R. (3d) 730 (QL) [*PWA* appeal decision].
[191] *Ibid*. at paras. 141-143.

with [American] which affected the Gemini partnership in a vital aspect of its business."[192]

Although the trilogy of Ontario decisions all applied *Scottish Co-operative*; the *PWA* appeal decision appears illustrative of a more conciliatory stance. However, under all circumstances, the case law indicates that nominee directors must owe their primary allegiance to the company.

In *Wood* v. *C.F.N. Precision Inc.*, on a motion for summary judgement, the Ontario Superior Court of Justice was called upon to examine the conduct of a nominee director so as to determine whether such nominee had compromised his independence and breached his fiduciary duties in causing an employment contract with the company to be terminated.[193] While the court did not oppose the position of the nominee director, it did stress that there was a fine line between taking an appointer's advice and acting in accordance with an appointer's direction.[194] The court noted that ultimately, the nominee must always conduct himself in the *bona fide* best interest of the corporation.

Canadian cases illustrative of the strict view do not appear to attribute nominee directors with any attenuation of their fiduciary duties; nominees must govern, as every director, with the view to the best interests of the corporation under all circumstances[195] and at the very least, must always undertake a reasonable analysis of the situation from that perspective.[196]

The *Scottish Co-operative* case as applied in *820099 v. Ballard* appears to remain valid authority as regards the conduct of nominee directors in Canada.[197] By way of example, in *Tal v. Lifemark Health Inc.*, a litigation involving a corporation on the brink of insolvency and the majority shareholder's right to nominate two directors onto the board, Justice Farley requested the majority shareholder's nominees to certify that they have

---

[192] *Ibid*.
[193] *Wood v. C.F.N. Precision Inc.*, [2008] CanLII 19797 (ON S.C.) [*Wood v. C.F.N.*].
[194] *Ibid*. at para. 47.
[195] Paskell-Mede, *Directors' Liability*, *supra* note 40 at 83.
[196] *Deluce v. Air Canada, supra* note 183.
[197] See also *Levy-Russell Ltd. v. Tecmotiv Inc.*, (1994) 13 B.L.R. (2d) 1 (WEST) [*Levy-Russell*]; *Tal v. Lifemark Health Inc.,* (2002) 29 B.L.R. (3d) 157 (WEST) [*Tal v. Lifemark*].

read and have understood, and agree to govern by those guiding principles formulated in *820099 v. Ballard* and further confirm that they will not release any confidential information to anybody, including their appointer.[198] Moreover, the *Scottish Co-operative* decision was more recently referenced in the Ontario Superior Court decision of *Ellins v. Conventree Inc.,* another oppression case involving a nominee director's misconduct in a subsidiary corporation.[199]

Notwithstanding the foregoing, there has been disagreement and criticism of the strict view as formulated in *Scottish Co-operative*, particularly in Australia, where it appears that a more pragmatic approach has been embraced.[200]

3.2 The pragmatic view

The pragmatic approach to nominee directorship has its roots in two pivotal decisions rendered in the 1960s by the Supreme Court of New South Wales.[201] It has been contended that these two judgments have provided both legitimacy to the practice of nominee directorship and have allowed the attenuation of the fiduciary duties imposed on these directors.[202]

Essentially, the pragmatic view provides nominee directors with more latitude in allowing them to consider the interests of their appointers provided that such interests do not run contrary to the company's best interests.[203] The pragmatic view also permits an attenuated standard of loyalty in certain circumstances.

The first decision, illustrative of the pragmatic view, is the 1962 decision of *Levin v. Clark.*[204] The facts of this case involved a company, Argus Investments Pty Ltd., the majority shares of which were subsequently purchased by the plaintiff, Aage Levin, by virtue of a sale and mortgage agreement, executed concurrently. Prior to the sale, the

---

[198] *Tal v. Lifemark*, *ibid*.
[199] *Ellins v. Conventree Inc.,* (2007) CanLII 9331 (ON S.C.).
[200] Mark Yeo, "The Myth of Undivided Loyalty" (1990) 11:7 Company Lawer 149 at 3 (WEST) [Yeo]; Darams, *supra* note 122 at 35. However, despite an appreciation for a more pragmatic view, recent case law in Australian appears to illustrate that certain judges continue to favor the strict view, see e.g. *Bell v. Westpac, supra* note 166.
[201] Discussion Paper No. 7, *supra* note 16 at 12.
[202] Redmond, *supra* note 22 at 197.
[203] Yeung, *supra* note 87 at 216.
[204] *Levin v. Clark*, (1962) N.S.W.R. 686 [*Levin v. Clark*].

vendors appointed two directors to which they bestowed broad powers, consistent with the company's articles. Furthermore, in order to guarantee the purchase price for the shares, it was agreed upon that the nominee directors would remain on the board but would abstain from active participation in the company *unless* Levin defaulted under the mortgage agreement. As such, exclusively in the case of default, the nominee directors would be restored with their broad governing powers. The articles of the company were consequently amended so as to validate the foregoing situation.

Thus, upon execution of the sale agreement, the nominee directors announced their retirement from active participation in the company's affairs and Levin along with several other directors, were appointed to the board by various corporate resolutions.

Subsequently, Levin defaulted under the mortgage agreement and as such, the nominee directors returned to active participation as governing directors. Levin instituted legal proceedings to challenge the nominee directors from returning to active participation; he advanced several arguments including the contention that the nominee directors were acting in the sole interests of the mortgagee, rather than in the interests of the company.

The Supreme Court of New South Wales dismissed the plaintiff's action on several grounds. The court acknowledged that the nominee directors had conducted themselves in the interests of the mortgagee; yet the court nonetheless took an arguable more permissible and realistic position on the conduct of these nominees. As the presiding Justice Jacobs indicated:

> *"It is not uncommon for a director to be appointed to a board of directors in order to represent an interest outside the company – a mortgagee or other trader of a particular shareholder. It may be in the interests of the company that there be upon its board of directors one who will represent these other interests and who will be acting solely in the interests of such a third party and who may in that way be properly regarded as acting in the interests of the company as a whole. […] It does not follow, in my opinion, that by acting in the interests of the mortgagee, and solely in the interests of the mortgagee, those directors necessarily cease to act in the interests of the company. Certainly they may cease to act in the interests of the plaintiff, and admittedly the plaintiff is the registered holder of the shares, but it*

> *would be quite artificial to ignore the interests of the mortgagee in these circumstances."*[205]

Furthermore, Jacobs J. also held that the degree or standard of applicable fiduciary duties should be evaluated in each particular situation. According to Jacobs, amidst the most significant of these circumstances are the *"terms of the instrument governing the exercise by the fiduciary of his powers and duties and wishes […]"*[206] In the case at bar, the governing instruments were the sale agreement and the company's articles which were purposefully amended so as to ensure the protection of the mortgagee's rights in the event of default, expressly through the powers of the nominee directors.

In view of the foregoing, the *Levin* decision expressly allowed the nominee directors to act in the interests of their appointer. Furthermore, it was held that under the circumstances, attenuation of the nominee directors' fiduciary duties was permissible.[207]

It has been reasoned that the degree of permissibility illustrative in *Levin v. Clark* is attributable to the fact that the court indicated that a company's articles may modify the duties of nominee directors so as to allow promotion of outside interests concurrently with those of a company.[208] However, in the forthcoming second decision historically illustrative of the pragmatic view, the articles of association were silent with respect to the applicable standard of fiduciary duties of nominee directors.

In *Re Broadcasting Station 2GB Pty Ltd.*, the Supreme Court of New South Wales was again faced with a suit contending the breach of the nominee directors' fiduciary duties that resulted in the alleged oppression of the minority shareholders.[209] The facts leading up to this decision are somewhat complex and therefore a simplified overview follows.

At the onset of the relevant timeframe, Broadcasting Station 2GB Pty Ltd., a company operating a commercial broadcasting station, was composed of a shareholding distributed in the following manner: 45% was held by Broadcasting Associates Pty., a corporate

---

[205] *Ibid*. at 700.
[206] *Ibid*. at 701.
[207] Thomas, *supra* note 121 at 151.
[208] Discussion Paper No. 7, *supra* note 16 at para. 206.
[209] *Re Broadcasting Station 2GB Pty Ltd.,* (1964-65) N.S.W.R. 1648 [*Broadcasting Station*].

shareholder of Broadcasting Station that was ultimately controlled by English interests, 14% was attributed to John Fairfax and Sons Pty Ltd., another corporate shareholder and subsidiary of John Fairfax Ltd., and the remaining shares were held amongst various minority shareholders. Furthermore, Broadcasting Station's articles contained a provision under which the Fairfax group was permitted to appoint a director on the board. Additionally, evidence at trial demonstrated that the board was also composed of four nominees representing the English interests and one other nominee representing the interests of the minority shareholders. The ninth member of the board, and also managing director did not represent any particular interests.

In 1958, the English interests sold their indirectly controlled shares to A.T.V. (Australia) Pty Ltd., a wholly owned subsidiary of Associated Television of England. The nominees of the English interests continued on as directors of Broadcasting Station and regarded themselves as now being the nominee directors of A.T.V. However, several years later, in 1964, the Fairfax group proceeded with a series of acquisitions that included the purchase of Associated Television of England's interests, including the 45% shares held by its subsidiary A.T.V. in Broadcasting Station. This resulted in the Fairfax group acquiring a 60% majority share interest in Broadcasting Station.

Accordingly, the Fairfax group requested the resignation of all directors of A.T.V., including the resignation of A.T.V.'s nominee directors, formerly the representatives of the English interests. However, two of the four nominees refused to resign declaring that they no longer represented a particular shareholder but rather that they were equally responsible representatives of all shareholders.[210] In view of their refusal, the Fairfax group concocted a procedure pursuant to which additional directors, also representatives of the Fairfax group, would be appointed to the board. Furthermore, a series of supplementary resolutions were adopted, in spite of the opposition by two of the A.T.V. nominees who had refused to resign. As well, a request by the A.T.V. nominees and the director representing the interests of the minority shareholders, for the disclosure of certain corporate information, was met with a swift rejection by the majority of the board.

---

[210] *Ibid*. at 1654-1656.

As such, one of the nominee directors instituted legal proceedings alleging that the affairs of Broadcasting Station were being unfairly conducted by the Fairfax group nominee directors in the sole interests of the Fairfax group without any regard to the interests of Broadcasting Station as a whole, and in a manner that was oppressive to the minority shareholders including the A.T.V. nominees who were shareholders themselves.

The New South Wales Supreme Court, again presided by Justice Jacobs, reiterated the director's duty to govern in the best interests of the company, ordinarily identified with the interests of the majority shareholders given that *"the system of election of directors is intended to achieve this result of majority rule."*[211] The court held that the nominees of the Fairfax group had not conducted themselves in a reprehensible manner given that there was no evidence that the directors had acted inconsistently with the best interests of the company:

> *"It may well be, and I am inclined to regard it as the fact, that the newly appointed directors were prepared to accept the position that would follow the wishes of the Fairfax interests without a close personal analysis of the issues […] but I see no evidence of a lack in them of a bona fide belief that the interests [of the Fairfax Groups] were identical with the interests of the company as a whole. I realize, that upon this approach, I deny any right in the company as a whole to have each director approach each company problem with a completely open mind, but I think that to require this of each director of a company is to ignore the realities of company organization. Also, such requirement would, in effect, make the position of the nominee or representative director an impossibility."*[212]

Jacobs also noted that the attention should be shifted towards the Fairfax group rather than their nominees, given that it was the Fairfax group who was ultimately determining the fate of Broadcasting Station.[213] This appears to suggest that even if the nominees had conducted themselves wrongfully, it should be the appointers that are held liable. However, Jacobs ruled that there was no evidence of oppressive conduct on the part of the appointers.

---

[211] *Ibid*. at 1662.
[212] *Ibid*. at 1663.
[213] *Ibid*. at 1664.

Broadcasting Station should be distinguished from *Levin v. Clark;* in the former case, the corporation did not contain articles that provided any guidelines with respect to the manner in which the nominees were to conduct themselves, nor did they provide for an attenuation of the nominee director's fiduciary duties. According to the pragmatic view as applied in *Broadcasting Station*, the conduct of nominee directors will not be sanctioned so long as they have a *bona fide* belief that their conduct, generally in accordance with the wishes of their appointers, is not contrary to the best interests of the company.[214] As per Justice Thomas, on the basis of *Levin* and *Broadcasting Station*, "*nominee directors need not necessarily approach company problems with an open mind and may pursue their appointers' interests provided that, in the event of a conflict, they prefer the interests of the company of which they are a director.*"[215]

It is important to note that in the *Broadcasting Station* case, the court indicated that the best interests of the company were to be equated with the interests of the majority shareholders. However, this premise has been rejected in Canada.[216] As such, it is questionable whether the pragmatic view in its most liberal formulation could ever be applicable in the Canadian context.

Nonetheless, Justice Jacobs view in *Broadcasting Station* was cited with approval in several successive Australian cases.[217] By way of example, in *Re Application of the News Corp. Ltd.*, the court indicated that to require a nominee director to approach each problem with a completely open mind was impossible and that it was acceptable to expect that such directors govern in the interests of their appointers provided that such is not contrary to the interests of the company as a whole.[218]

In *Morgan v. 45 Fleurs Avenue Pty Ltd.*[219], it was alleged that a nominee director was acting exclusively in the interests of his appointer when exercising his voting power as

---

[214] Crutchfield, *supra* note 145 at 138.
[215] Thomas, *supra* note 121 at 152.
[216] See Section 2.2.1. above.
[217] See e.g. *Re Application of The News Corp. Ltd.,* (1987) 70 A.L.R. 419 at 248-249 (WEST) [*The News Corp.*]; *Morgan v. 45 Fleurs Avenue Pty Ltd.* (1986) A.C.L.R. 692 at 705 (QL) [*Morgan v. 45 Fleurs*].
[218] *The News Corp.*, *ibid*. at 245.
[219] *Morgan v. 45 Fleurs*, *supra* note 217 at 705.

the director of the company he was nominated to govern. The Supreme Court of New South Wales, this time presided by Justice Young, did not agree and indicated that:

> "*A person who is what might be called a nominee director, may legitimately exercise his votes on a board in the interests of the person who appointed him without being in breach of a fiduciary duty to the company on whose board he sits.*"[220]

Moreover, in *Molomby* v. *Whitehead*, it was held that unless a director was clearly in a situation of conflict; such director should be treated as any other and should not be denied access to corporate information.[221]

The pragmatic view has also received judicial support in New Zealand, where doctrinal commentators and judges have embraced its reconciliation with commercial reality.[222] The leading decision of *Berlei Hestia (NZ) Ltd. v. Fernyhough* is illustrative of New Zealand support for the pragmatic view.[223] The *Berlei Hestia* case involved a series of takeovers and mergers, culminating with an Australian company, Berlei Hestia, obtaining a 40% share interest in a New Zealand company, Bendon Berlie. Accordingly, Bendon Berlie's articles of association allowed for Berlei Hestia to nominate three of the six directors on Bendon Berlie's board, while the remaining three directors were to be nominated by the New Zealand shareholders of Bendon Berlie. However, a dispute arose from Bendon Berlie's competition with Berlei Hestia's business in Australia, leading to the breakdown of relations between the parties including between the nominee directors representing each side. Namely, it was alleged by Berlei Hestia that the New Zealand shareholders' nominee directors had taken control of Bendon Berlie's affairs to the exclusion of Berlei Hestia's nominee directors. It was also alleged that the New Zealand shareholders' nominees were refusing Berlei Hestia's nominees access to Bendon Berlie's premises and to corporate information that should ordinarily be accessible to all directors.

---

[220] *Ibid*.
[221] *Molomby v. Whitehead and Australian Broadcasting Corporation,* (1985) 8 A.L.D. 341 (F.C.A.) (QL) [*Molomby v. Whitehead*].
[222] *Trounce and Wakefield v. NCF Kaiopoi Ltd.,* (1986) 2 N.Z.C.L.C. 422 at 422 (N.Z.H.C.) [*Trounce v. NCF*]; *Berlei Hestia (NZ) Ltd. v. Fernyhough,* (1980) 2 N.Z.L.R. 150 (QL) [*Berlei Hestia*]; *Dairy Containers Ltd. v. NZI Bank Ltd Dairy Containers Ltd. V. Auditor-General,* (1995) 2 N.Z.L.R. 30 (AUSTLII) [*Dairy Containers v. NZI Bank*].
[223] *Berlei Hestia*, *ibid*.

As such, Berlei Hestia applied for an interlocutory injunction against the New Zealand shareholder nominees to invalidate the approval of certain accounting statements given that they were approved without the consent of Berlei Hestia's nominees. Berlei Hestia also requested a court order forcing the New Zealand shareholders' nominees to allow Berlei Hestia's nominees access to board meetings, company records and other corporate information. The New Zealand shareholders' nominees argued that their conduct was justified given Berlei Hestia's competition with Bendon Berlie.[224]

Justice Mahon ultimately sided with Berlei Hestia, noting that irrespective of the fact that the directors were nominees of Berlei Hestia, they nonetheless had responsibilities to the whole body of shareholders and as such, their exclusion from governance was unjustified. Furthermore, Justice Mahon's support of Justice Jacob's pragmatic view was particularly evident in this decision where he made the following propositions in connection with the pragmatic view:

> *" […] there have been attempts to bring this theoretical doctrine of undivided responsibility into harmony with commercial reality, upon the basis that when articles [of association] are agreed upon whereby a specified shareholder or group of shareholders is empowered to nominate its own directors, then there may be grounds for saying that in addition to the responsibility which such directors have to all shareholders as represented by the corporate entity, they may have a special responsibility towards those who nominated them."*[225]

Mahon indicated that according to the pragmatic view, construing a company's articles so as to permit a director to attribute special consideration to one particular stakeholder could be conducive to the interests of the company as a whole.[226]

While the majority of Canadian case law involving the conflict of interest faced by nominee directors evidences adherence to a less comprising view, at least one author has

---

[224] The New Zealand nominees relied on *Conway et al. v. Petronius Clothing Co. Ltd.*, [1978] 1 E.R. 185 (Ch. D.) in which the court approved denial of access and denial of inspection on the same grounds as those invoked by the New Zealand nominees.
[225] *Berlei Hestia, supra* note 222 at 165.
[226] *Ibid*.

suggested that the Canadian judiciary may be moving to a more moderate stance on this issue.[227]

Interestingly, the province of Alberta also appears to provide endorsement for a more pragmatic view in the form of corporate legislation. Namely, subsection 122(4) of the Alberta *Business Corporations Act*[228] (the "**Albert Act**"), contains a unique provision that reads as follows:

> ***122 (4)*** *In determining whether a particular transaction or course of action is in the best interests of the corporation, a director, if the director is elected or appointed by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors, may give special, but not exclusive, consideration to the interests of those who elected or appointed the director.*

This seems to be the only existing legislation in Canada that explicitly recognizes the practice and position of nominee directors and allows such directors some leeway. Although somewhat vague, it appears that subsection 122(4) of the Alberta Act allows nominee directors to attribute special consideration to the interests of their appointers. Furthermore, legislative commentary leading up to the adoption of this provision seems to confirm such a position and may even suggest a possible inclination towards a modified standard of duty applicable to nominee directors:

> *"If [a nominee director] is elected, the CBCA, and probably the present Alberta law, imposes upon him the same duty to advance the company's interests as is imposed upon the other directors. It may well be argued that the director's fiduciary duty prevents him from reporting to his constituency and from taking its interests into account, so that the purpose for which he is appointed is stultified. Our inclination is to adapt a suggestion made by Professor Gower in connection with another subject and to recommend that the proposed Act provide that […] a director 'may give special but not exclusive consideration' to the interests of the special constituency."*[229]

[227] McGuinness, *supra* note 138 at 11.140, citing *Keating v. Bragg*, (1996) 158 N.S.R. (2d) 241(Affirmed in Appeal) (QL), in which the Nova Scotia Supreme Court explicitly disagreed with the premise that a conflict arose solely by virtue of a person being a nominee director and appeared to indicate that evidence must necessarily establish wrongful conduct on the part of the nominee.
[228] Alberta Act, *supra* note 95.
[229] Alberta, *Proposals for a new Alberta Business Corporations Act* (Report No. 36) (Edmonton: Alberta Institute of Law Research and Reform, 1980) at 66.

It appears that subsection 122(4) has been applied by the judiciary only in rare circumstances. One such circumstance is the decision of *Colborne Capital Corp. v. 542775 Alberta Ltd*., a case involving an appeal by a nominee director of a wholly-owned subsidiary.[230] One of the nominee director's grounds for appeal was that the trial judge had erred in holding that he owed a fiduciary duty to the parent company. Although the appeal was ultimately allowed on other grounds, on this particular point, the appeal court concluded that the trial judge had not erred and relied on the former subsection 122(4) to conclude that the nominee was in a very particular position and did in fact owe a fiduciary duty to his appointer, in this case, the parent company. However, the court did distinguish this case from *Scottish Co-operative* in that there were no minority shareholders.

Decisions that have adhered to the pragmatic view acknowledge that the appointment of nominee directors onto corporate boards is common and accepted commercial practice. However, in contrast with the strict view, the pragmatic view expressly permits nominee directors to govern in the interests of their appointers. The limitation appears to be that directors must reasonably believe that consideration or promotion of their appointers' interest is not contrary to the interests of the company.[231] However, where does one draw the line?

Author Crutchfield proposes the following standard so as to determine whether a nominee director is off-side:

> "*A nominee is entitled to have in mind the interests of his appointer, and to advance the interest of his appointer, provided that in so doing he has a reasonable belief that he is acting consistently with the interests of the company as a whole [...]*"[232]

---

[230] *Colborne Capital v. 542775, supra* note 109.
[231] Crutchfield, *supra* note 145 at 128. Thomas, *supra* note 121.
[232] Crutchfield, *supra* note 145 at 138.

Crutchfield also notes that although such standard may be criticized for inciting disregard for the company's interests, he contends that it is in line with Justice Jacobs' objective standard put forth in *Broadcasting Station.*[233]

Although many doctrinal commentators hale both the *Levin* and the *Broadcasting Station* cases for being in tune with commercial reality,[234] it is uncertain whether they are validly accepted authority. To this author's knowledge, neither of these two decisions appears to have been explicitly confirmed for the exact same motives and Justice Jacobs reasoning in *Broadcasting Station* with respect to nominee directorship has even been questioned as regards to whether it constitutes validly accepted authority.[235]

The Corporations and Market Advisory Committee has even suggested that Justice Street's view in the *Bennetts*' decision constitutes authority on the dual loyalty of nominee directors while Justice Jacob's view is merely an *obiter* opinion.[236] Others have contended that the pragmatic view does not adequately protect minority shareholders and that nominee directors should not be able to govern with their appointer's interests in mind unless the company's articles or a shareholder's resolution expressly permits such conduct.[237]

This leads to the final judicial approach to nominee directorship which is perhaps the most practically accepted approach, given the criticism of the other two approaches and the emphasis of this third approach on the intent of the parties.

3.3 Looking to the corporations' constituent documents

The third and final approach to nominee directorship essentially reposes on an examination of the corporation's articles and other related documentation, including

---

[233] *Ibid*.
[234] Yeung, *supra* note 87 at 219.
[235] *SGH Limited v. The Commissioner of Taxation of the Commonwealth of Australia*, (2002) 210 C.L.R. 51 at para. 30 (WEST); *Capricornia Credit Union Ltd. v. Australian Securities and Investment Commission*, (2007) F.C.A.F.C. 79 at para. 63 (AUSTLII).
[236] Austr., Commonwealth, Corporations and Market Advisory Committee, *The Duties and Liabilities of Nominee Directors and Alternate Directors* (Report No. 8) Chaired by Professor Harold A.J. Ford (Sydney: Companies and Securities Law Review Committee, 2 March 1989) at para. 21, online: Australian Government Takeovers Panel: <http://www.takeovers.gov.au/content/Resources/cslrc/cslrc_report_no_8.aspx> [Report No. 8, 1989].
[237] Yeung, *supra* note 87 at 219-220.

unanimous shareholders' or joint venture agreements so as to determine whether the nominee director may benefit from an attenuated standard of duty.[238] According to this view, the director's dual loyalty may be tolerated by way of an agreement, subject of course to certain restrictions in connection with the alteration of a director's duties.[239] This view essentially reposes on the premise that fiduciary obligations should not remain stagnant and may depend on a variety of characteristics such as the constitution and structure of the company or even the source of a nominee's appointment.[240] However, in such circumstances, it has been put forth that substantive evidence is required to demonstrate that a nominee director's fiduciary duty has in fact been attenuated by way of an agreement, such as an express written agreement executed by all of the shareholders.[241]

Although the *Levin* case is often associated with the pragmatic view, in this latter decision, the court also emphasized that the company's constituent documents had narrowed the applicable fiduciary duties, allowing the nominee directors to act in the interests of their appointer.[242] In this decision, the court appeared to favour the notion that directors' fiduciary duties are not to remain static, and are subject to statutory modification pursuant to the wishes and desires of the parties; as per Jacobs: "*the fiduciary duty has been narrowed, by agreement amongst the body of the shareholders.*"[243] Similarly, in the *Berlei Hestia* decision, the court also appeared to suggest the possibility that an attenuated form of fiduciary liability may be agreed upon by way of the company's articles.[244]

Utilizing the company's constituent documents or unanimous shareholders' agreement to determine the scope of a director's duties was also determinative in several other decisions.[245] By way of example, in *Whitehouse v. Carlton*[246], the High Court of

---

[238] Crutchfield, *supra* note 145 at 139.
[239] Austin *et al.*, *Company Directors*, *supra* note 34 at para. 14.34.
[240] Thomas, *supra* note 121 at 153.
[241] *Cobden v. RWM*, *supra* note 164 at para. 67.
[242] *Levin v. Clark*, *supra* note 204 at 700.
[243] *Ibid.*
[244] *Berlei Hestia*, *supra* note 222 at 165-166.
[245] *Ibid.*; *Whitehouse v. Carlton,* (1987) 70 A.L.R. 251 (QL); *Japan Abrasive Materials Pty Ltd. & Others v. Australian Fused Materials Pty Ltd.*, (1998) 16 A.C.L.C. 1 (AUSTLII) [*Japan Abrasive*].
[246] *Whitehouse v. Carlton*, *ibid*.

Australia paid particular attention to the provisions of the company's articles in analyzing whether the governing director had the right to allot shares to dilute the voting powers of the existing shareholders, so as to ensure that his sons, the appellants and shareholders, retained control over the company. There was a particular provision in the company's articles that vested the governing director, Mr. Whitehouse with extensive and exclusive powers as the sole governing director. The court dismissed the appeal, insisting on the fact that the company's articles did not allow for such an improper purpose. Of interest however, is that the majority appeared to support the proposition that the company's articles may validate an otherwise improper purpose. In the courts words:

> *"It may be assumed that the Articles of a company could be so framed that they conferred upon a governing director authority to exercise a power to allot shares for the purpose of diluting the voting power or other rights of existing shareholders. They have not been so framed in the present case. [The article in question] does not authorize the exercise by Mr. Whitehouse of that fiduciary power for what would be an impermissible and vitiating purpose if it were exercised by the directors."*[247]

Another decision that endorsed a similar approach was *Japan Abrasive Materials Pty Ltd. & Others v. Australian Fused Materials Pty Ltd.*[248] This decision involved a joint venture company in which each of the three shareholder companies were attributed with the right to appoint two directors onto the joint venture company's board. However, a dispute arose between the parties in relation to a proposed expansion. Essentially, the joint venture company could not proceed with the proposed expansion unless it received the unanimous approval of all the directors at a board meeting. Although, the nominee directors of one of the shareholders refused to approve the proposed expansion, the majority nonetheless decided to go through with the proposal. This resulted in the dissenting shareholder's institution of proceedings requesting a declaration that the proposed expansion had not received the necessary approval, as well as a permanent injunction restraining the company from implementing the expansion project. The defendant shareholders argued that the nominee directors of the plaintiff were acting

---

[247] *Ibid.* at 256.
[248] *Japan Abrasive*, *supra* note 245.

exclusively in the interests of their appointers and were therefore in breach of their fiduciary duties to act in the best interests of the company.

The Supreme Court of Western Australia, presided by Justice Templeman, ultimately ruled in favour of the plaintiff, being the dissenting shareholder. The court noted that the shareholders' agreement expressly permitted the nominee directors to vote in accordance with the wishes of their appointer. Moreover, the court held that this position was not in conflict with the directors' statutory duties.[249] As such, there was no breach of the fiduciary duty to act in the best interests of the company. Particularly of interest was the court's acceptance of the modification of the fiduciary duties by way of the shareholders' agreement. Justice Templeman, citing *Levin v. Clark* with approval, noted the following:

> *"It is always open to shareholders by unanimous agreement, to attenuate the fiduciary duties which the directors of their company would otherwise owe to it. […] I [do not] see any conflict between the right of a nominee director to vote in accordance with the wishes of the appointing joint venturer and the fiduciary obligations imposed on him or her […]"*[250]

It is however important to note that the *Japan Abrasive* case involved a joint venture company. Joint venture companies are quite particular in that their interests are more often aligned with those of their shareholders; as such it has been argued that the directors of joint venture companies benefit from a higher degree of immunity than directors of non-joint venture companies.[251]

The New Zealand *Companies Act* ("**N.Z. Act**") contains a provision that allows nominee directors of a joint venture company to act in the best interests of their appointers in circumstances where the company's constituent documents explicitly allow the directors to act in such a manner.[252] Author Crutchfield, who supports the view that an attenuation of the nominee director's duties should be permitted in circumstances where the unanimous shareholders' agreement or the company's articles specifically provide for such an attenuation, proposes that a draft provision be inserted into the articles so as to

---

[249] *Ibid*. at 9.
[250] *Ibid*.
[251] Ayeung, *supra* note 147 at 38.
[252] *Companies Act 1993* (N.Z.), 1993/105, subsection 131(4) [N.Z. Act].

shield the nominee director from a breach of his duties in circumstances where such nominee acts in the interests of his appointer.[253] Moreover, Crutchfield notes the advantages of inserting such a provision, such as, the fact that the scope of the nominee director's duties are expressly defined, providing the court with guidance in situations where a dispute arises. To the extent that the attenuation of the nominee director's duties is permitted, such attenuation should be undertaken with the necessary consent.[254] However, the permissible scope of attenuation is questionable, particularly, in view of the fact that directors must never fetter their discretion by limiting the exercise of their future discretion.[255]

Thus, despite the case law and doctrine in support of the possibility of attenuating the nominee director's duties by providing a provision to this effect in the company's articles or in other relevant agreements, there remains a risk that such attenuation may be invalidated.[256] As per Justice Warren's comments in the British Chancery Division decision of *Cobden v. RWM*:

> "*[...] the duties are capable of being attenuated with the unanimous agreement of the shareholders, although I would remark that attenuation does not mean complete abrogation. The extent to which the shareholders could effectively agree that a particular nominee director could act in a way which, he and the rest of the board, saw to be positively against the interests of the company must be open to question.*"[257]

Interestingly, subsection 173(2)(b) of the U.K. *Companies Act 2006*[258] ("**U.K. Act.**") allows a director, in exercising independent judgment, to act "*in a way authorised by the company's constitution.*" The legislative commentary leading up to the enactment of the U.K. Act indicates that the foregoing provision allows a nominee director to act in accordance with the wishes of his appointer without breaching his duty to exercise

---

[253] Crutchfield, *supra* note 145 at 140.
[254] Austin & Ellison, *supra* note 50 at 31; *Hawkes v. Cuddy*, *supra* note 164.
[255] Lee, *supra* note 38 at 460-461.
[256] Allen B. Afterman, "Directors' Duties in Joint-Ventures and Parent Subsidiary Companies" (1968) 42 Austr. L. J. 168 at 170 [*Afterman*]. In *Gravino v. Enerchem*, *supra* note 21 at para. 33ff., the Québec Court of Appeal also confirmed the principle that a director's duty of loyalty cannot be overridden by agreement.
[257] *Cobden v. RWM*, *supra* note 164 at para. 64.
[258] Companies Act 2006, c. 46. [U.K. Act]

independent judgement, provided that same is stipulated in the company's constituent documents.[259]

It has been contended that only one particular aspect of the fiduciary duty may be modified or even excluded by the company's constituent documents, being the duty to act for a proper purpose.[260] Accordingly, this duty may be excluded by way of the articles in view of the fact that the duty itself may be established by the articles rather than by way of general corporate law.[261] In other words, a provision in the company's articles may in fact determine what constitutes an improper or proper purpose.[262] It has been suggested that in circumstances where the articles are drafted so as to attribute complete discretion to the directors, then all that is consequently required of them is to act honestly; and as such, the duty to act for a proper purpose may be excluded.[263] However, this is not the unanimous approach, as Parkinson's notes, "*the proper-purpose doctrine exists therefore, to maintain the constitutional separation of powers within a company; an article which releases the duty would serve to undermine the corporate structure […]*"[264]

In circumstances where the law permits a nominee to act according to the wishes of his appointer, then a provision in the articles allowing him to so act shall most likely be upheld. However, in circumstances where the director is subject to a strict fiduciary duty that may not be attenuated, a provision in the company's articles that indirectly shields a nominee director from a breach of duty in circumstances where he acts in the interests of his appointer, may not be given any effect.[265]

It is clear that while the attenuation of duty may be formulated so as to allow the nominee director to consider and promote the interests of his appointer, such attenuation would

---

[259] U.K., H.C., Company Law Reform Bill in Standing Committee D, Session 2005-2006, col. 601 (11 July 2006), online: House of Commons <http://www.publications.parliam ent.uk/pa/cm200506/cmstand/cmscclaw.htm> [Company Law Reform Bill].
[260] John Birds, "*The Permissible Scope Articles Excluding the Duties of Company Directors*" (1976) 39 Mod. Law Rev. 394 at 400 [*Birds*].
[261] *Ibid*.
[262] Ford *et al.*, *supra* note 23 at para. 9.440.
[263] Birds, *supra* note 260 at 400.
[264] J.E. Parkinson, "The modification of directors' duties" (1980) J. Bus. L. 335 at 344.
[265] Afterman, *supra* note 256 at 170.

never allow a nominee director to conduct himself in a manner that is oppressive to minority shareholders or detrimental to the company's business.[266]

Thus, one comes to the primordial question of this chapter: how to reconcile the different approaches to resolve the inherent conflict faced by nominee directors?

3.4 Chapter summary and the possible reconciliation of the different views

Each of the three approaches has received both judicial and doctrinal support and criticism, rendering it impossible to ascertain the prevailing approach. However, several common denominators may be identified amongst all of them. Other than adherence to the strict view in its purest form, it is safe to conclude that all three approaches, whether implicitly or explicitly, recognize the practice of appointing nominee directors.[267]

While the dual loyalty has consequently been acknowledged by the judiciary; it is the *conflict* of this dual loyalty that causes the primary difficulty. However, it appears that so long as there is no conflict between the interests of the appointer and those of the company, from a practical perspective, it is unlikely that the nominee director shall face liability. Thus, whether nominee directors can promote the interests of their appointer where such interests either coincide with, or are not contrary to, the company's best interests, is for the most part academic. On the other hand, under all circumstances, in situations of actual conflict, a nominee director can never prefer the interests of his appointer to those of the company.[268]

According to author Ayeung, the pragmatic view and the strict view may ultimately "*be a distinction without a difference and furthermore accord with the strong general principle requiring directors to act 'bona fide' in the company's best interests*."[269]

As such, it is unclear whether the three different approaches represent a different application of legal principle or whether ultimately the same legal principal is being

---

[266] Ramsay, *supra* note 23 at para. 9.440.
[267] Ayeung, *supra* note 147 at 37.
[268] Ayeung, *supra* note 37; Haddy, *supra* note 84 at 150.
[269] *Ibid*.

applied to different facts.[270] By way of example, in cases illustrative of the strict view such as in *Scottish Co-operative*, there was a clear intent on the part of the nominee directors and their appointers to act in bad faith and in a manner that is contrary to the best interests of the company. In other cases illustrative of the pragmatic view, such as in the *Levin* or *Broadcasting Station* decisions, such an intent was not evident. Thus, perhaps conflicts of interests faced by nominee directors that lead to situations of litigation, as was illustrative in the cases that were examined throughout this chapter, must be approached on a case-by-case basis. If evidence is illustrative of bad faith or an intent to act blindly in accordance with an appointer's wishes, whether or not such wishes are concurrent with the company's best interests, then the courts will mostly likely adhere to a less compromising approach. By way of example, in *Glopal v. Burke*, the Supreme Court of British Columbia agreed with the *Scottish Co-operative* decision given the fact pattern similarity with the case before it.[271]

This also seems to be in line with Justice Warren's view in *Cobden v. RWM*[272], in which he states that as a generality, the extent of the duties of a nominee director are fact-specific:

> *"The general duty is clear; the difficult question is the extent to which the duty is qualified. That qualification will depend critically on the context of the relationship and the particular action which is said to constitute a breach of duty."*[273]

As such, in circumstances where there is no evidence of bad faith in the alleged conduct and that such conduct could be attributed to reasonable commercial or business strategy, then perhaps courts will be inclined to take on a more pragmatic stance, particularly in circumstances where the articles, a shareholders' agreement or a joint venture agreement allow for directors to consider the interests of their appointers. After all, further to the

---

[270] Austin & Ellison, *supra* note 50 at 27.
[271] *Glopal v. Burke,* 41 B.L.R. (4th) 312 (2007) at para. 41 (CANLII).
[272] *Cobden v. RWM*, *supra* note 164.
[273] *Ibid*. at para. 68.

Supreme Court of Canada, persons are presumed to be acting in good faith unless proven otherwise.[274]

However, if the nominee director subordinates the interests of the company to those of his appointer in situations of actual conflict, the nominee is clearly in breach of his fiduciary duties. Although several cases in Section 3.3 above do suggest that the fiduciary duty owed by a nominee director may be attenuated, the limits of such attenuation remain unclear. While in certain jurisdictions, the attenuation of the fiduciary duty may be permitted, in Canada such attenuation has been expressly barred by the judiciary.[275]

As such, on the basis of either approach, in circumstances of veritable conflict between the company's interests and those of an appointer, the nominee director must always prefer the interests of the company irrespective of whether this may result in such director's forced resignation or termination.[276] As noted by authors Nicholl and Paskell-Mede: "*the nominee who cannot stand the heat ought to get out of the kitchen*."[277] Hence, while the appropriate course of action may not necessarily always be resignation, under certain circumstances, it may be the only course open.[278]

---

[274] *Blair v. Consolidated Enfield Corp.,* [1995] 4 S.C.R. 5 at para. 35 (CANLII).
[275] Rousseau & Gauthier, *supra* note 36 at 16. See e.g. *Bell Canada v. Manitoba Telecom Services Inc.*, (2004) 49 B.L.R. (3d) 17 at para. 31 (QL).
[276] Boros, *supra* note 133; *Scottish Wholesale, supra* note 89; *Bennetts*, *supra* note 167.
[277] Paskell-Mede, *Directors' Liability*, *supra* note 40 at 84.
[278] Frank R. Foram, Stephen C. Lee & Howard Mackie, "The Dilemma for Nominee Directors" in *Corporate Liability*, vol. II (Toronto: Federated Press, Governance and Liability: Papers from recent conferences and articles from recent journals, 1996) 1 at 161.

4. COMMON DIFFICULTIES ASSOCIATED WITH NOMINEE DIRECTORSHIP

While the preceding chapter dealt mainly with the different judicial approaches formulated to resolve the inherent conflict of dual loyalty, this chapter explores in more detail the most common and practical difficulties associated with nominee directorship as well as the legislative and judicial responses to these difficulties. The first of these associated difficulties is arguably the most important, given that it often constitutes the *raison d'être* of the nominee's appointment.

4.1 Access and disclosure to corporate information

As mandataries and fiduciaries of a corporation, directors must have access to all corporate information required to fulfill their mandate and their duties as directors.[279] However, as part of their fiduciary duties, directors are required to preserve the confidentiality of information received through their position.[280] As such, directors are precluded from disclosing or using corporate information, whether for their personal benefit, for the benefit of any third party, or to the detriment of the company.[281] Furthermore, the fiduciary duty also prohibits directors from competing with the company; and as such they are precluded from appropriating any corporate opportunities and assets that belong to the company.[282] Article 323 of the *C.C.Q.* has codified an equivalent to this common law rule, under which, absent authorization, it explicitly prohibits a director from using for his own profit or for the profit of a third person, any property of the corporation.[283] Corporate information acquired through, or a result of the director's position constitutes property belonging to the company and is therefore

---

[279] Chantal Perreault, Karine Bourgeois & Julie Bouthillier, "L'accès à l'information des administrateurs et des actionnaires du Québec" in Service de la formation permanente du Barreau du Québec : *Développements Récents sur les abus de droit* (Cowansville: Yvon Blais, 2005) 199 at 251.
[280] *Peoples v. Wise*, *supra* note 112 at para. 35.
[281] Martel, *Legal and Practical Aspects*, *supra* note 98 at 23-78.1; McGuinness, *supra* note 138 at para. 11.124.
[282] McGuinness, *ibid.*.
[283] The same rule applies to mandataries under Article 2146 of the *C.C.Q.* Article 2184 of the *C.C.Q.* further provides that upon termination of the mandate, the mandatory is bound to render an account and return to the mandatory everything he has received in the performance of his duties. Moreover, according to Martel, *supra* note 98 at 23-79, the decision of *Gravino v. Enerchem*, *supra* note 21, confirms that Article 323 of the *C.C.Q.* provides the legal basis for the imposition of directors' liability in connection with the misappropriation of business opportunities.

covered by the foregoing prohibition, independent of whether such information is necessarily characterized as confidential.[284]

However, reporting back corporate information to an appointer is undoubtedly one of the principle motives behind the appointment of a nominee director.[285] By way of example, a nominee director representing a financial lender or other important creditor shall undoubtedly be expected to report back relevant information to his appointer.[286] After all, it is only normal that a financial lender or creditor desires to "*keep an eye out*" on its stakes; usually by way of monitoring the corporate affairs and board discussions through one or two nominee directors.[287] In absence of such supervision, a financial lender may abstain from advancing the necessary funds to the company for lack of confidence. Same can be reasoned in situations where the company is seeking an extension to make a loan payment, or where the company requires additional credit. In such circumstances, a nominee director representing an important creditor may provide the latter with the needed comfort to advance the required funds.[288] However, if an impending insolvency is revealed, a nominee director's reporting back may result in a creditor's decision not to invest or worse, to "pull the plug". As noted by author Leigh Thomson, a nominee director representing a debenture holder shall likely provide his appointer with details of a corporation's breach of the debenture and/or whether there are grounds for an appointer's intervention.[289]

While the actual agreement between a nominee and his appointer shall differ on a case-by-case basis, the nominee is likely required to inform his appointer on matters that present particular importance.[290] However, channelling corporate information back to one's appointer, whether confidential information or not, places the nominee director in a

[284] Crête & Rousseau, supra note 136 at 509; *Gravino v. Enerchem*, *supra* note 21 at para. 47.
[285] Yeung, *supra* note 87 at 220; Rousseau & Gauthier, *supra* note 36 at 22.
[286] Yeo, *supra* note 200 at 149.
[287] Rousseau & Gauthier, *supra* note 36 at 22.
[288] Darams, *supra* note 122 at 53.
[289] Thomson, *supra* note 42 at 168.
[290] *Ibid*. at 162.

compromising situation, particularly in circumstances where disclosure of such information could injure the company.[291]

Furthermore, the situation is equally difficult in opposing situations where the nominee acquires information from his appointer that could adversely affect the company. Thus, to what extent, if any, may a nominee director access confidential corporate information and subsequently disclose said information back to his appointer? Additionally, if a nominee acquires important information from his appointer that could harm the company, is a nominee obliged to report back to the latter? The following subsections attempt to respond to the foregoing questions.

4.1.1 Nominee directors' access to corporate information

All directors have a general right to attend board meetings and access corporate records and information.[292] This right of access is derived under both statute and under the common law. By way of example, Sections 20, 21 and 110 of the CBCA explicitly allow directors the right to consult corporate information and attend board meetings. These rights have been interpreted to allow directors broad access to all of the corporate information and records required to properly perform their duties and functions.[293] Moreover, it appears that access to corporate information must always be granted unless it can be evidenced that a director shall misuse such information.[294]

This general rule applies without distinction to nominee directors.[295] As fiduciaries of the company, nominee directors have an equal right of access to corporate information.[296] as has been held in several foreign decisions. By way of example, in the New Zealand decision of *Berlei Hestia,* the facts of which have already been reiterated above,[297] it was held that nominee directors, like any other directors, should not be denied access to

---

[291] Yeung, *supra* note 87 at 220.
[292] Perreault, *supra* note 279; Hadden, *supra* note 81 at 208; Ford *et al.*, *supra* note 23 at para. 10.410.
[293] In *Auclair v. Auclair*, 2005 CanLII 18110 (Qc. Sup. Ct.) at paras. 48-49, the Superior Court explicitly indicated that a director is required access to corporate information so as to adequately fulfill his duties to the company.
[294] Rousseau & Gauthier, *supra* note 36 at 23-24; Martel, *Legal and Practical Aspects*, *supra* note 98 at 23-80.
[295] Boros, *supra* note 133 at 14.
[296] Austin & Ellison, *supra* note 50 at 32.
[297] See subsection 3.2 above.

corporate information unless it is evidenced that they would misuse such information.[298] As such, in absence of concrete evidence suggesting that the nominee directors were going to misuse the corporate information they needed to access, the court concluded that they should have been granted access.[299] Furthermore, the court held that the only evidence brought to its attention was the fact that the directors were nominees, and that this alone was not sufficient to deny them access to corporate information.[300]

In the subsequent New Zealand decision of *Trounce and Wakefield v. NCF Kaiopoi Ltd.,* similar reasoning was invoked.[301] This case involved an application for a prohibition against a company and seven of its directors from creating a sub-committee, to evaluate a takeover offer, on the grounds that it purposefully excluded the applicants, being two of the board's nominee directors. The defendants argued that the nominee directors would undoubtedly report all information back to their appointers and, as such, they were in an inherent position of conflict, justifying their exclusion from the sub-committee. The New Zealand High Court rejected the defendants' pretensions and reiterated the premise that nominee directors, like any other directors, must be granted the right to access all corporate information, to attend all board meetings and to actively participate in the affairs of the company.

In *Trounce v. NCF*, the court relied on landmark decisions such as *Edman v. Ross* in which it was held that a director's right to inspect corporate documents is imperative to the proper performance of a director's duties, and that unless there is evidence of abuse or bad faith, a court should not have any discretionary powers in determining whether a director can or cannot access such information.[302]

It was concurrently noted by the court in *Trounce v. NCF*, that a director's right of access is necessary to properly discharging his duties and that there should not be a presumption

---

[298] *Berlei Hestia, supra* note 222; *Molomby v. Whitehead, supra* note 221.
[299] *Berlei Hestia*, *ibid.* at 165.
[300] *Ibid.*
[301] *Trounce v. NCF, supra* note 222 at 422.
[302] *Edman v. Ross,* (1922) 22 S.R. (NSW) 351; see also *Fox v. Gadsden*, (2003) NSWSC 748 (AUSTLII); Austin *et al*., *Corporate Directors*, *supra* note 34 at para. 4.13; *Molomby v. Whitehead*, *supra* note 221.

that a nominee director would conduct himself in bad faith merely because of his position of dual loyalty:

> *"[The nominee directors] will have to be acutely aware of their fiduciary obligations should the interests of the company as resolved by the directors run counter to the interests of the company that has appointed them. I am certain that directors as persons of integrity are capable of exercising the nice decisions that are required to be made in these circumstances and it is plain that directors are required to do this in many circumstances from time to time. I am not prepared to impute bad faith to them in advance and I believe the company must take its directorate as it is structured."*[303]

The court also cited with approval the *Broadcasting Station* decision and reiterated that absent evidence to the contrary, nominee directors should be presumed to be acting in good faith and in line with their fiduciary duties.

Similarly, in the Australian decision of *Molomby v. Whitehead,* rendered less than a year prior to the *Trounce v. NCF* decision, the applicant, a nominee director, was denied access to documentation relating to claims for legal fees despite the fact that such documentation was made available to the other board members. [304] The Federal Court of Australia ultimately concluded that there was no evidence to the effect that the applicant nominee director would misuse the information and thus, there was no justification in denying the nominee director access to information and documentation that was made readily available to the other board members.

However, in circumstances where there is conflict of interest; a court will not hesitate to highlight a nominee director's obligation to preserve the confidentiality of information received through his position.[305] Accordingly, where it is demonstrated that a nominee director will misuse the corporate information that he seeks to access, including unauthorized disclosure, the courts will likely deny such access.[306] Again, the primordial

---

[303] *Trounce v. NCF, supra* note 222 at 432.
[304] *Molomby v. Whitehead*, *supra* note 221.
[305] *Tal v. Lifemark, supra* note 197.
[306] *Bennetts*, *supra* note 167.

factor must be that the nominee director shall misuse or disclose such information despite board instructions to keep the information confidential.[307]

Notwithstanding the foregoing, Canadian courts generally appear to favour broad access to corporate information. By way of example, in *152581 Canada Ltd. v. Matol World Corp.*, the Québec Superior Court held that preventing or limiting access to corporate information cannot be reconciled with the position of a corporate director and therefore access to corporate information cannot be easily denied.[308]

As such, it is safe to conclude that nominee directors, like all other corporate directors, have a generally unrestricted right of access to all corporate information required so as to discharge their duties. Such access is particularly important given that as part of their duty of care, all directors, including nominee directors, are required to be reasonably informed prior to exercising their decision-making powers.[309]

Thus, as a general statement, a director's right of access, whether an independent director or a nominee, cannot be limited, unless a director's intent to misuse the corporate information that he seeks to access is evidenced.[310] Perhaps, the aforementioned statement was best expressed in *Morgan v. 45 Fleurs*, where the Supreme Court of New South Wales concluded the following:

> *"A board member can look at all the papers that he wants to see, even though he may be appointed to represent a special interest group because when acting for the board it is assumed unless the contrary is proved the director is acting in the affairs of the board and not in conflict with them."*[311]

Thus, while the principles with respect to a nominee director's access to corporate information are relatively clear, the same cannot be said as to whether such information may be disclosed to an appointer. Corporate information obtained by a director may only be used for the purposes for which such information was accessed; thus, to what extent, if

[307] Austin & Ellison, *supra* note 50 at 32-33.
[308] *152581 Canada Ltd. v. Matol World Corp*, [1997] R.J.Q. 161 at para. 93 (QL).
[309] *Trounce v. NCF, supra* note 222 at 431-432.
[310] Austin *et al.*, *Company Directors, supra* note 33 at paras. 4.9-4.14.
[311] *Morgan v. 45 Fleurs, supra* note 217 at 705.

any, may a nominee director disclose corporate information to his appointer? It appears that the favoured approach to the regulation of nominee directors and their duties with respect to corporate information targets disclosure of corporate information rather than the right to obtain such information.[312]

4.1.2 Nominee directors' disclosure of corporate information

As noted above, it is clear legal principal that all directors may not use information obtained as a result of, or through their positions, whether confidential or not, for their personal benefit or for the benefit of any third party.[313] However, will the disclosure of confidential corporate information by a nominee director necessarily incur the latter's liability?

Interestingly, in at least one Canadian decision, the Alberta Court of Appeal held that, absent any conflict of interest, directors of a subsidiary company are not precluded from providing their parent company with confidential corporate information and that any strict rule precluding such disclosure would be both impractical and difficult to enforce.[314]

It is evident that directors who agree to pass on *all* company information to their appointer would be in breach of their fiduciary duties, particularly the duty not to fetter their discretion.[315] Additionally, where company information may result in, or contribute to, a conflicting situation between the company and the appointer, again directors are precluded from disclosing such information.[316]

Furthermore, it has been put forth that the duty of confidence, existing in parallel with the fiduciary duties, would also preclude directors from disclosing any confidential corporate information without the company's prior consent.[317] In order for corporate information to be deemed confidential, such information must have a quality of confidence and must not

---

[312] Thomson, *supra* note 42 at 166.
[313] Crête & Rousseau, *supra* note 136 at 430; Martel, *Legal and Practical Aspects*, *supra* note 98 at 23-80.1; Article 323 *C.C.Q.*
[314] *Michel v. Lafrentz*, (1992) 4 C.P.C. (3d) 155 at 4 (WEST).
[315] Boros, *supra* note 133 at 219.
[316] *Ibid.*, citing *Bennetts*, *supra* note 167.

be information which is public property or public knowledge.[318] Public information mixed with private information to produce a final body of information may be deemed confidential.[319] As such, board meeting deliberations are generally also characterized as confidential.[320] However, in circumstances where corporate information is not deemed confidential and generally accessible, it is unlikely that a nominee's disclosure of such information will give rise to any legal consequences.

According to the Supreme Court of Canada in the seminal decision of *Lac Minerals v. International Corona Resources*, in circumstances where: (i) the information is deemed confidential; (ii) is communicated in confidence; and (iii) is misused by the party to whom it was communicated, then the duty of confidence has been breached.[321]

The fact that the Supreme Court appears to require an element of "misuse" so as to infer a breach of the duty of confidence may evidence that the breach of the duty of confidence is subject to a liability rule as opposed to a property rule. Liability and property rules were first theorized in great detail by authors Calabresi and Melamed, as potential mechanisms to protect and balance various legal rights in the face of conflict.[322] According to Calabresi and Melamed's theory, the consequences of a breach shall depend on whether the right is protected by the property rule as opposed to the liability rule.[323] If the right is subject to a property rule, the mere use of such right results in a breach.[324] Hence, subject to the property rule, the nominee director's disclosure of corporate information back to his appointer, regardless of whether his appointer acts on such information, is a breach that subjects the nominee to liability. However, if the right is subject to the liability rule, the nominee's disclosure is not in and of itself a breach that shall incur liability; rather the breach will necessary require evidence of damages.

---

[317] Thomson, *supra* note 42 at 166.
[318] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 [*Lac Minerals*].
[319] Thomson, *supra* note 42 at 167. Additionally, in the case of public issuers, securities regulations prohibit the disclosure of certain privileged information: Crête & Rousseau, supra note 136 at 434-435.
[320] *Ibid.* at 168.
[321] *Lac Minerals*, *supra* note 318 at para. 66.
[322] A. Douglas Melamed & Guido Calabresi, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85:6 Harvard L. Rev. 1089 (HEIN).
[323] *Ibid*.
[324] Lucian Arye Bebchuk, "Property Rights and Liability Rules: The Ex Ante View of the Cathedral" (2001-2002) 100 Mich. L. Rev. 601 at 610 (HEIN).

Moreover, under the liability rule, the remedies in the face of a breach are limited to compensatory damages.[325]

One doctrinal commentator that has contemplated this issue from a theoretical perspective contends that the breach of confidentiality, particularly in the context of a fiduciary relationship, should be subject to the property rule as opposed to the liability rule.[326] However, although confidential corporate information gives rise to ownership rights, particularly in the corporate context, it has also been put forth that it would be quite challenging and inefficient to subject the breach of such rights, whether by unauthorized disclosure or otherwise, to the property rule as elaborated by Calabresi and Melamed.[327] Furthermore, the misuse by a director, of a company's assets, which includes information,[328] will often go undetected unless such misuse results in damages.[329] As noted by author and professor Loke:

> *"The liability rule is distinguishable by the fact that the taking is possible notwithstanding its unlawful nature. [...] The fiduciary who uses corporate information might be liable to account for the profits made with the corporate information - he is penalized with restitution remedies. But his capacity to appropriate a corporate opportunity or use corporate information without the consent of the corporation persists. [...] That the fiduciary has the leeway to appropriate the corporate information or the corporate opportunity – notwithstanding such appropriation being unlawful – undermines the essential requirement of consent which identifies protection of an entitlement by the property rule."*[330]

This issue does not appear to have been the subject of any doctrinal commentary in either Australia or New Zealand. However, given that breach of the duty of confidence appears

---

[325] *Ibid*.
[326] Jay Weiser, *Measure of Damages for Violation of Property Rules: Breach of Confidentiality* (Research Paper 01-19) (Stanford, US: Stanford Faculty of Law, 2001) at 63, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract id=277172>; see also Arnold S. Weinrib, "Information and Property" (1988) 38 U.T.L.J. 117.
[327] Alexander Loke, "The painters in the Cathedral: economic efficiency and the corporate fiduciary duty of loyalty" (Paper presented at the Socio-Legal Studies Association (U.K.) Annual Conference, 6-8 April 2004) (Singapore: National University of Singapore, 2004) at 3, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=496142> [Loke].
[328] Martel, *Legal and Practical Aspects*, *supra* note 98 at 23-78.
[329] *Ibid*.
[330] Loke, *supra* note 327 at 18.

to necessarily require evidence of misuse,[331] one may contend that in the latter jurisdictions, subjecting the breach of confidentiality to the liability rule may be the favoured approach. Absent evidence of misuse, Australian and New Zealand courts appear reluctant to grant any remedies, whether compensatory or otherwise, so as to prevent access or disclosure of confidential information.[332]

At least one Canadian decision appears to endorse a similar approach; in *Aronowicz v. Emtwo Properties Inc.*, the Ontario Superior Court of Justice refused to grant any remedies as a result of a shareholder-director's disclosure of confidential corporate information, in absence of any evidence of harm or detriment to the corporation.[333]

4.1.3 Possibility of disclosure without breach?

It has been contended by several doctrinal commentators that the disclosure of corporate information, whether confidential or not, may be permitted by express or even implied contractual consent.[334] As noted in the third chapter, if the view that a company's articles may reformulate a nominee director's fiduciary duties is accepted, then this same logic could apply to whether a nominee director may report information back to his appointer; namely an express provision contained in the company's articles could allow nominee directors to disclose corporate information to their appointers.[335] However, the insertion of such a provision risks contravening a director's duty not to fetter his future discretion. Moreover, in jurisdictions such as Canada, the interdiction against the attenuation of directors' duties by agreement would likely bar the viability of such a solution.[336]

Absent consent or contractual provisions that either expressly or implicitly allow disclosure, nominee directors who disclose confidential information back to their appointers are theoretically in breach of their duties.[337] However, from a practical

---

[331] Discussion paper No. 7, 1987, *supra* note 16 at para. 328-329.
[332] See e.g. *Berlei Hestia, supra* note 222; Ford *et al., supra* note 23 at para. 10.410.
[333] *Aronowicz v. Emtwo Properties Inc.*, [2009] CanLII 55454 at para. 63 (ON S.C.D.C.) (QL) [*Aronowicz v. Emtwo Properties*].
[334] *Corporate Groups* (Final Report), *supra* note 28 at para. 2.118; Redmond, *supra* note 22 at 33.
[335] *Ibid.*
[336] Rousseau & Gauthier, *supra* note 36 at 16, 27.
[337] *Ibid.*

perspective, the risk of injuring the company and/or incurring liability may be insignificant, depending on the circumstances.

Institutional and other large investors often require, as a condition to advancing the necessary funds to a corporation, that in addition to board representation, they are also provided with broad and periodic access to corporate information that may otherwise be deemed confidential, including sensitive financial information in connection with the corporation. Thus, in circumstances where a creditor is permitted access to such information pursuant to an agreement with the corporation, or as a condition to making an investment, a director's disclosure of such information shall unlikely incur any practical legal consequences, unless the director discloses confidential information beyond his appointer's realm of access. Furthermore, given that such information may serve to comfort a creditor or investor, it can be argued that the disclosure of same is in fact in the interests of the company.[338] However, the validity of a general authorization that allows a nominee director to continuously disclose confidential information to his appointer is problematic given that this may attenuate the director's duties.[339]

Moreover, in practice, in most circumstances, it is not the nominee director's disclosure of confidential information back to his appointer that will incur legal consequences; but rather, it is the appointer's conduct as a result of being provided with such information. If an appointer does not act on the information, the practical consequences of the nominee director's conduct, in having disclosed the information, shall likely be minimal.[340] It may be submitted that only in circumstances where an appointer acts on the information obtained, shall the nominee director realistically face liability. Moreover, even in circumstances where an appointer acts on the information obtained, short of the appointer's conduct harming the company, it is unlikely that the nominee would be subject to liability. Conversely, in circumstances were the appointer's conduct injures the company, the nominee will likely be held liable for any damages resulting from the appointer's conduct.

---

[338] Crête & Rousseau, *supra* note 136 at 434.
[339] Rousseau & Gauthier, *supra* note 36 at 16, 27.
[340] *Ibid*.

In view of the foregoing, several jurisdictions have either proposed or enacted possible solutions to this predicament faced by nominee directors, namely the extent to which a director may report back to his appointer.

By way of example, over two decades ago, the United Kingdom's *Institute of Directors* had put forth a proposition suggesting that the appropriate test should simply be whether such disclosure was in the best interests of the company:

> *"The simple criterion is whether the disclosure is bona fide in the interests of the company. It is for the director concerned to prove that any disclosure is indeed bona fide. A director cannot be acting bona fide in the interests of his company if he fetters his discretion as to how he is to act. Thus if a nominee director agreed always to pass on to his nominator the management accounts of the company of which he is a director, that action alone would be a breach of his duty to act in good faith towards that company."*[341]

While the foregoing test is theoretically correct, in practice, nominee directors will unlikely comply, particularly in circumstances where they have been appointed by an important stakeholder who requires that certain information be necessarily reported back, whether or not, such disclosure is in the *bona fide* interests of the company.

Another more viable solution lies in New Zealand corporate legislation, which contains a statutory exception allowing nominee directors to pass on corporate information to their appointers subject to the fulfillment of certain conditions contained in the legislation. Specifically, Section 145 of the N.Z. Act reads as follows [emphasis added]:

> *145(1) A director of a company who has information in his or her capacity as a director or employee of the company, being information that would not otherwise be available to him or her, must not disclose that information to any person, or make use of or act on the information, except -*
>
> (a) *for the purpose of the company; or*
>
> (b) *as required by law; or*
>
> (c) *in accordance with subsection (2) or subsection (3) of this section.*

---

[341] U.K., Institute of Directors, *Nominee Directors* (London: Guide to Boardroom Practice No. 8, 1985) at para. 17.

> *"145(2) A director of a company may, unless prohibited by the board, disclose information to*
>
> (a) *a person whose interests the director represents; or*
>
> (b) *a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the director's powers and duties and, if the director discloses the information, the name of the person to whom it is disclosed must be entered in the interests register."*
>
> *"145(3) A director of a company may disclose, make use of, or act on the information if -*
>
> (a) *particulars of the disclosure, use, or the act in question are entered in the interests register; and*
>
> (b) *the director is first authorized to do so by the board; and*
>
> (c) *the disclosure, use, or act in question will not, or will not be likely to, prejudice the company."*

Accordingly, subsection 145(2) allows a nominee director to effectively report back corporate information to his appointer unless the former is explicitly prohibited by the board to disclose such information.[342] Furthermore, although the third subsection of this same section enlists conditions to the disclosure of information, these conditions do not appear to be cumulative given that subsection 145(1) refers to the conditions in either subsection (2) *or* subsection (3).

Absent the enactment of a provision similar to the one contained in the N.Z. Act,[343] each time a nominee director is party to confidential corporate information, it appears that the nominee must necessarily obtain the consent of the board prior to reporting back to his appointer.

Consequently, absent consent of the board, the nominee must reflect on the consequences of reporting such corporate information back to his appointer given that reporting back will necessary result in a theoretical breach of the nominee director's duties. However, if reporting back to one's appointer will unlikely harm the company, it is submitted that the

---

[342] *Corporate Groups* (Final Report), *supra* note 28 at 82.

practical consequences of reporting back are minimal. Conversely, if the consequences of reporting back to the appointer risks harming the company, then the nominee's liability may be in play. By way of example, if the nominee is privy to confidential corporate information of a company's possible insolvency and is expected to report such information back to his appointer, the nominee must evaluate his appointer's reaction when advised of such information. In circumstances where the appointer's reaction may result in conduct that is harmful to the company, the nominee should either abstain from reporting back to his appointer or resign.

4.1.4 Duty to report back to the company?

Another connected issue that arises is the nominee director's duty to report back information received from his appointer, particularly if such information may impact the company. As noted by author McGuiness, "*under general principles of equity, as fiduciaries, directors and officers are under a duty to their corporation to bring to its notice all information that comes to their attention that is relevant to its business or affaires.*"[344] The duty to report back to the company also ties in with a director's duty not to compete with the company and to exploit all corporate opportunities, including information, for the benefit of the company.[345]

The failure of nominee directors to disclose relevant information back to the company that they had been appointed to govern was at the heart of the dispute in the *PWA* decision, the facts of which have already been summarized above.[346] In particular, at the trial level, it was concluded that the failure to disclose information back to the company was a breach of duty.[347] However, the Court of Appeal limited the nominee director's duty to report back to the company, to the information which affected the entity in a "*vital aspect of its business*".[348]

[343] N.Z. Act, *supra* note 252.
[344] McGuinness, *supra* note 138 at para. 11.43.
[345] Lusina Ho & Pey-Woan Lee, "A director's duty to confess: a matter of good faith" (2007) 66:2 C.L.J. 348 (WEST).
[346] See Section 3.1 above.
[347] *PWA*, supra note 187.
[348] *PWA* appeal decision, *supra* note 190 at para. 143.

Subsequently, in the *Levy-Russel Ltd.* decision the court cited with approval the Court of Appeal decision in *PWA*, and reiterated the premise that directors' are required to disclose all information that was critical to the company.[349] Other Canadian decisions have also rendered similar conclusions in emphasizing that directors must provide full and timely disclosure of information in connection with serious matters that affect the corporation.[350]

In view of the nominee director's positive obligation to report corporate information back to the company in circumstances where such information is material to the company's operations, the nominee director may find himself in a compromising position particularly where his appointer has forbade him from disclosing such information. In such circumstances, similar to when a nominee is privy to confidential corporate information that he has been forbidden to disclose to his appointer, it is submitted that the nominee director must make a decision to either report the information back to the company and face the consequences from his appointer or resign as a director of the corporation.

Access, disclosure and the positive obligation to report back information are merely a few of the difficulties associated with nominee directorship. Another major issue is the nominee director's appointment to corporate boards within the corporate group structure.

4.2 Nominee directors in corporate groups

As noted in the second chapter, the modern day economy, particularly in the Canadian context, is no longer uniquely characterized by the single corporate entity, but rather, it consists of groups of integrated companies, often operating together as a whole and with common objectives.[351] However, traditional legal principle requires that each company within the group be treated by its directors as a separate legal entity.[352] As such, the doctrine of limited liability, fiduciary duties and the business judgment rule all

---

[349] *Levy-Russell*, *supra* note 197.
[350] *Maiklem v. Springbank Oil & Gas*, (1995) 3 W.W.R. 631 at para. 37 (QL).
[351] Blumberg, *supra* note 80 at 606; Janis Sarra "Corporate Group Insolvency: Seeking the Forest and the Trees" (2008) 24 B.F.L.R. 63 at 63 (WEST) [Sarra, "Corporate Groups"].
[352] Hadden *et al*., *supra* note 93 at 633; McGuinness, *supra* note 138 at para. 2.66.

theoretically apply to subsidiary companies within corporate groups[353] notwithstanding that their application is difficult in the context of corporate groups.

Directors' duties are particularly important in the corporate group context in view of the fact that legal principles require directors to discharge their duties in the interests of the individual company they have been appointed to govern as opposed to the group.[354] In theory, these principles continue to prevail, even within group companies.[355] However, in practice, directors on the board of a subsidiary company are increasingly nominees of the parent.[356] As such, they are evidently expected, if not mandated, to govern in the interests of the parent.[357] As author Lee notes, "*it is unrealistic to insist that the interests of an entity which is part of a larger group can be completely isolated and divorced from the rest of the group, disregarding the fact of their interdependence.*"[358] Furthermore, subsidiaries are often created for practical reasons to further the objectives of the parent; in such circumstances, these subsidiaries seldom benefit from a distinct existence.[359]

Consequently, the directors' ability to veritably operate the subsidiary as a "*truly independent*" entity is often quite restricted.[360] As noted by author Hadden, *"[t]he traditional rules on the duties of the directors and officers of individual companies make little sense within corporate groups*."[361]

It has been contented that the law surrounding directors' duties within corporate groups severely lags commercial reality.[362] While doctrinal commentators have focused on particular aspects of corporate groups, such as the allocation of liability, the possibility of piercing the corporate veil or the duties of directors' in the particular context of

---

[353] Emma D. Enriquez, "Honor thy shareholder at all costs? Towards a better understanding of the fiduciary duties of directors of wholly-owned subsidiaries" (2003) 32 S.U.L. Rev. 97 at 98 (HEIN) [Enriquez].
[354] Ian M. Ramsay & Dr. Geof P. Stapledon, *Corporate Groups in Australia*, (Working Paper No. 26) (Melbourne: Faculty of Law of Melbourne Public Law and Legal Theory, 2002) at 18, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=286116>; Robert Baxt, "Issues Facing Directors in Corporation Groups" (1997) 25 Austl. Bus. L. Rev. 436 at 436 [Baxt, "Issues"].
[355] Prentice, *supra* note 77 at 314.
[356] Ross Grantham, "Liability of Parent Companies for the Actions of the Directors of their Subsidiaries" (1997) 18:5 Company Lawyer 138 at 138 (WEST) [Grantham].
[357] Haddy, *supra* note 84 at 141.
[358] Lee, *supra* note 38 at 3; Keay, *supra* note 134 at 304.
[359] Sargent, *supra* note 74 at 162.
[360] *Ibid*. at 163.
[361] Hadden, *supra* note 81 at 62.
[362] *Quintex Australia Finance Ltd. v. Schroders Australia Ltd.* (1990) 3 A.C.S.R. 267 at 268.

insolvency,[363] few commentators have focused on the every-day tension faced by nominee directors governing within corporate group structures. In such circumstances, nominee directors have a dual role; on one hand they must govern in the interests of their appointer which will likely concord with the best interests of the parent or the corporate group as a whole, and on the other hand, they must govern in the best interests of the company on whose board they sit.[364] However, from a practical perspective, directors of companies within the group, particularly subsidiary companies, will govern according to the instruction of the parent.[365]

Fortunately, it appears that the conduct of nominee directors appointed to the boards of companies within corporate groups rarely gives rise to conflict. Perhaps this is because the long term interests of each company within the group are often intrinsically linked with the success of the corporate group as a whole. Therefore, the interests of each of the companies within the group rarely diverge, particularly if the group is financially stable. However, in certain circumstances, such as when there arises a difference of opinion between the directors of the different companies within the group, including between those of a parent and subsidiary, or in situations of insolvency, conflict may surface.[366] Moreover, parent and subsidiary companies may engage in questionable price transferring practices that are often not in the best interests of the subsidiary; which may eventually result in conflict.[367]

In light of the parent company's power to remove the directors of each subsidiary, in practice, subsidiary directors shall rarely defend what they believe is the appropriate course of action and in the best interests of the company that they have been appointed to govern. As such, they are essentially precluded from ever exercising true independence

---

[363] See e.g. Ian M. Ramsay, "Allocating Liability in Corporate Groups: An Australian Perspective" (1998-1999) 13 Conn. J. Int'l L. 329 (HEIN); Jennifer Hill, "Corporate Groups, Creditor Protection and Cross Guarantees: Australian Perspectives" (1995) 24 Can. Bus. L.J. 321; Sarra, "Corporate group", *supra* note 351.
[364] *Corporate Groups* (Final Report), *supra* note 28 at para. 2.74.
[365] Eric J. Gouvin, "Resolving the Subsidiairy Director's Dilemma" (1995-1996) 47 Hastings L.J. 287 at 290 (HEIN) [Gouvin].
[366] Hadden *et al*., *supra* note 93 at 634.
[367] Gouvin, *supra* note 365 at 290; see also *Ford Motor Co. of Canada, Ltd. v. Ontario Municipal Employees Retirement Board,* [2004] 41 B.L.R. (3d) 74 (QL) (Partially Reversed in Appeal: *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*, [2006] 12 B.L.R. (4th) 189) (QL)) [*Ford Canada v. Ontario*].

in the corporate group context.[368] This is a particularly preoccupying issue in circumstances where the subsidiary is partly-owned, and therefore includes minority shareholders and creditors or when the subsidiary or the group is in a financially precarious situation. As noted in the Australian decision of *Re Spargos Mining NL*:

> *"One can understand that philosophy within a group of corporate entities where there is a unity of control in the form of major shareholdings and representation upon the various boards, but it is an approach which tends to take little account of the particular interests of individual companies and therefore of individual small shareholders in those corporate entities."*[369]

The court ultimately held that the conduct of the nominee directors was not in the benefit of the company they were appointed to govern and consequently allowed an application for an oppression remedy.[370]

In view of the predicament faced by directors nominated to the boards of companies within corporate groups; the judiciary, particularly in Australia, New Zealand and England has adopted several approaches in responding to alleged breaches of directors' duties in the corporate group context.

Earlier case law, particularly in Australia, preferred an application of what is referred to as the "*entity approach*", derived from the theory that corporations forming part of a corporate group are to be treated as distinct legal entities, separate from the other companies within the group. This approach however, must be contrasted with a different line of authority that has endorsed what is referred to as the "*enterprise approach*".[371] Pursuant to the enterprise approach, the focus should be on the business enterprise as a whole, and not on each individual company within the group.[372] As such, the enterprise approach takes into consideration that directors' appointed to the boards of different companies within a corporate group will likely govern in the interests of the group as a whole.

---

[368] Hadden *et al.*, *supra* note 93 at 635.
[369] *Re Spargos Mining NL,* (1990) 3 A.C.S.R. 1 at 33 (QL).
[370] *Ibid.* at 47ff.
[371] Kaylene, Cross & Jon Webster "Issues Facing Directors in Corporate Groups" (1997) 25 Austl. Bus. L. Rev. 436 at 442 [Cross & Webster].
[372] Blumberg, *supra* note 80 at 605.

A third approach was even suggested, evidenced in several decisions involving an alleged breach of directors' duties in the corporate group context.[373] This third approach appears to endorse a proper purpose test as a means of determining whether directors' in the context of corporate groups have violated their fiduciary duties.

The following sections provide an overview of each of these three approaches; they accordingly provide some insight on the manner in which directors appointed to the various boards within corporate groups should conduct themselves.

4.2.1 The entity approach

The traditional and arguably most conservative view with respect to directors' duties in corporate groups, [374] being the entity approach, was expressed in the Australian decision of *Walker v. Wimborne,*[375] in which the court took a hard line stance against the possibility of directors governing in consideration of the best interests of the group rather than the individual corporation they have been appointed to govern.[376]

In *Walker v. Wimborne*, the directors of a company, operating as part of a group of companies, authorized and effected a series of intra-group transactions. One of these intra-group transactions involved loan payments to another company within the group that was in dire need of financial assistance. However, the lending company did not receive any reciprocal benefits from the deal but for an implied promise of repayment upon demand. The lending company subsequently went into liquidation; the liquidators challenged the validity of the aforementioned loan payments, on the grounds that the directors of the lending company had breached their fiduciary duty in authorizing the loan. Essentially, the liquidators alleged that the loan payments were not made in the *bona fide* interest of the lending company and therefore constituted a misapplication of its funds.[377] The High Court of Australia sided with the liquidators and concluded that the directors were wrong in having authorized most of the loan payments in view of the fact

---

[373] *Maronis Holdings Ltd. v. Nippon Credit Australia Pty. Ltd.*, (2001) 38 A.C.S.R. 404 (AUSTLII) [*Maronis*].
[374] John. H. Farrar, "Legal Issues Involving Corporate Groups" (1998) 16 C. & S.L.J. 184 at 187.
[375] *Walker v. Wimborne,* (1976) 137 C.L.R. 1 [*Walker v. Wimborne*].
[376] Robert Baxt, "Duties to a Corporate Group – One Step Forward or Two Steps Backwards?" (1994) 22 Austl. Bus. L. Rev. 138 at 138 [Baxt, "Duties"].
[377] *Walker v. Wimborne*, *supra* note 375 at 4.

that they did not benefit the lending company. As regards the duties of the directors, the court stipulated the following:

> *"Each of the companies was a separate and independent legal entity, and that it was the duty of the directors of [the lending company] to consult its interests and its interests alone in deciding whether the payments should be made to other companies."*[378]

According to the approach as formulated in the *Walker v. Wimborne* decision, directors must govern in the interests of the specific company they have been appointed to direct and not in the interests of the group as a whole.[379] Although the court did indicated that the interests of the group could be relevant in determining the interests of the lending company, author Baxt comments as follows:

> "*[the Walker decision] denied directors in a group of companies the luxury of taking the interests of the group into account in evaluating a course of conduct, and this was particularly relevant where the relevant company or companies were insolvent.*"[380]

Although the single entity approach may provide certain benefits, such as the protection of unsecured creditors of solvent companies within a group or minority shareholders of partly-owned subsidiaries, it has been contended that such benefits may be overvalued.[381] However, doctrine and case law, particularly in Australia, indicate that *Walker v. Wimborne* remains authoritative legal principle.[382] In Canada, although there is minimal case law on this precise issue, the premise in *Walker v. Wimborne,* that the individual members of group companies are distinct from each other was confirmed in at least one decision emanating from the Alberta Court of Appeal.[383]

---

[378] *Ibid.* at 7.
[379] Jeanne Cilliers, "Directors' duties in corporate groups –Does the green light for the enterprise approach signal the end of the road for Walker v. Wimborne?" (2001) 13 Austr. J. Corp. L. 109 at 1 (QL) [Cilliers].
[380] Baxt, "Duties", *supra* note 376 at 140.
[381] *Corporate Groups* (Final Report), *supra* note 28 at 17.
[382] *Linter Group Ltd. v. Goldberg*, (1992) 7 A.C.S.R. 580 at 581 (QL) [*Linter*], per Southwell J.: "*A duty is owed by a director of the company and not to other companies whether within a part of the group or not. A director must meet this responsibility.*" However, despite his confirmation of the *Walker* decision, Justice Southwell ultimately applied *Charterbridge, infra* note 387, at the request of the parties. In *Spedley Securities Ltd. (in liq.) v. Greater Pacific Investments Pty Ltd (in liq.)* (1992) 30 N.S.W.L.R. 185 (QL) [*Spedley*], the court confirmed the legitimacy of the principle derived from *Walker* but again, the courts applied *Charterbridge, infra* note 387, at the request of the parties.
[383] *Gainers Inc. v. Pocklington Financial Corporation,* (2000) 81 Alta. L.R. (3d) 17 at para. 28 (QL).

In contrast with the entity approach is the enterprise approach, which is arguably a more liberal approach, in that it allows directors to govern in the interests of the group as a whole, provided that in so doing, they are also objectively advancing the interests of the company on whose board they have been appointed to govern.[384]

4.2.2 The enterprise approach

The enterprise approach allows the corporate group to be treated as a single economic enterprise that functions as a whole. According to the enterprise approach, the corporate group may adopt governing principals that allow the controlling or parent company within the group to operate the companies within its control for the benefit of the corporate group as a whole. Moreover, the directors of each company within the corporate group may owe their primary allegiance to the controlling or parent company or even to the corporate group as a whole, rather than to the individual company they have been appointed to govern.[385] Additionally, it has also been submitted that the enterprise approach to corporate governance may even provide a solution to the associated difficulties faced by corporate groups in the context of insolvency.[386]

The British decision of *Charterbridge Corporations Ltd. v. Lloyds Bank Ltd.*[387] is often accredited as being the key case endorsing an enterprise-inspired approach to directors' duties within corporate groups.[388] In this latter decision, the court appeared to recognize that commercial reality dictates that directors within corporate groups shall necessarily act with a view to advancing the corporate group's interests as a whole.[389]

The *Charterbridge* case essentially involved a large group of companies, interrelated by both common shareholding and directorate. The corporate group also shared the same objective, being the operation of a property development enterprise. For practical reasons, a separate company was created for the purposes of dealing with each new

---

[384] Lee, *supra* note 38 at 453.
[385] *Corporate Groups* (Final Report), *supra* note 28 at 24.
[386] John Kluver, "Entity v. Enterprise Liability: Issues for Australia" (2004-2005) 37 Conn. L. Rev. 765 at 781 (HEIN): "*Arguably, this legislative enterprise presumption would better ensure that in the event of the group's insolvency, all the group's assets would be available to meet the group's liabilities.*"
[387] *Charterbridge Corporations Ltd. v. Lloyds Bank Ltd.*, [1970] 1 L.R. Ch. 62 [*Charterbridge*].
[388] Cilliers, *supra* note 379 at 1; Lee, *supra* note 38 at 453.
[389] Baxt, "Issues", *supra* 354 at 437.

property that was acquired. The series of events that gave rise to the litigious dispute appear to have stemmed from an overdraft from the accounts of several companies within the corporate group resulting in the bank's request for additional guarantees. A response to the bank's request resulted in a string of interrelated guarantees by various companies within the corporate group. Particularly, one of the companies, Pomeroy Developments (Castleford) Ltd. guaranteed the payments on demand owed by another company within the group, Pomeroy Developments Ltd. Furthermore, Pomeroy Developments (Castleford) granted a security so as to finance the debts incurred by the financially troubled Pomeroy Developments.

Subsequently, Pomeroy Developments (Castleford) entered into several agreements for the sale of its property; however the property could not be sold free and clear from encumbrances as a result of the security granted in exchange for the financial assistance to Pomeroy Developments. As such, the purchaser instituted legal proceedings requesting a declaration to invalidate the securities charging the property that had been consented by the directors of Pomeroy Developments (Castleford) to guarantee Pomeroy Developments obligations.

Although the court, presided by Justice Pennycuick, acknowledged that the directors of Pomeroy Developments (Castleford) had not considered the interests of the former company separately from the interests of the corporate group, the court felt that by accepting the plaintiff's contention that only the individual consideration for Pomeroy Developments (Castleford) was acceptable, would be too strict an approach in the context of a corporate group. As per Justice Pennycuick:

> *"That is, I think an unduly stringent test and would really absurd results, i.e., unless the directors of a company addressed their minds specifically to the interests of the company in connection with each particular transaction, that transaction would be ultra vires and void, notwithstanding that the transaction might be beneficial to the company."*[390]

[390] *Charterbridge*, *supra* note 387 at 74.

The court did nuance its position by indicating that looking to the benefit of the group as a whole was not in and of itself sufficient. Accordingly, the court held that each company was nonetheless a separate legal entity and therefore the directors of a particular company were never entitled to sacrifice the interests of that company in favour of the group. Justice Pennycuick therefore reformulated as follows what he believed should be the proper test for directors in a corporate group:

> *"whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company."*[391]

The court went on to conclude that under the aforementioned test, the directors of Castleford had not breached their duties to the individual company that they had been appointed to govern.

Justice Pennycuick's test, as formulated in the *Charterbridge* decision, has been labelled as an objective standard, in that directors may act in the interests of the group so long as an honest and reasonable director may infer that such conduct is also in the benefit of the company they have been appointed to govern.[392] The standard formulated in *Charterbridge* takes into account the fact that in the context of group companies, the interests of the group as a whole will often override the interests of the individual entities within the group.[393] However, as long as the interests of the group as a whole do not contradict the interests of the company within the group, there is no breach. As such, the *Charterbridge* decision appears to have attributed directors within corporate groups with greater latitude in decision-making; corporate decisions will not be subject to review where directors can objectively establish reasonable grounds for their decisions.[394]

In England, Australia and New Zealand, courts have applied the *Charterbridge* standard to numerous situations involving an alleged breach of directors' duties, many of which

---

[391] *Ibid.*
[392] Cilliers, *supra* note 379 at 2.
[393] Hadden *et al*., *supra* note 93 at 633.
[394] Matthew Harding, "Dual Listed Companies: Understanding Conflict of Interest for Directors" (2002) 25:2 U.N.S.W.L.J. 594 at 608 [Harding].

tend to be nominee directors within corporate group.[395] The objective standard as formulated in *Charterbridge* has even been compared with the pragmatic approach undertaken in the *Broadcasting Station* decision.[396] According to author Lee, the preferred approach, should be the *Charterbridge* standard given that it is the approach that recognizes "*the broadly convergent interests of the members within a group and the reality that directors would invariable be motivated by the concern to optimize such interests*."[397]

In the Supreme Court of Victoria's decision in *Farrow Financing v. Farrow Properties,*[398] the facts leading up to the litigious dispute involved the corporate collapse of the "Farrow group", a group of about 30 corporate entities. At trial, the evidence filed before the court demonstrated a series of questionable transactions and misconduct between the different corporate entities prior to the collapse. However, there was one particular inter-company loan that was at the heart of the dispute between the parties.

The court acknowledged that although each company was a separate legal entity with its own governing board of directors, the companies were nonetheless run as a single unit. As such, the court did not reprimand such conduct generally, but rather accepted it as reflective of commercial reality. The court approved and applied *Charterbridge*'s objective standard, adding however, as an additional criterion, in the case of an inter-company loan, an examination of the likelihood of the burrowing entity's ability to repay their debt. Accordingly, based on an application of the objective standard as formulated in *Charterbridge,* namely that of the intelligent, honest and reasonably director, the court held that the directors in question were in breach of their fiduciary duties as it was clear that the inter-company loan derived no benefit to the lending company.[399]

---

[395] *Extrasure Travel Insurances Ltd. and another v. Scattergood and another*, (2002) 1 B.C.L.C. 598 (WEST); *Reid Murray Holdings Ltd (in liq.) v. David Murray*, (1972) 5 S.A.S.R. 386; *Linton v. Telnet Pty Ltd*., (1999) 30 A.S.C.R 465; *Japan Abrasive*, *supra* note 245; *Pascoe Ltd. (in liq) v. Lucas*, (1991) 33 A.C.S.R. 357 (QL).
[396] Ford *et al*., *supra* note 23 at para. 9.460.
[397] Lee, *supra* note 38 at 459.
[398] *Farrow Financing v. Farrow Properties,* (1999) 1 V.R. 584 (WEST).
[399] *Ibid*. at 41ff.

Despite its general approval by doctrinal commentators as the more "*realistic*" approach to directors' duties within corporate groups,[400] certain courts have been hesitant to embrace the *Charterbridge* objective standard. By way of example, in the unreported British decision of *Ocular Sciences Ltd. and Another v. Aspect Vision Care Ltd. and Others*, in examining whether the director of a wholly-owned subsidiary could abide by the parent company's wishes, the court held that corporate duties of company directors must always remain consistent regardless of whether the director is appointed to a subsidiary company or a company within a corporate group.[401] Although the court acknowledged the importance of the relationship between companies within a group, the court noted that at the end of the day, directors owe duties to the company they have been appointed to govern and not to the group as a whole. Furthermore, the court held that in circumstances where the parent company is not satisfied, then it had many choices, such as passing a resolution obliging the directors to act in a particular way or even removing the nominee directors from office. However, the court did not seem to give consideration to the practical implications of the parent's conduct, namely that the risk of being removed from office may be enough to ensure that directors shall act in accordance with the instructions of the parent.

Interestingly, despite an endorsement of the entity approach as formulated in *Walker v. Wimborne*, numerous courts have applied the *Charterbridge* objective standard at the request of the parties.[402] In fact, *Charterbridge* was applied at both the trial and appeal levels in the case of *Equiticorp v. Bank of New Zealand.*[403] However, despite the parties' request that the *Charterbridge* objective standard be applied, the majority judges in appeal expressed important reservations about the *Charterbridge* standard.

The facts of the *Equiticorp* decision are relatively complex; the Equiticorp group of companies expanded into a network of over 140 affiliated companies, initially starting in New Zealand and eventually diffusing all the way into Hong Kong and England through

---

[400] Haddy, *supra* note 84 at 142.
[401] *Ocular Sciences Ltd. and Another v. Aspect Vision Care Ltd. and Others,* Chancery Division (Patents Court), Judgment rendered on 11 November 1996 [unreported] (QL).
[402] Haddy, *supra* note 84; *Linter, supra* note 382; *Spedley*, *supra* note 382.

the incorporation of a series of subsidiary and related companies. The corporate group comprised two main divisions: the industrial and trading division and the finance division. Mr. Allan Hawkins was the chairman of the holding company at the summit of the corporate group, Equiticorp Holdings Limited, controlling almost 41% of the holding company's shares. He also acted as a director and shareholder in various other companies within the group.

The particular facts giving rise to the litigation between the parties involved an offer from the Bank of New Zealand to Equiticorp Tasman Ltd., a member of the industrial and trading division of the corporate group, of a loan of $200 million to finance a takeover bid. However, it was decided that the actual transaction with the BNZ for the loan would take place with a wholly-owned subsidiary of Equiticorp Tasman, while Equiticorp Tasman would guarantee the loan. Thus, Uruz Pty Ltd., a wholly-owned subsidiary of Equiticorp Tasman, was chosen as the vehicle for the transaction with the BNZ. The loan agreement was executed in July of 1987, with repayment due within a year. Subsequently, a series of uncontrollable events impacting the corporate group resulted in the inability of either Uruz or Equiticorp Tasman to repay the loan within the agreed-upon term. Simultaneously, two other companies within the financial division of the corporate group, Equiticorp Financial Services Ltd. and Equiticorp Finance Ltd. became beneficiaries of a $50 million "liquidity reserve" with the BNZ. As a result of pressure from the BNZ for repayment of the loan made to Uruz, the $50 million liquidity reserve belonging to Equiticorp Financial and Equiticorp Finance were ultimately utilized, on the orders of Mr. Hawkins, to repay the loan. Subsequently, both Equiticorp Financial and Equiticorp Finance went into liquidation and their liquidators instituted legal proceedings challenging the use of the liquidity reserve to repay the loan made to Uruz. Particularly, the liquidators contended that there was no authority for the use of the liquidity reserve, and that the directors' of Equiticorp Financial and Equiticorp Finance were in breach of their fiduciary duties in following Mr. Hawkins' orders.

---

[403] *Bank of New Zealand v. Equiticorp Finance Ltd. and Another*, (1992) A.C.S.R. 199 (QL) (Trial Decision); *Equiticorp Finance Ltd. (in liq.) v. Bank of New Zealand,* (1993) 11 A.C.S.R. 642 (QL) (Appeal Decision) [*Equiticorp*].

At the trial level, the trial judge had recognized that it was Mr. Hawkins who had the authority despite the fact that he did not necessarily serve as a director on the boards of either Equiticorp Financial or Equiticorp Finance.[404] Even the directors who disagreed with Mr. Hawkins ultimately acquiesced to the latter's orders. In terms of whether the directors of Equiticorp Financial and Equiticorp Finance had breached their fiduciary duties, the trial judge had applied the *Charterbridge* objective standard and concluded that there was no breach of fiduciary duty, particularly in view of the derivative benefit to the companies who provided the liquidity, given that they were indirectly providing assistance to their parent company.[405] Furthermore, the trial judge had given a lot of weight to the fact that Mr. Hawkins wanted to ensure the bank's continued support for the corporate group.[406] If the corporate group were to lose the support of the BNZ, then the collapse of the corporate group would have naturally resulted in the collapse of both Equiticorp Financial and Equiticorp Finance.

Although the decision was appealed, the majority judges of the Supreme Court of New South Wales confirmed the trial decision. Although, the appeal court applied the *Charterbridge* objective standard, given that it had been applied by the trial judge and that it was requested by both parties at the appeal level, the majority nonetheless indicated a reluctance to apply *Charterbridge* particularly in relation to directors' duties to exercise their powers in the interests of the company.[407] Thus, although the majority judges applied *Charterbridge*, they nonetheless proposed an alternative test:

> *"A preferable view may be that where the directors have failed to consider the interests of the relevant company they should be found to have committed a breach of duty. If, however, the transaction was, objectively viewed, in the interests of the company, then no consequences would flow from the breach. Such an inquiry would not require the court to consider how the hypothetical honest and intelligent director would have acted. On the contrary it would accept that a finding of breach of duty flows from a failure to consider the*

---

[404] *Equiticorp* (Trial Decision), *ibid*. at 230ff; *Equiticorp* (Appeal Decision), *ibid.* at 673.
[405] *Equiticorp* (Appeal Decision), *ibid.* at 674.
[406] *Ibid*.
[407] *Ibid.* at 727.

> *interests of the company and would then direct attention at the consequences of the breach."*[408]

The *Equiticorp* decision also encompassed a dissenting opinion that strongly opposed the majority judges' application of the *Charterbridge* standard and held that the entity approach as formulated in *Walker* should have been followed. Accordingly, it was submitted that the directors should have considered the "*separate vulnerabilities*" of Equiticorp Financial and Equiticorp Finance, particularly in situations of insolvency.[409] More recently, in *Bell v. Westpac*[410], the Supreme Court of Australia reiterated the reservations expressed in *Equiticorp* as regards the *Charterbridge* standard, indicating that directors were bound to exercise their powers *bona fide* in what they consider as the interests of the company and not for any collateral purpose.[411]

Subsequent to *Equiticorp*, another Australian decision, *Gamble v. Hoffman,* emerged which also dealt with directors' duties in the context of interrelated companies.[412] The facts of this decision are relatively simple; Mr. and Mrs. Hoffman were the sole directors and shareholders of a wholesale food company, Tallimba Pty Ltd. They were also director and secretary of Sunhaven Nominees Pty Ltd., a food retailer created as a retail chain for Tallimba. The disputed issues resulted from the authorization of the directors of Tallimba, to make numerous payments in connection with Sunhaven, including an agreement to lend Sunhaven $80,000 so as to surrender its lease. However, Sunhaven became insolvent and Tallimba was unable to recover the loan it had made to Sunhaven, therefore resulting in Tallimba's liquidation. The joint liquidators of Tallimba instituted legal proceedings against Mr. and Mrs. Hoffman, alleging negligence, default and breach of their fiduciary duties towards Tallimba.

With respect to the applicable test to assess whether the directors' had breached their duties, the court did not apply either *Walker v. Wimborne* or *Charterbridge*. Rather, the

---

[408] *Ibid*. at 643.
[409] *Ibid*. at 683.
[410] *Bell v. Westpac, supra* note 166.
[411] *Ibid.* at para. 4620ff.
[412] *Gamble and another v. Hoffman and another,* (1997) 24 A.C.S.R. 369 (QL) [*Gamble v. Hoffman*].

court applied a two-fold objective standard inspired by an earlier Australian case[413] involving the standard of due diligence expected of directors:

> *"1. Assess what benefit, if any, Tallimba would derive from making these payments on behalf of Sunhaven.*
>
> *2. If there were any benefit so to be derived by Tallimba, to assess whether there was any reasonably foreseeable prospect of detriment to Tallimba."*[414]

With respect to the aforementioned standard, the directors contended that the loans to Sunhaven ultimately derived a benefit for Tallimba in view of the fact that the two companies had an agreement pursuant to which Sunhaven would purchase all of its supplies from Tallimba. In other words, the loan to Sunhaven would assist Tallimba in securing its wholesaling supplies contract with Sunhaven. Furthermore, the directors asserted that the two companies essentially operated in harmony, with Sunhaven providing a retail arm to Tallimba. Moreover, the directors relied on a particular statement made by Mason J. in *Walker v. Wimborne*, where he stated that "*the payment of money by company A to company B to enable company B to carry on its business may have derivative benefits for company A as a shareholder in company B if that company is enabled to trade profitably or realize its assets to advantage.*"[415]

However, the judge rejected the directors' submission that the advances to Sunhaven presented a prospect of accruing benefits to Tallimba, particularly in light of Sunhaven's cession of all business operations. Furthermore, evidence did not demonstrate that Tallimba was to receive any interest in exchange for the loan. The judge also rejected the directors' reliance on the aforementioned passage in *Walker v. Wimborne*, particularly in view of the fact that Tallimba did not hold any shares in Sunhaven and that such payments did not allow Sunhaven to "*trade profitably*" or "*realize its assets to advantage*."[416]

---

[413] *Daniels v. Anderson*, (1995) 37 N.S.W.L.R. 438.
[414] *Gamble v. Hoffman, supra* note 412 at 374.
[415] *Walker v. Wimborne*, *supra* note 375 at 6.
[416] *Gamble v. Hoffman*, *supra* note 412 at 376.

The judge also distinguished the *Equiticorp* decision on the basis that Mr. Hoffman did not have any documented strategy for Sunhaven to become a profitable entity and that the financial reality of Sunhaven was "*hopelessly insolvent*".[417] The court noted that the survival of what the directors termed as their "corporate group" did not depend upon the $80,000 loan made to Sunhaven; such loan served no purpose for Sunhaven, was detrimental to Tallimba and ultimately only benefited the directors as guarantors of Sunhaven's lease.[418] In fact, the loan from Tallimba to Sunhaven was to shield the directors from their potential liability as guarantors of Sunhaven's lease. It is important to note that the credibility and motives of Mr. Hoffman, played a significant role in the court's decision. Furthermore, the weight attributable to this decision must be determined with caution given that the court held that the directors had conducted themselves in bad faith with a view to their own interests only.

In Canada, the *Charterbridge* decision has been cited and endorsed by the Québec Superior Court in the *Peoples v. Wise* trial decision,[419] however the objective standard as formulated in *Charterbridge* was not applied; rather, the *Charterbridge* decision appears to have been cited as authority that directors' may never lose sight of the interests of the company on who's board they have been nominated in favour of the interests of the parent or group. In fact, the decision appeared to endorse a view that was more in line with the entity approach as formulated in the *Walker v. Wimborne* decision.[420] In another Canadian decision, *Westfair Foods v. Watt*, the Alberta Court of Queen's Bench also indicated that directors of a subsidiary corporation must ensure that they do not lose sight of the interests of the subsidiary in favour of another corporation.[421]

More recently, in the Ontario Superior Court of Justice's decision of *Ford Canada v. Ontario,*[422] the minority shareholders of Ford Motor Company of Canada, alleged that the intercompany agreements setting price transfer and allocation costs between Ford Canada, the subsidiary, and Ford U.S., the parent company, were oppressive to the

---

[417] *Gamble v. Hoffman*, *supra* note 412 at 377.
[418] *Ibid*.
[419] *Peoples Department Stores Inc. (trustee of) v. Wise*, (1998) 23 C.B.R. (4th) 200 at para. 71ff (QL).
[420] *Ibid*. at para. 196ff.
[421] *Westfair Foods v. Watt* (1990) 73 Alta L.R. 326 (Affirmed in Appeal) (QL).
[422] *Ford Canada v. Ontario*, *supra* note 367.

minority shareholders; namely in view of the fact that Ford Canada bore the currency exchange risks and the overall operation of the transfer-pricing system.[423] In determining whether there was oppression, the Ontario Superior Court of Justice noted that Ford Canada was an independent entity with its own board of directors that was charged with acting in the best interests of Ford Canada and all of its shareholders.[424] The court then went on to indicate:

> *"One need not be naïve as to the probable nature of the vertical relationship of a U.S. parent and Canadian subsidiary where the widely-held minority interest is only some 6% of the total shares in the subsidiary. However, a majority shareholder cannot treat a subsidiary corporation with minority shareholders as its wholly-owned subsidiary. The majority shareholder cannot direct corporate decisions which enure to its benefit to the detriment of minority shareholders. [...]"*[425]

The Ontario Superior Court of Justice ultimately concluded that the intercompany agreements, particularly as regards the transfer-pricing system were unfair and that Ford Canada's board of directors simply turned a blind eye and accepted the actions of its parent company in determining the elements and structure of the transfer-pricing system and the intercompany agreements.[426] Although the Ontario Court of Appeal overturned the trial decision on several grounds, it agreed with the trial judge's decision as regards the unfairness of the transfer-pricing system. The Ontario Court of Appeal also emphasized that Ford Canada had simply accepted the system put into place by its parent; there was no evidence that the directors of Ford Canada had even attempted to negotiate a more favourable agreement.[427] While the foregoing decision indicates preference for an entity-inspired approach rather than an enterprise approach towards directors' duties in the context of corporate groups, one wonders again to what extent the facts of the case, and namely the passive conduct of the subsidiary directors, influenced the court's decision.

---

[423] *Ibid.*
[424] *Ibid.* at para. 262.
[425] *Ibid*. at para. 263.
[426] *Ibid*. at para. 264.
[427] *Ford Canada v. Ontario* (Appeal decision), *supra* note 367 at para. 56.

Conversely, in the recent *BCE 1976* decision, the Supreme Court of Canada indicated that it would be unwarranted for the purposes of its analysis to distinguish between the conduct of the directors of the holding company, BCE and the directors of its subsidiary, BELL Canada, nor would it factor into its analysis the "*distinct corporate character of the two entities*".[428] Although the Supreme Court's reluctance to deal with this issue may have been a result of the lower courts' decision not to have made the distinction,[429] it may nonetheless evidence the court's preference of the enterprise approach in the context of a corporate group in which the directors of both the parent and the subsidiary were the same individuals.

In light of the foregoing, there appears to be authority in various jurisdictions in favour of both the entity and enterprise approaches.[430] As such, there remains a certain ambiguity with respect to how nominee directors of companies within corporate groups, particularly the directors of subsidiary companies, should conduct themselves. In furtherance to this uncertainty, another decision involving directors' duties in the context of corporate groups, *Maronis Holdings Ltd. v. Nippon Credit Australia Pty. Ltd*[431] proposed another approach in response to this situation.

4.2.3 A proper purpose test?

The *Maronis* decision also revolved around whether directors' had breached their fiduciary duties by failing to consider the interests of the company within the group for which they were appointed to govern. Justice Bryson of the New South Wales Supreme Court indicated that the *Charterbridge* objective standard was first applied so as to determine whether a transaction should be null and void and not in the context of whether the directors' had breached their fiduciary duties. Moreover, he noted that most cases applied the *Charterbridge* standard on application of the parties and that even the majority judges' in the *Equiticorp* decision were not in favour of *Charterbridge* and had put forth an alternative test. Accordingly, Bryson J. held that the reformulated test by the majority in *Equiticorp* represented the "*correct view*", under which the directors should

---

[428] *BCE 1976, supra* note 18 at para 33.
[429] *Ibid.*
[430] Cross & Webster, *supra* note 371 at 442.

not be held liable for a breach if the transaction was "*objectively viewed, in the interests of the company.*"[432] Accordingly, the judge concluded that if:

> "*directors take a company into a transaction in the interests of a group of which it was part, or a parent company, or of a subsidiary company and what they did was, objectively viewed, in the interests of the company, they incurred no liability.*"[433]

Furthermore, the court noted that directors are not precluded from governing with a view to the interests of the group, provided that the company benefits in some derivative manner.[434] As such, if it can be demonstrated that the directors had conducted themselves in a reasonable manner and had honestly believed that their actions would benefit both the individual company and the group, their actions would unlikely be in breach of their fiduciary duties.[435] According to the court in the *Maronis* decision, in circumstances where directors' of individual companies within a corporate group make decisions based on the interests of the group, without regard to the separate interests of the company, they act for an improper purpose and are consequently in breach.[436] However, in author Lee's opinion, applying the proper purpose rule in this context is inappropriate, given that it does not contribute to resolving the predicament faced by nominee directors in the context of corporate groups; rather, Lee prefers the *Charterbridge* standard given its recognition of commercial reality, that directors within corporate groups govern to optimize the interests of the group as a whole.[437]

In light of the different approaches and standards that have been used by the judiciary to determine the scope of directors' duties within corporate groups, it is difficult to ascertain how nominee directors in the context of corporate groups need to conduct themselves so as to avoid breaching their duties. Unfortunately, foreign authority and doctrinal

---

[431] *Maronis*, *supra* note 373.
[432] *Ibid*. at para. 185.
[433] *Ibid*.
[434] *Maronis*, *supra* note 373 at para 190.
[435] Cross & Webster, *supra* note 371 at 442.
[436] Lee, *supra* note 38 at 459.
[437] *Ibid*. at 460.

commentary appears divided on this issue and little authority or commentary emanates from Canada.[438]

Alternatively, the issue of directors' duties in the context of parent-subsidiary relationships has been contemplated by various American commentators.[439] Essentially, American commentators appear to have linked this issue back to the long standing debate as to whom directors' owe their fiduciary duties, namely whether their duties are owed to the shareholder, being the parent company or to the corporation itself, being the subsidiary.[440] In fact, it has been put forth that even if it is determined the directors must act in the interests of the corporation, it is unrealistic to require that directors of a subsidiary act solely in the interests of the subsidiary. As noted by Gauvin, "*instead of requiring these directors to behave as if the subsidiary were an independent entity, the law should be more realistic and allow them to do the bidding of the parent or shareholder*."[441] However, notwithstanding Gauvin's assertion, it appears that the law continues to favour and apply traditional legal principal, even in the context of group companies.[442]

To reiterate the premise that resurfaces throughout this analysis, the only guiding principle that can be restated with certainty is that directors must always act in the *bona fide* interests of the particular company that they have been appointed to govern, given that the law continues to treat companies within corporate groups as separate legal entities.[443] Nonetheless, in circumstances where directors, acting reasonably, believe that their decisions or conduct benefit the group as a whole, despite a potential breach of their fiduciary duties in the strictest sense, they will unlikely face liability if they can evidence a derivative benefit to the particular company they have been appointed to govern.[444]

---

[438] However, perhaps in an effort to ensure the equitable nature of related party transactions, securities regulators have adopted regulations (such as *Regulation 61-101 – respecting protection of minority security holders in special transactions*, c. V-1.1, r.0.1.02.1, relating to insider-bids, self-tender transactions and related party transactions) calling for enhanced disclosure obligations, more adequate minority shareholder protection and valuation requirements.

[439] See e.g. Gouvin, *supra* note 365; Enriquez, *supra* note 353; Stefan J. Padfield, "In search of a higher standard: rethinking fiduciary duties of directors of wholly-owned subsidiaries" (2004-2005) 10 Fordham J. Corp. & Fin. L. 79 [Padfield] (HEIN).

[440] Gouvin, *supra* note 365 at 297.

[441] *Ibid*. at 304-305.

[442] Padfield, *supra* note 439 at 112.

[443] Haddy, *supra* note 84.

[444] Harding, *supra* note 394 at 608.

However, if there is no derivative benefit to the company or in circumstances where the directors intentionally acted to the detriment of the company, even if their conduct is in the overall interest of the group, such directors are in breach of their duties and potentially subject to liability.[445]

4.2.4 Statutory exceptions

Despite the prevalence of the entity approach, legislation in both Australia and New Zealand contain various provisions that favour the enterprise approach.[446] In fact, statutory exceptions contained in both Australia and New Zealand's company law legislation, permit the directors of wholly-owned subsidiaries to govern in the interests of their parent company. Furthermore, in New Zealand, the directors of partly-owned subsidiaries and joint venture companies may also govern in the interests of their parent or shareholders. By way of example, Section 187 of the *Corporations Act*[447] protects a director of a wholly-owned subsidiary that acts in the interests of the parent corporation against liability. Essentially, the provision states that a director of a wholly-owned subsidiary is taken to have acted in good faith and in the best interests of the subsidiary when the following three conditions are cumulatively satisfied: (1) the constitution of the subsidiary expressly authorizes the director to act in the best interests of the holding company; (2) the director acts in good faith in the best interest of the holding company; and (3) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.[448]

The latter provision was adopted subsequent to legislative reforms that originated from the *Australian Corporate Law Economic Reform Program*. Moreover, Section 187 was originally inspired from subsection 131(2) of the N.Z. Act[449] which encompasses a similar provision. However, the New Zealand provision takes the issue a step further and explicitly states that the director is to act in "*a manner which he or she believes is in the*

---

[445] *Scottish Wholesale*, *supra* note 89; *Gamble v. Hoffman*, *supra* note 412.
[446] *Corporate Groups* (Final Report), *supra* note 28 at 26.
[447] *Corporations Act, supra* note 27.
[448] See Section 187, paragraphs a, b, and c of the *Corporations Act*, *supra* note 27.
[449] N.Z. Act, *supra* note 252.

best interests of that company's holding company". As such, it appears that a subjective standard would be applicable in circumstances where Section 131 applies.[450]

While Section 187 of the *Corporations Act*[451] applies exclusively to wholly-owned subsidiary, subsections 131(3) and 131(4) of the N.Z. Act indicate that this principle is also applicable to the partly-owned subsidiary as well as to joint venture companies:

> ***131(3)*** *A director of a company that is a subsidiary (but not a wholly-owned subsidiary) may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company and with the prior agreement of the shareholders (other than its holding company), act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.*
>
> ***131(4)*** *A director of a company that is carrying out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.*

No similar provision appears to exist in either the CBCA, nor in other Canadian provincial company legislation. The issue of legislative reform and associated initiatives as regards nominee directors in Canada will be elaborated upon in the concluding chapter.

4.3 Appointer liability

Another practical difficulty that arises in connection with the appointment of nominee directors is the possibility of attributing liability to an appointer for breach of the nominee directors' duties. Although the act of designating a director does not alone create a legal relationship between nominee and appointer, in certain circumstances other legal relationships such as that of employer-employee or principal-agent may provide grounds that justify the liability of an appointer.[452] In fact, there has been significant legal debate,

---

[450] Cilliers, *supra* note 379 at 10.
[451] Corporations Act, *supra* note 27.
[452] Ford *et al.*, *supra* note 23 at para. 14.35.

particularly in Australia, as to whether an appointer such as the controlling shareholder, major investor or joint venture partner can be held liable for a nominee's wrongful conduct.[453] This situation is equally preoccupying in parent-subsidiary relationships, and namely in situations where the subsidiary becomes insolvent as a result of decisions undertaken by a nominee director.[454]

It has been put forth that the commonwealth's position with respect to shareholders, is that they do not owe a duty to the corporation to supervise and ensure that the directors they nominate properly exercise their duties, and as such, they cannot be held liable for breach of their nominee's duties to the corporation.[455] Hence, it is the directors who owe fiduciary duties to the company and as such the general principle is that an appointer cannot be held liable for the wrongful conduct of its nominees.[456]

However, both case law and doctrine appear to have opened the door towards the possibility of imposing liability on an appointer for the breaches caused by its nominees, particularly in circumstances where an appointer intentionally instructs a nominee to act in violation of his duties. By way of example, at the trial level, in the *PWA* decision, the trial judge noted that an appointer, who instructs its nominee directors to conduct the affairs of the company in a manner that is contrary to the nominee's fiduciary duties, could be held liable for the wrongful conduct of its nominees.[457] Ultimately though, the court did not impose any liability on the appointer. However, it is questionable whether the court was merely referring to extreme cases where the appointer is necessarily manipulating his nominees in a puppet like manner.[458] Certain commentators are of the view that appointer liability should not be reserved for only the blatant and extreme cases of manipulation. Justice and doctrinal commentator Thomas submits that "*liability*

---

[453] See e.g. April Mountfort, "Nominee Directors : Are Appointers Vicariously Liable for Breaches of Director's Duties" (2001) 75 Austr. L. J. 231; Jason Pizer, "Holding an Appointer Vicariously Liable for its Nominee Director's Wrongdoing – an Australian Roadmap" (1997) 15 C & S.L.J. 81 [Pizer]; Robert Baxt, "Can nominating companies be vicariously liable for the negligence of their nominee directors?" (1995) 69 Austr. L. J. 684; Thomas, *supra* note 121.

[454] Grantham, *supra* note 356.

[455] McGuinness, *supra* note 138 at para. 11.147, unless the nominating shareholder interferes in the management of the corporation or instructs or causes its nominees to breach their duties towards the corporation; see also Section 4.3.1 below.

[456] *Ibid.*

[457] *PWA Corporation v. Gemini Group Automated Distribution Systems Inc., supra* note 187; see also *Mogil v. Abelson*, (1992) 8 B.L.R. (2d) 102 at 106 (QL) [*Mogil v. Abelson*].

should arise where the nominee directors are expected to act in accordance with some understanding or arrangement which creates an obligation or expectation of loyalty on the appointer."[459]

Australian doctrinal commentators have categorized the different grounds under which an appointer may be held liable as follows: (1) as a shadow director; (2) under the doctrine of vicarious liability; (3) under criminal liability; (4) under civil liability; or (5) as a constructive trustee.[460] However, given the lack of doctrinal commentary and case law on most of the foregoing grounds, only two of them shall be explored in more detail herein, namely liability as a shadow director and liability under the doctrine of vicarious liability.

4.3.1 Shadow directorship

The U.K. Act defines "shadow directors" as persons "*whose directions or instructions the directors of the company are accustomed to act*."[461] The *Corporations Act* contains a similar provision, absent an express reference to the term "shadow director". [462]

It is uncertain whether the notion of a shadow director has been recognized in Canada; the CBCA defines a director as either a person formally appointed to the board of directors, or a person "*occupying the position of director by whatever name called*."[463] However, this appears to be a reference to "*de facto*" directorship. A "*de facto*" director has been defined as a person who, without being formally appointed to the board, undertakes the same duties that are generally undertaken as a director.[464] The British decision of *Re Hydrodam (Corby) Ltd.*[465] draws a distinction between the two concepts, where it was held that a *de facto* director was one who claimed to act and conduct himself as though validly appointed as a director while a shadow director by contrast:

---

[458] Jean Jacques Du Plessis, "Nominee directors versus puppet, dummy and stooge directors: Reflections on these directors and their nominators or appointers" (1995) 2 Journal of South African Law 310 at 318.
[459] Thomas, *supra* note 121 at 148.
[460] Pizer, *supra* note 453 at 82; Austin *et al.*, *Company Directors*, *supra* note 34 at para. 14.36-14.37: Austin *et al.* also put forth another possible ground; liability under equity in circumstances where the appointer acts dishonestly and takes part in the breach by the nominee director, the latter can be held liable to pay the company "*equitable compensation*" for loss resulting from the breach.
[461] U.K. Act, *supra* note 258, Section 251.
[462] *Corporations Act, supra* note 27, Section 9.
[463] Section 2 CBCA.
[464] Martin Markovic, "The Law of Shadow Directorships" (1996) 6 Australian J. Corp. L. 3 (QL) [Markovic].
[465] *Re Hydrodam (Corby) Ltd.*, (1994) 2 B.C.L.C. 180 (WEST).

> "*does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company.*"[466]

It has also been contended that a shadow director need not necessarily conceal his participation in the company.[467]

One of the objectives of legislating or recognizing the concept of shadow or *de facto* directorship is undoubtedly to "catch" individuals who act as directors through the directors that they have appointed to the board on paper.[468] It has been put forth that appointers may be categorized as shadow directors if, based on the factual situation, the director is accustomed to always acting pursuant to his appointer's instructions.[469] The *raison d'être* behind imposition of liability as a shadow directly likely stems from the view that if the appointer is actively participating in the company's governance then, in circumstances of misconduct, the appointer should also be exposed to liability.[470] In one Canadian decision, the court appears to have endorsed liability equivalent to shadow directorship.[471] In *Mogil v. Abelson*, the nominating shareholders were held liable to the corporation for the breach by their nominee director in light of evidence that the nominee had acted as an agent for the sole benefit of his appointers.[472]

It is important to note however that the imposition of liability as a "*shadow director*" appears to require positive evidence of interference. The appointment of a nominee director who naturally favours his appointer's interest is not itself sufficient to infer the appointer's liability. Accordingly, it is unlikely that an appointer shall be attributed liability as a shadow director merely because he provides instructions to his nominee,[473]

---

[466] *Ibid*. at 183.
[467] Chris Noonan & Susan Watson, "The Nature of Shadow Directorship: Ad Hoc Statutory Intervention or Core Company Law Principle" (2006) J. Bus. L. 763 at 779 [Noonan & Watson].
[468] De Lacy, *supra* note 31 at 279.
[469] Ford *et al*., *supra* note 23 at para. 9.420.
[470] Markovic, *supra* note 464.
[471] *Mogil v. Abelson*, *supra* note 457.
[472] *Ibid*.
[473] Noonan & Watson, *supra* note 467 at 779. Same authors provide as a "*paradigm*" example of shadow directorship, an insolvent individual who appoints his wife as director and gives her precise instructions as to the decisions she must make.

or because his nominee reports back confidential corporate information.[474] As such, in order to incur liability as a shadow director, the appointer is required to actively give instructions to his nominee, the latter who is expected to act, upon all these instructions. Furthermore, it has also been put forth that the person or entity needs to influence the majority of directors on the board so as to be characterized as a shadow.[475] Thus, in order to qualify as a shadow director, the latter is necessarily required to control a majority of the board. Consequently, the appointer of one or two directors on a board comprised of five or six directors shall unlikely be categorized as a shadow director.[476] The element of repetition must be present and the nominee directors must be accustomed to acting pursuant to their appointer's wishes.

In the decision of *Australian Securities Commission v. AS Nominees Limited*, Justice Finn of the Australian Federal Court appears to indicate that shadow directorship requires directors "*to act at all times and for all purposes […] entirely as [their appointer's] puppets without exercising any discretion at all in company matters.*"[477] Thus, it appears that the director must act as a veritable "puppet director" so as to incur the liability of his appointer.[478] In *Secretary of State for Trade and Industry v. Deverell,* the British Court of Appeal had to determine whether two individuals could be qualified as shadow directors.[479] The court turned to evidence "*other than ownership or control of the company*" to ultimately conclude that the two defendants were in fact shadow directors, in view of the evidence to the effect that they were, "*personally involved*" and "*played a prominent role*" in important transactions; and that one of the defendants "*bossed everyone around from the directors downwards*".[480] In determining that an individual was

---

[474] *Aronowicz v. Emtwo Properties, supra* note 333 at para. 172.
[475] Oscar Shub, "Separate Corporate Personality: Piercing the Corporate Viel" (2006) 56:2 Federation of Defence and Corporate Counsel Quarterly 253 at 262 [Shub]; De Lacy, *supra* note 31 at 280.
[476] De Lacy, *ibid.*
[477] *Australian Securities Commission v. A.S. Nominees Limited,* (1995) 62 F.C.R. 504 at para. 331 (AUSTLII).
[478] *Selangor v. Cradock*, *supra* note 41; see also *Beach Petroleum NL v. Johnson*, (1993) 43 F.C.R. 1 [*Beach Petroleum v. Johnson*]; *Hancock Family Memorial Foundation Ltd. v. Porteous* (1999) 32 A.C.S.R. 124 (AUSTLII) [*Hancock v. Porteous*].
[479] *Secretary of State for Trade and Industry v. Deverell,* (2000) 2 B.C.L.C. 133 (QL).
[480] *Ibid.* at para. 47.

a shadow director, the court looked to identify who veritably influenced the corporate affairs of the company.[481]

It has also been contended that other parties at risk of being unintentionally labelled shadow directors include parent or holding companies.[482] As previously noted, parent and holding companies often nominate the directors onto the boards of their subsidiaries and as such these companies may be at risk for liability as shadow directors. However, the courts still remain hesitant to impose liability, as a shadow director, on parent or holding companies for the wrongful conduct of nominee directors on the board of their subsidiaries,[483] likely for the same reasons that courts hesitate to pierce the corporate veil.

However, in situations where management and finances are effectively controlled through nominees, the controlling entity may be considered a shadow director and be held in breach, as was the case in *Standard Chartered bank of Australia Ltd. v. Antico.*[484] In this decision, the parent company, Pioneer International Ltd. held a 42% share interest in one of its subsidiaries, Giant Resources Ltd. Pioneer had appointed three nominee directors on to the board of Giant, which subsequently entered into an agreement with the Standard Chartered Bank of Australia Ltd. for a facility of $30,000,000. The facility was subsequently renegotiated and extended on several occasions, with the bank eventually providing Giant with extended financial support via an overdraft facility. However, Giant was nonetheless forced into liquidation.

The bank subsequently instituted proceedings against Pioneer and its three nominee directors on Giant's board and essentially alleged that they should be held liable. On the question of whether Pioneer could be held liable, the Supreme Court of New South Wales, presided by Justice Hodgson, noted that the mere fact that Pioneer had three nominees on the board of Giant along with the fact that it held a 42% share interest was not enough to conclude that Pioneer was either a *de facto* or shadow director.[485]

---

[481] *Ibid.* at para. 33; see also *Beach Petroleum v. Johnson, supra* note 478*; Hancock v. Porteous, supra* note *478*. *Compare Bluecorp Pty Ltd (in liq.) v. Anz Executors and Trustee Co Ltd.*, (1994) 13 A.C.S.R. 386; *Natcomp Technologies Australia Pty Ltd v. Graiche*, [2001] N.S.W.C.A. 120 at para. 13ff (AUSTLII).
[482] Markovic, *supra* note 470 at 2.
[483] *Dairy Containers v. NZI Bank*, *supra* note 222.
[484] *Standard Chartered bank of Australia Ltd. v. Antico*, (1995) 131 A.C.L.C. 1 at 381 (QL).
[485] *Ibid*. at para 66.

However, Pioneer was the only shareholder with a significant share interest; and evidence demonstrated that Pioneer exercised considerable financial control over Giant including the imposition of severe financial reporting requirements. It was also evidenced that Pioneer exercised management control over Giant with respect to important corporate decisions. For the foregoing reasons, the court ultimately held that Pioneer was liable as a director to Giant. Although, it has been argued that this case may be distinguished from other cases given that Pioneer was the only major shareholder of Giant.[486]

In light of the foregoing, despite the possibility of appointer liability in the form of shadow directorship, it appears that the "threshold" for the imposition of such liability remains quite high.[487]

4.3.2 Vicarious liability of the appointer

Imposing vicarious liability on a nominee's appointer stems from the common law principle that an employer is generally liable for an employee's faults in circumstances where such faults occur within the course of employment.[488] Liability of the principal for the fault of his agents and servants is an equivalent concept under Québec civil law and has been codified by way of Article 1463 of the *C.C.Q.* The concept of vicarious liability of the appointer is essentially derived from the appointer's control over the nominee, as is characteristic of an employment relationship.[489] As regards appointer-nominee relationships, such control is rooted in the appointer's ability to appoint and terminate the nominee.[490]

As once noted by the New Zealand Federal Court, the ground for imposing such liability on appointers arises from the fact that nominee directors are "*responding, perhaps unconsciously, to the commercial imperative summed up in the maxim:* "*He who pays the piper calls the tune*."[491] Despite commentary that seems to support the latter proposition, the two decisive cases on vicarious liability of appointers, both emanating from New

---

[486] Shub, *supra* note 475.
[487] *Ibid*.
[488] Pizer, *supra* note 453 at 82.
[489] Austin *et al*., *Company Directors*, *supra* note 34 at para. 14.38.
[490] Grantham, *supra* note 356 at 141.
[491] *Dairy Containers v. NZI Bank*, *supra* note 222 at 95.

Zealand, did not impose vicarious liability on the appointers in question. However in the second case, *Dairy Containers Ltd. v. NZI Bank*[492], the trial judge elaborated in detail on the possibility of imposing vicarious liability.

The New Zealand decision of *Kuwait v. National* [493] was the first case that appeared to explicitly deal with the possibility of imposing vicarious liability on the appointer of nominee directors. In this decision, National Mutual Life Nominees Ltd. acted as a trustee to AIC Securities Ltd., a money broker, as required under the *Securities Act 1978*. Kuwait Asia Bank EC owned 40% of the shares of AIC, and in virtue of an agreement with several other shareholders, had appointed two directors to the board of AIC Securities. However, AIC Securities subsequently became insolvent and went into liquidation. National was sued by one of the depositors who brought a representative action against it, contending National's breach of duties under the trust deed. Although the action between National and the depositor was ultimately settled, National instituted proceedings against Kuwait Asia and various other defendants for contribution to the settlement amount. National essentially contended that the nominee directors had committed a breach of their duty to care and as such, their appointer, Kuwait Asia, should be held responsible. More specifically, with respect to the issue of appointer liability, National contended that Kuwait Asia should be held vicariously liable as the employer of the two nominee directors and that the relationship between Kuwait Asia and the nominees was that of principal-agent. As such, Kuwait Asia should be held responsible for the acts and omissions of its agents.[494]

The Privy Counsel rejected National's submissions with respect to holding Kuwait Asia vicariously liable for the acts of its employees, being the nominee directors. The majority ruled that in absence of any alleged fraud or bad faith[495] on the part of Kuwait Asia, the latter could not be held liable for the shortcomings of its nominee directors. The Privy Counsel further stated that for the purposes of the alleged breach, the nominees were directors and agents of AIC Securities and not those of Kuwait Asia. Additionally, it was

---

[492] *Ibid*.
[493] *Kuwait v. National*, *supra* note 172.
[494] *Ibid*. at 517.

also noted that despite the nominee directors' relationship with their employer-appointer, Kuwait Asia, in their capacity as directors they were obligated to disregard the latter's welfare: "*[the nominee directors] were bound to ignore the interests and wishes of their employer, [Kuwait Asia]. They could not plead any instruction from the bank as an excuse for breach of their duties to [AIC] and [National]*"[496]

The aforementioned decision should be contrasted with another seminal decision rendered several years later, namely *Dairy Containers v. NZI Bank*[497] in which the court criticized the *Kuwait v. National* decision for ruling against the imposition of vicarious liability. The facts of the *Dairy Containers v. NZI Bank* decision are complex and shall be simplified for the purposes of the present.

Dairy Containers Ltd., a wholly-owned subsidiary of the New Zealand Dairy Board, was essentially comprised of a board of NZDB-appointed directors. These directors were also senior executive, and therefore employees of the NZDB. Dairy Containers' operations initially involved the fabrication of cans for the NZDB, but it later became an important investment company, holding several accounts in numerous banks. In 1989, it was discovered that the three nominee directors on Dairy Containers' board had misappropriated Dairy Containers' funds. The nominees were terminated and subsequently pleaded guilty to criminal charges including fraud. Diary Containers instituted legal proceedings against the New Zealand Auditor-General, who had audited Dairy Containers during the relevant time frame, and several other banks, alleging that the audit was deficient and claiming over $11,000,000 dollars for damages suffered as a result of the misappropriation of the nominees. However, the Auditor-General argued contributory negligence on the part of Dairy Containers and its directors as well as the liability of the NZDB in its capacity as the employer of the nominee directors and as a shadow director.

---

[495] *Ibid*. at 533: e.g. in circumstances where the bank would have exploited its position as employers of the nominees to obtain an improper advantage or to cause harm to National.
[496] *Kuwait v. National*, *supra* note 172 at 533.
[497] *Dairy Containers v. NZI Bank*, *supra* note 222.

With respect to the contention of vicarious liability, Justice Thomas questioned the Privy Council's decision in *Kuwait v. National* not to apply the doctrine of vicarious liability to circumstances where the breach of duties occurred in the course of the nominee directors' employment. As Justice Thomas indicated, a nominee director's responsibilities to the company he has been appointed to govern does not necessarily prevail over other legal responsibilities.[498] Thomas criticized the *Kuwait v. National* decision for contending that an employee who acts as a director ceases to act as an employee. Furthermore, the learned judge emphasized that one must not overlook commercial reality in which an employee shall undoubtedly favour their employer, particularly in circumstances where they have been given a clear mandate to "*to protect and promote their employer's interests*."[499] Moreover, the fact that they owe their appointment to their employer and the fact that their employer holds the power to dismiss them, serves to reinforce such loyalty. Consequently, nominees govern with a view to the interests of their appointers and realistically, "*reserve their primary or ultimate loyalty for their masters and not the company to which they have been appointed.*"[500] Thus, why shouldn't an appointer be held liable for the unlawful conduct of his employee-directors, where such conduct was committed "*on the job*"? Justice Thomas' underlying conclusion was that there was no valid justification for excluding the doctrine of vicarious liability in connection with employees who serve as nominee directors.[501] However, ultimately the court did not impose vicarious liability given the fact that it felt bound by the *Kuwait v. National* decision.

In the *Dairy Containers* decision, Justice Thomas went on to make important statements on the position of nominee directors. Thomas noted that their position is inherently in conflict with the "no-conflict" rule as outlined in the aforementioned *Aberdeen Railway* case.[502] The judge proceeded to review the authority with respect to nominee directors in both the U.K and England to ultimately conclude, true to the pragmatic view, and perhaps better stated than any before him:

---

[498] *Ibid.* at 93.
[499] *Ibid.* at 95.
[500] *Ibid*.
[501] Pizer, *supra* note 453 at 85.
[502] *Dairy Containers v. NZI Bank*, *supra* note 222.

> *"Nominee directors need not necessarily approach company problems with an open mind and they may pursue their appointer's interests provided that, in the event of a conflict, they prefer the interests of the company. In such circumstances the breadth of the fiduciary duty has been narrowed by agreement amongst the body of shareholders. In other words, the corporators have agreed upon an adjusted form of fiduciary obligation."*[503]

Following the *Dairy Containers v. NZI Bank* decision, Justice Thomas firmly reiterated his position in a case comment, in which he emphasized that nominee director remain agents or employees of their appointer and therefore, it is unrealistic to argue that because nominee directors owe their primary duty to the company, they cannot be considered agents or employees of their appointer.[504]

The issue of vicarious liability has also been discussed, albeit briefly, in several subsequent Australian cases. In one particular case, it was held that the trustees of investment trusts had standing to lawful sue an appointer for the wrongful conduct of its nominee directors.[505] Subsequently, in the case of *LMI Pty Ltd. v. Baulderstone Pty Ltd.*, the court held that the plaintiffs were correct in not having attempted to impose vicarious liability on the employer-appointer of employee-nominees; the court reiterated the principle enunciated in the *Kuwait v. National* case, that a director on the board of a company, regardless of his appointment, is independent when it comes to performing his functions as a director and as such, vicarious liability should not be attached to his appointer-employer for the employee's conduct in his capacity as director.[506]

There have been several principal arguments put forth to support the imposition of vicarious liability on appointers, such as the fact that it is in the interests of equity that the employer-appointer bears the burden for losses caused by its employee-nominees, as opposed to the company or its creditors.[507] Another compelling argument is that the risk

---

[503] *Ibid*. at 96.
[504] Thomas, *supra* note 121 at 161.
[505] *Young. v. Murphy*, (1994) 13 A.C.S.R. 722.
[506] *LMI Pty Ltd. v. Baulderstone Pty Ltd.*, (2001) NSWSC 886 at 79 (WEST).
[507] Pizer, *supra* note 453 at 85.

of liability may deter appointer-employers from instructing or allowing their employee-nominees to conduct themselves in an unlawful manner.[508]

Conversely, disagreement with the imposition of vicarious liability emanates from deeply rooted company law principles and namely the separate identity doctrine. As one author notes, "*it is crucial that this basic premise does not give way merely because there is evidence that the affairs of the company are controlled by particular individuals or other companies.*"[509] Other arguments against the imposition of vicarious liability include the premise that it may hinder business practice such as dissuading the appointment of nominee directors who do serve a useful purpose, despite their conflict of interest.[510]

In view of the foregoing, the law as it currently stands does not appear inclined to impose vicarious liability. Perhaps a middle ground could be that the mere negligence of a nominee director would not be enough to impose vicarious liability on his appointer.[511] However, in deliberate cases, where the appointer instructs its nominees on how to govern, or has required them to act in violation of their fiduciary duties, vicarious liability could be imposed.[512]

4.3.3 Liability of the nominee director towards his appointer?

To this writer's knowledge, the issue of the nominee director's liability towards his appointer by virtue of his appointment as a director does not appear to have been the subject of any legal debate or scholarly research. However, it has been contended that the imposition of liability of the nominee director towards his appointer by virtue of such appointment is not possible, given the fact that the nomination itself does not create any legal relationship between the two that would give rise to such liability.[513] However, as indicated above, nominee directors may owe duties towards their appointers in the context of an employment relationship or by reason of an agreement between nominee

---

[508] *Ibid*. at 86.
[509] Grantham, *supra* note 356 at 145.
[510] Pizer, *supra* note 453 at 86.
[511] Robyn Carroll, "Shadow Director and Other Third Party Liability for Corporate Activity" in Ian Ramsay, ed., *Corporate Governance and the Duties of Company Directors,* Centre for Corporate Law and Securities Regulation (Melbourne : Faculty of Law of the University of Melbourne, 1997) at 169.
[512] *Ibid*.
[513] Austin *et al*., *Company Directors*, *supra* note 34 at para. 14.35.

and appointer.[514] Accordingly however, such duties cannot override the nominee director's duty to the corporation on whose board he has been nominated.[515]

4.4 Chapter summary

The objective of this fourth chapter was to highlight some of the most prominent difficulties caused by the nominee director's inherent position of conflict. As illustrated in the preceding pages, numerous doctrinal commentary and case law, most of which emanate from foreign jurisdictions, have attempted to provide solutions to the difficulties underlined herein.

As regards the access and disclosure to corporate information, the nominee director's access to corporate information is neither regulated nor limited, unless misuse is evidenced. However, absent consent of the board, disclosure by the nominee director of confidential corporate information back to his appointer, shall likely result in a breach of the nominee director's fiduciary duties. However, the consequences of such breach will likely depend on the consequences of the disclosure. By way of example, if an appointer acts on the information received from his nominee in a manner that is harmful to the corporation, the nominee's liability will likely be incurred. In such circumstances the nominee will have to avoid disclosure or alternatively, resign from the board. The rules regarding the conduct of nominee directors in the context of corporate groups or parent-subsidiary relationships are even murkier; in Australia and New Zealand, it appears that certain statutory exceptions allowing nominee directors of subsidiary companies to govern in the interests of the parent illustrate a legislative intent to reconcile the law with commercial reality. However, in jurisdictions such as Canada, it appears that the entity approach continues to prevail and it is doubtful whether nominees of subsidiary companies, or of companies within a group, may govern primarily in the interests of the parent or the group as opposed to the particular member of the group on whose board they have been appointed. Lastly, the risk of appointer liability illustrates that the practical difficulties faced by nominee directors also extend to their appointers. Albeit

---

[514] *Hawkes v. Cuddy*, *supra* note 164 at para. 32.
[515] *Ibid*.

rare, the potential for appointer liability is nonetheless a warning for persons with the objective of controlling or manipulating their directors.

5. CONCLUSION

In light of the foregoing analysis, it is not surprising that the issues surrounding nominee directors have alerted legislators as to whether legislative reform may provide a viable solution to the inherent conflict faced by these directors.[516] As previously noted, certain legislative measures have been taken, particularly in New Zealand and Australia, where the pragmatic view and the enterprise approach appear to have inspired the adoption of various provisions in company law statutes. In fact, out of all the jurisdictions researched for the purposes of the present thesis, it appears that New Zealand is home to the most detailed legislative framework dealing with nominee directors. Interestingly, while legislators in Australia, Canada and the U.K. have in the past contemplated with the idea of regulating nominee directors, subject to certain exceptions, they ultimately opted against such reform.

It is no surprise that the jurisdiction that has provided the most judicial authority and doctrinal commentary in connection with nominee directors has also undertaken the most comprehensive governmental discussions and associated research on the subject. In fact, the *Australian Companies and Securities Law Review Committee* released two reports in the late 1980s that rigorously elaborated on both the theoretical and practical issues pertaining to nominees, including the possibility of legislative reform.[517]

The first of these reports, namely *Discussion Paper No.7*, identified the different issues that required review, including: (1) whether nominee directors should be permitted an attenuated standard of the fiduciary duty required of all directors generally; (2) whether to allow nominee directors any exemptions; (3) whether a statutory definition of nominee directors should be adopted as well as a register so as to track these directors; (4) the nature of the commitments a nominee may make to his appointer; (5) the personal liability of the nominee; (6) appointers' liability; (7) nominee directors and the oppression remedy; (8) nominee directors representing parent companies; and (9)

---

[516] In Canada, see *Canada Business Corporations Act, Discussion Paper*, *supra* note 26.
[517] Discussion paper No. 7, 1987, *supra* note 16; Report No. 8, 1989, *supra* note 236.

reporting back to the appointer.[518] A few years later, a follow-up report, namely *Report No. 8*, was published which reiterated the issues that were highlighted in the discussion paper and suggested several legislative amendments and other proposals in connection with nominee directors.[519]

Essentially, as regards to whether nominee directors should be permitted an attenuated standard of the fiduciary duty, *Report No. 8* noted that while legislative clarifications may fail to cover all possible commercial situations, it should not ignore the problems faced by nominee directors and as such, it was submitted that the *Corporations Act*[520] should contain "*more direct recognition*" of nominee directors.[521] However, *Report No. 8* did not elaborate any further on this issue. With respect to an exemption for nominee directors, a draft provision similar to the exemption contained in the Alberta Act[522] was suggested; although the report ultimately recommended a provision that would indicate the conditions under which a nominee director may consider the interests of his appointer without breaching his fiduciary duties. These conditions would include the prior informed consent of all members of the corporation, authorization under a shareholders' agreement or, in circumstances where the company is a wholly-owned subsidiary and the director considers the interests of his appointer, authorization of the parent or holding company. The aforementioned situation would evidently be limited to solvent corporations. *Report No. 8* did not recommend allowing the constituent documents to authorize a director to consider the interests of his appointer as such could lead to a "*widespread dilution of the directors' duty of loyalty where dilution was not warranted*".[523] Moreover, *Report No. 8* also opted against a statutory definition of nominee directors.[524] However, the report did recommend the creation of a register to publicly identify nominee directors. *Report No. 8* also suggests that the provision already included in corporate statute requiring directors to disclose certain situations of conflict of interest, be extended to require directors to disclose whether they are nominees and the

---

[518] Discussion paper No. 7, 1987, *ibid* at paras. 43-53.
[519] Report No. 8, 1989, *supra* note 236.
[520] *Corporations Act, supra* note 27.
[521] Report No. 8, 1989, *supra* note 236at para. 59.
[522] Alberta Act, *supra* note 95.
[523] Report No. 8, 1989, *supra* note 236 at para. 69.

particularities of their appointment, namely whether they are expected to act in the interests of their appointers. With respect to the possibility of defining in advance the issues in connection with which a nominee director may make "commitments" to his appointer, it was noted that such a definition would be quite impossible to accomplish. However, it was put forth that a general formulation would be advisable under which several limitations are imposed such that a director would not be able to override certain duties such as those related to the company's financial statements, or taking into account the interests of creditors where the company is on the brink of insolvency. As regards the nominee director's personal liability, *Report No. 8* concluded that such a matter is best left to the judiciary. Furthermore, the report did not make any recommendations with respect to appointer liability.

Despite the foregoing, the recommendations set forth in *Report No. 8* do not appear to have been adopted as of yet, save for Section 187 with respect to nominee directors of wholly-owned subsidiaries.[525] Interestingly, almost a decade ago, the *Companies and Securities Advisory Committee* undertook yet another examination of the issues relating to nominee directors, this time in the context of corporate groups.[526] The issues relating to nominee directors that were contemplated in the *Final Report* included regulation of the disclosure of the nominee's position, the nominee's fiduciary duties, the nominee's access and disclosure of corporate information, his liability as well the liability of his appointers. However, despite certain interesting suggestions noted by the Committee, the latter ultimately appeared not to make any recommendations with respect to enacting further legislation with a view to regulating the position of nominee directors and their appointers.[527]

---

[524] *Ibid*. at para. 75
[525] Ford *et al*., *supra* note 23 at para. 9.460.
[526] *Corporate Groups* (Final Report), *supra* note 28.
[527] Austl., Commonwealth, Companies and Securities Advisory Committee, *Annual Report of the Companies and Securities Advisory Committee 1999-2000,* by Convenor R.A. St. John (Sydney: Companies and Securities Advisory Committee, 2000) at 9, online: Corporations and Markets Advisory Committee < http://www.camac.gov.au/camac/camac.nsf/ByHeadline/PDFAnnual+Report+1999+2000/$file/CASAC_Annual_Report_1999-2000.pdf>.

In the U.K., the issues particular to nominee directors were also contemplated in a 1985 paper published by the British House of Commons and presided by Chairman Sheldon Roberts.[528] The paper included a summary of the main difficulties faced by nominee directors and although it provided for certain legislative recommendation; these recommendations do not appear to have been implemented.

Over a decade later, the *English and Scottish Law Commissions*, the *Department of Trade and Industry* and particularly, the *Company Law Review Steering Group* ("**CLRSG**") collectively embarked on an extensive research project, resulting in the release of a substantial number of reports with respect to directors' duties, with the objective of instigating a wide-spread review of the U.K. company law.[529] This included, for the first time, a legislative enactment of directors' duties, which were, prior to the *U.K. Act*.[530] solely entrenched in the common law. The issue of nominee directors appears to have been briefly discussed in one of the *Scottish Law Commissions*' discussion papers.[531] where the different views expressed in England and Australia were compared. Ultimately no conclusions or recommendations appear to have been made. Moreover, the CLRSG did not appear to undertake any discussion of nominee directors or even directors' duties in the context of corporate groups.[532] However, more recently, it appears that the British House of Commons indicated that the company law reform would not change the general law on nominee directors.[533] The Standing Committee stated that once appointed: "*The nominee director must ignore the interests and wishes of the person who appointed him, and we rely there on case law, including [the Scottish Co-operative and the Kuwait v. National decisions].*"[534]

---

[528] U.K., H.C., "Roles and responsibilities of nominee directors" in "First Report from the Committee of Public Accounts", HC 33, Sessional papers (1985-1986) (President: Sheldon Roberts).
[529] Sarah Worthington, "Reforming Directors' Duties" (2000) 64 Mod. L. Rev. 439 at 439.
[530] U.K. Act, *supra* note 258.
[531] U.K., Scottish Law Commission, *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (Scottish Law Commission Discussion Paper No. 105) (Edinburgh: Scottish Law Commission, 1998) (BAILII).
[532] Worthington, *supra* note 529 at 440-441.
[533] Company Law Reform Bill, *supra*, note 259. However, the Standing Committee did indicate that subsection 173(2)(b) of the U.K. Act was nonetheless enacted with a view to permitting a nominee director to follow the instructions of his appointer without breaching is duty provided that same is indicating in the company's articles; see Section 3.3 above.

As noted in various instances throughout this analysis, there is limited doctrinal commentary and scholarly research that specifically treats the conflict of interest faced by nominee directors in Canada. The subject was nonetheless considered by Industry Canada, in a 1995 discussion paper that examined the different issues pertaining to directors' liability under the CBCA.[535]

One particular issue that the discussion paper deliberated was whether to permit nominee directors to give special, albeit not exclusive, consideration to the interests of their appointers. The discussion paper noted the difficulties faced by nominee directors and considered the trilogy of Canadian decisions rendered in relation to nominees, including the *PWA* and *Deluce Holdings* cases. The discussion paper also reflected upon the provision enacted in the Alberta Act[536] in which nominees are permitted to give consideration to the interests of their appointers. Several options were put forth as regards nominee directors: (a) the adoption of a provision parallel to that contained in the Alberta Act[537]; or (b) the adoption of a provision parallel to that in the Alberta Act,[538] with an extra precaution, in the form of a phrase to the effect that nominee directors may give special, although not exclusive, consideration to the interests of their appointers: "*so long as the consideration is not contrary to the best interests of the corporation.*"[539] However, ultimately, the discussion paper's recommendation was not to amend the law, principally because of a concern that legislative reform may risk diluting directors' fiduciary duties owed to the corporation they have been appointed to govern.[540] Subsequent to the release of the aforementioned discussion paper, legislative reform in response to the conflicts faced by nominee directors does not appear to have been the subject of any further publically published reports by the Canadian government.

In view of the fact that the foregoing jurisdictions opted out of providing legislative guidance in connection with nominee directorship, difficult questions and issues remain

---

[534] *Ibid*.
[535] *Canada Business Corporations Act, Discussion Paper*, *supra* note 26.
[536] Alberta Act, *supra* note 95.
[537] *Ibid*.
[538] *Ibid*.
[539] *Canada Business Corporations Act, Discussion Paper*, *supra* note 26 at 22.

unresolved. The crux of the issue, being the inherent conflict of interest faced by nominee directors is for the most part theoretical,[541] however, faced with practical issues, Canadian courts do not appear to provide nominee directors with any attenuation of their fiduciary duties; and therefore, the interests of the company as a whole shall continue to prevail. While Australian and New Zealand courts generally demonstrate greater tolerance towards a nominee director's outside allegiance, it is questionable whether the decisions illustrative of the pragmatic view were a product of the factual circumstances in each case. Do good facts make good law? By of example, in the *Levin* case, one cannot ignore that the sole objective behind the appointment of the nominee directors was to secure the interests of the mortgagee; a security that the plaintiff, being the sole shareholder, had explicitly agreed to.[542] As such, under the particular circumstances, it would have been unfair for the court to have granted the plaintiff's proceedings and annulled the nominee directors' conduct.

It has been submitted that similar to the *Levin* case, in light of the conflicting case law and in absence of any legislative initiatives, judges who are faced with assessing whether a nominee director has breached his fiduciary duties, should develop a reasoned and equitable formula in determining whose interests prevail.[543] Such reasoning should involve a balance between the interests of the corporation and those of the appointer and should also depend on the particular facts of each case.[544]

Notwithstanding the foregoing, a nominee director can still represent his appointer's interests while minimizing his risks of liability by undertaking several precautions. Firstly, transparency of the nominee director's appointment is crucial. As noted by Veasey and Guglielmo, "*so long as the constituency directors' representative capacity is transparently disclosed to stockholders and fellow directors, constituency directors could attempt to persuade the entire board that their sponsors' interests represent or are*

---

[540] *Ibid*.
[541] Darams, *supra* note 122 at 72.
[542] Koh, *supra* note 146.
[543] Veasey & DiGuglielmo, *supra* note 32 at 767.
[544] *Ibid*.

aligned with the interests of the corporation and all its stockholders."[545] Secondly, nominee directors should abstain from voting on any decisions that would create a conflict of interest.[546] As regards the disclosure of corporate information, absent board consent, it is recommended that the nominee does not disclose confidential information to his appointer.[547] As noted again by Veasey and Guglielmo, "*while constituency directors can provide their sponsors with a voice in the board-room, they should not expect to be their sponsor's eyes and ears in all circumstances.*"[548] Moreover, in the context of corporate groups, nominee directors who govern pursuant to the interests of the group as a whole may not disregard the interests of the particular entity on whose board they have been appointed to govern and must even be prepared to justify their conduct by evidencing derivative benefits to such entity. As the law stands today, the bottom line is that where the interests of an appointer and those of the company diverge, it is clear that the nominee director must necessarily favour the interests of the corporation.

---

[545] *Ibid*. at 772.
[546] André Laurin, "The 'Nominee' director and conflicting loyalties" (May 2006) Corporate Governance and Securities Law bulletin at 4, online: Lavery deBilly < http://lavery.ca/upload/pdf/bulletins/060504a.pdf >.
[547] *Ibid*.
[548] Veasey & DiGuglielmo, *supra* note 32 at 775.

BIBLIOGRAPHY

LEGISLATION

Business Corporations Act, R.S.A. 2000, c. B-9. (Alberta).

Business Corporation Act, R.S.O. 1990, c. B.16. (Ontario).

Canada Business Corporations Act, R.S.C. 1985, c. C-44.

Companies Act 2006, c. 46. (U.K.).

Corporations Act 2001 (Cth.) (Australia).

Civil Code of Québec, S.Q. 1991, c. 64.

Duties Act 2000, Act. No. 79/2000 (Australia).

Companies Act 1993, 1993/105 (New Zealand).

Regulation 61-101 respecting protection of minority security holders in special transactions, c. V-1.1, r. 0.1.02.1. (Québec).

JURISPRUDENCE

152581 Canada Ltd. v. Matol World Corp, [1997] R.J.Q. 161 (QL).

820099 Ontario Inc. v. Harold E. Ballard Ltd., (1991) 3 B.L.R. (2d) 113 (QL).

Aberdeen Rail Co. v. Blaikie Brothers, (1843-1860) All E.R. Rep. 249 (QL).

Aronowicz v. Emtwo Properties Inc., 2009 CanLII 55454 (ON S.C.D.C.).

Auclair v. Auclair, 2005 CanLII 18110 (Qc Sup. Ct.).

Australian Securities Commission v. A.S. Nominees Limited, (1995) 62 F.C.R. 504 (AUSTLII).

Balesteri v. Robert, [1992] A.Q. No 495 (QL).

BCE inc. (Arrangement relatif à), 2008 QCCA 953 (CANLII).

BCE Inc. v. 1976 Debentureholders, 2008 SCC 69 (CANLII).

Beach Petroleum NL v. Johnson, (1993) 43 F.C.R. 1.

Bell Canada v. Manitoba Telecom Services Inc., (2004) 49 B.L.R. (3d) 17 (QL).

Bennetts v. Board of Fire Commissioner of New South Wales, (1967) 87 W.N. (NSW) 307.

Berlei Hestia (NZ) Ltd. v. Fernyhough, (1980) 2 N.Z.L.R. 150 (QL).

Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5 (CANLII).

Bluecorp Pty Ltd (in liq.) v. Anz Executors and Trustee Co Ltd., (1994) 13 A.C.S.R. 386.

Boulting and Another v. Association of Cinematograph, Television and Allied Technicians, (1960) 2 Q.B. 606 (QL).

Brant Investments Ltd. v. KeepRite Inc., (1991) 3 O.R. (3d) 289 (QL).

British Columbia Power Corporation Ltd. v. Attorney-General of British Columbia et al., (1964) 47 D.L.R. (2d) 633 (QL).

Capricornia Credit Union Ltd. v. Australian Securities and Investment Commission, (2007) F.C.A.F.C. 79 (AUSTLII).

Charterbridge Corporations Ltd. v. Lloyds Bank Ltd., [1970] 1 L.R.Ch. (Law Reports, Chancery Division) 62.

Clark v. Workman, (1920) 1. I.R. 107.

Cobden Investments Ltd. v. RWM Langport Ltd. & Ors, [2008] E.W.H.C. (Ch.) 2810 (BAILII).

Colborne Capital Corp. v. 542775 Alberta Ltd., (1999) 45 B.L.R. (2d) 21 (QL).

Conway et al. v. Petronius Clothing Co. Ltd., [1978] 1 E.R. (Ch. D.) 185.

Dairy Containers Ltd v. NZI Bank Ltd Dairy Containers Ltd v Auditor-General, (1995) 2 N.Z.L.R. 30 (AUSTLII).

Daniels v. Anderson, (1995) 37 N.S.W.L.R. 438.

Deluce Holdings Inc. v. Air Canada, (1992) 12 O.R. (3d) 131(QL).

Edman v. Ross, (1922) 22 S.R. (NSW) 351.

Ellins v. Conventree Inc., (2007) CanLII 9331 (On S.C.).

Bank of New Zealand v. Equiticorp Finance Ltd. and Another, (1992) A.C.S.R. 199 (QL).

Equiticorp v. Bank of New Zealand, (1993) 11 A.C.S.R. 642 (QL).

Exide Canada Inc. v. Hilts, (2005) 11 B.L.R. (4th) 311 (CANLII).

Extrasure Travel Insurances Ltd. and another v. Scattergood and another, (2002) 1 B.C.L.C. 598 (WEST).

Farrow Financing v. Farrow Properties, (1999) 1 V.R. 584 (WEST).

Fitzsimmons v. R., (1997) 23 A.C.S.R. 355.

Ford Motor Co. of Canada, Ltd. v. Ontario Municipal Employees Retirement Board, [2004] 41 B.L.R. (3d) 74 (QL).

Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board, [2006] 12 B.L.R. (4th) 189 (QL).

Fox v. Gadsden, (2003) NSWSC 748 (AUSTLII).

Fulham Football Club Ltd. & Ors v. Cabra Estates plc, [1992] B.C.C. 863 (WEST).

Gainers Inc. v. Pocklington Financial Corporation, (2000) 81 Alta. L.R. (3d) 17 (QL).

Gamble and another v. Hoffman and another, (1997) 24 A.C.S.R. 369 (QL).

Glopal v. Burke, 41 B.L.R. (4th) 312 (2007) (CANLII).

Gravino v. Enerchem Transport Inc., 2008 QCCA 1820 (CANLII).

Greenhalgh v. Arderne Cinemas Ltd. and Others, (1950) 2 E.R. 1120.

Hancock Family Memorial Foundation Ltd. v. Porteous, (1999) 32 A.C.S.R. 124 (AUSTLII).

Harkness v. Commonwealth Bank of Australia, (1993) 12 A.C.S.R. 165 (QL).

Hawkes v. Cuddy & Ors, (2009) E.W.C.A. Civ. 291 (Supreme Court of Judicature Court of Appeal - Civil Division) (BAILII).

Hutton v. West Cork Railway Company, 2 (1883) 23 Ch. D. 654.

Japan Abrasive Materials Pty Ltd. & Others v. Australian Fused Materials Pty Ltd., (1998) 16 A.C.L.C. 1 (AUSTLII).

Keating v. Bragg, (1996) 158 N.S.R. (2d) 241 (QL).

Kuwait Asia Bank E.C. v. National Mutual Life Nominees Ltd., [1990] 3 N.Z.L.R. 513 (QL).

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574.

Levin v. Clark, (1962) N.S.W.R. 686.

Levy-Russell Ltd. v. Tecmotiv Inc., (1994) 13 B.L.R. (2d) 1 (WEST).

Linter Group Ltd. v. Goldberg, (1992) 7 A.C.S.R. 580 (QL).

Linton v. Telnet Pty Ltd., (1999) 30 A.S.C.R 465 (QL).

LMI Pty Ltd. v. Baulderstone Pty Ltd., (2001) NSWSC 886 (WEST).

Maiklem v. Springbank Oil & Gas, (1995) 3 W.W.R. 631 (QL).

Maronis Holdings Ltd. v. Nippon Credit Australia Pty. Ltd., (2001) 38 A.C.S.R. 404 (AUSTLII).

Martin v. Gibbons, (1907) 15 O.L.R. 623.

Michel v. Lafrentz, (1992) 4 C.P.C. (3d) 155 (WEST).

Millgate Financial Corp. v. BF Realty Holdings Ltd., Canadian Broadcasting Corp. Pension Plan (Trustee of), (2003) 47 C.B.R. (4th) 278 (QL).

Mogil v. Abelson, (1992) 8 B.L.R. (2d) 102 (QL).

Molomby v. Whitehead and Australian Broadcasting Corporation, (1985) 8 A.L.D. 341 (F.C.A.).

Morgan v. 45 Fleurs Avenue Pty Ltd., (1986) A.C.L.R. 692 (QL).

Natcomp Technologies Australia Pty Ltd v. Graiche, (2001) N.S.W.C.A. 120 (AUSTLII).

Ocular Sciences Ltd. and Another v. Aspect Vision Care Ltd. and Others, Chancery Division (Patents Court), Judgment rendered on 11 November 1996 [unreported] (QL).

Parke v. The Daily News Ltd. and Others, (1962) Ch. D. 926.

Pascoe Ltd. (in liq.) v. Lucas, (1991) 33 A.C.S.R. 357 (QL).

Peoples Department Stores Inc. (trustee of) v. Wise, (1998) 23 C.B.R. (4th) 200 (QL).

Peoples Department Stores Inc. v. Wise, [2004] 3 S.C.R 461.

PWA Corporation v. Gemini Group Automated Distribution Systems Inc., (1993) 101 D.L.R. (4th) 15 (QL).

PWA Corporation v. Gemini Group Automated Distribution Systems Inc., (1993) 15 O.R. (3d) 730 (QL).

Quintex Australia Finance Ltd. v. Schroders Australia Ltd., (1990) 3 A.C.S.R. 267.

Re Application of The News Corp. Ltd., (1987) 70 A.L.R. 419 (WEST).

Re Broadcasting Station 2GB Pty Ltd., (1964-65) N.S.W.R. 1648.

Re Hydrodam (Corby) Ltd., (1994) 2 B.C.L.C. 180 (WEST).

Re Palmer and Carling O'Keefe Breweries of Canada Ltd. et al., (1989) 67 O.R. (2d) 161.

Re Spargos Mining NL, (1990) 3 A.C.S.R. 1 (QL).

Reid Murray Holdings Ltd. (in liq.) v. David Murray, (1972) 5 S.A.S.R. 386.

Ringuet v. Bergeron, [1960] S.C.R. 672 (QL).

Scottish Co-operative Wholesale Society Ltd. v. Meyer, (1959) A.C. 324.

Secretary of State for Trade and Industry v. Deverell, (2000) 2 B.C.L.C. 133 (QL).

Selangor United Rubber Estates Ltd. v. Cradock and Others (No. 3.), (1968) 1 W.L.R. 1555 (QL).

SGH Limited v. The Commissioner of Taxation of the Commonwealth of Australia, (2002) 210 C.L.R. 51 (WEST).

Solomon v. Solomon and Company, [1897] A.C. 22.

Spedley Securities Ltd. (in liq.) v. Greater Pacific Investments Pty Ltd (in liq.), (1992) 30 N.S.W.L.R. 185 (QL).

Standard Chartered bank of Australia Ltd. v. Antico, (1995) 13 A.C.L.C. 1 (AUSTLII).

Tal v. Lifemark Health Inc., (2002) 29 B.L.R. (3d) 157 (WEST).

The Bell Group Ltd. (In liq.) v. Westpac Banking Corporation (No. 9) (2008) W.A.S.C. 239 (AUSTLII).

Thorby v. Goldberg, (1964) 122 C.L.R. 597.

Trimac Ltd. v. C-I-L Inc., (1990) 1 W.W.R. 133 (QL).

Trounce and Wakefield v. NCF Kaiopoi Ltd., (1986) 2 N.Z.C.L.C. 422 (N.Z.H.C.).

Walker v. Wimborne, (1976) 137 C.L.R. 1.

Westfair Foods v. Watt (1990) 73 Alta L.R. 326 (QL).

Whitehouse v. Carlton, (1987) 70 A.L.R. 251 (QL).

Wood v. C.F.N. Precision Inc., 2008 CanLII 19797 (ON S.C.).

Young. v. Murphy, (1994) 13 A.C.S.R. 722.

SECONDARY MATERIAL: MONOGRAPHS

Austin, Robert P., Ford, Harold Arthur John, & Ramsay, Ian M. *Company Directors: Principles of Law & Corporate Governance* (Sydney: LexisNexis, 2005).

Blommestein, Hans J. & Funke, Norbert. *Institutional Investors in the New Financial Landscape,* (Paris: OECD Publications, 1997).

Cassidy, Julie. *Concise Corporations Law*, 5th ed. (Annandale: Federation Press, 2006).

Crête, Raymonde & Rousseau, Stéphane. *Droit des Sociétés par Actions,* 2nd ed. (Montréal: Thémis, 2008).

Davies, Paul L. *Gower and Davies' Principles of Modern Company Law*, 7th ed. (London: Sweet and Maxwell, 2003).

Davis, Ronald. *Directors' Liability in Canada* (North Vancouver: Special Technical Publishers, 2006).

Ford, Harold Arthur John, Austin, Robert P. & Ramsay, Ian M. *Ford's principles of Corporations Law*, 11th ed., (Sydney: LexisNexis Butterworths, 2003).

Hadden, Tom, Forbes, Robert E. & Simmonds, Ralph L. *Canadian Business Organizations Law* (Toronto: Butterworths, 1984).

Hansell, Carol. *Directors and Officers in Canada: Law and Practice*, vol. 2 (Toronto: Carswell, 2009).

Hansell, Carol. *What Directors Need to Know: Corporate Governance* (Toronto: Thomson Carswell, 2003).

Martel, Paul. *Business Corporations in Canada: Legal and Practical Aspects*, vol. 2 (Toronto: Thomson Carswell, 2007).

McGuinness, Kevin Patrick. *Canadian Business Corporations Law*, 2nd ed. (Markham: LexisNexis Canada, 2007).

Kevin P. McGuinness. *Halsbury's Laws of Canada: Business Corporations II*, 1st ed. (Markham: LexisNexis Canada, 2008).

Vanduzer, J. Anthony. *The Law of Partnerships and Corporations* (Toronto: Irwin Law, 2003).

SECONDARY MATERIAL: ARTICLES

Afterman, Allen B. "Directors' Duties in Joint-Ventures and Parent Subsidiary Companies" (1968) 42 Austr. L. J. 168.

Austin, Robert P. & Ellison, Minter. "Representatives and Fiduciary Responsibilities – Notes on Nominee Directorships and Life Arrangements" 7 Bond L.R. (1995) 19.

Baxt, Robert. "Can nominating companies be vicariously liable for the negligence of their nominee directors?" (1995) 69 Austr. L. J. 684.

Baxt, Robert. "Duties to a Corporate Group – One Step Forward or Two Steps Backwards?" (1994) 22 Austl. Bus. L. Rev. 138.

Baxt, Robert. "Issues Facing Directors in Corporation Groups" (1997) 25 Austl. Bus. L. Rev. 436.

Baxt, Robert & Lane, Timothy "Developments in Relation to Corporate Groups and the Responsibility of Directors – Some Insights and New Directions" (1998) 16 C. & S.L.J. 628.

Bebchuk, Lucian Arye. "Property Rights and Liability Rules: The Ex Ante View of the Cathedral" (2001-2002) 100 Mich. L. Rev. 601 (HEIN).

Ben-Ishai, Stephanie. "A Team Production Theory of Canadian Corporate Law" (2006) 44 Alta. L. Rev. 299 (QL).

Birds, John. "*The Permissible Scope Articles Excluding the Duties of Company Directors*" (1976) 39 Modern Law Review 394.

Blumberg, Phillipe I. "The Transformation of Modern Corporations Law: The Law of Corporate Groups" (2004-2005) 37:3 Conn. L. Rev. 605 (HEIN).

Boros, Elizabeth. "The Duties of Nominee and Multiple Directors: Part I" (1989) 10:11 Company Lawyer 211(HEIN).

Bratton, William W. "Enron and the dark side of shareholder value" (2002) 76 Tulane Law Rev. 1275 (HEIN).

Carroll, Robyn. "Shadow Director and Other Third Party Liability for Corporate Activity" in Ian Ramsay, ed., *Corporate Governance and the Duties of Company Directors,* Centre for Corporate Law and Securities Regulation (Melbourne : Faculty of Law of the University of Melbourne, 1997).

Cilliers, Jeanne. "Directors' duties in corporate groups – Does the green light for the enterprise approach signal the end of the road for Walker v. Wimborne?" (2001) 13 A.J.C.L. 109.

Courtney, Thomas B. "Fettering Director's Discretion" (1995) 16:8 Company Lawyer 227 (HEIN).

Cross, Kaylene & Webster, Jon. "Issues Facing Directors in Corporate Groups" (1997) 25 Austl. Bus. L. Rev. 436.

Crutchfield, Philip. "Nominee Directors: The Law and Commercial Reality" (1991) 12:7 Company Lawyer 136 (WEST).

Daniels, Ronald J. & Halpern, Paul. "Too Close for Comfort: The Role of the Closely Held Public Corporation in the Canadian Economy and the Implications for Public Policy" (1995) 26 Can. Bus. L.J. 11 (HEIN).

Daniels, Ronald J. & Iacobucci, Edward M. "Some Causes and Consequences of Corporate Ownership Concentration in Canada" in Randall Morck, ed., *Concentrated Corporate Ownership*, by the National Bureau of Economic Research (Chicago, University of Chicago Press, 2000) 81.

Daniels, Ronald J. & Waitzer, Edward J. "Challenges to the Citadel: A brief Overview of Recent Trends in Canadian Corporate Governance" (1994) 23 Can. Bus. L.J. 23.

Davis, E. Philip. "Institutional investors, corporate governance and the performance of the corporate sector" (2002) 26 Economic Systems 203.

De Lacy, John. "The concept of a company director: Time for a new expanded and unified statutory concept" (2006) J. Bus. L. 267.

Dignam, Alan & Galanis, Michael "Australia Inside-Out: The Corporate Governance System of the Australian Listed Market" (2004) 28 Melbourne U. L.R. 623 (QL).

Du Plessis, Jean Jacques. "Nominee directors versus puppet, dummy and stooge directors: Reflections on these directors and their nominators or appointers" (1995) 2 Journal of South African Law 310.

Enriquez, Emma D. "Honor thy shareholder at all costs? Towards a better understanding of the fiduciary duties of directors of wholly-owned subsidiaries" (2003) 32 S.U.L. Rev. 97 (HEIN).

Erickson, John Park, Yan W. & Shin, Hyun-Han. "Board Composition and Firm Value Under Concentrated Ownership: The Canadian Evidence" (2005) 13 Pacific-Basin Finance Journal 387.

Farrar, John H. "Legal Issues Involving Corporate Groups" (1998) 16 C. & S.L.J. 184.

Fink, Rachel A. "Social Ties in the Boardroom: Changing the Definition of Director Independence to Eliminate 'Rubber Stamping' Boards" (2005-2006) 79 S. Cal. L. Rev. 455 (HEIN).

Franks, Julian, Mayer, Colin and Rossi, Stefano. "Spending less time with the family – The decline of family ownership in the United Kingdom" in Randall Morck, ed., *A History of Corporate Governance Around the World*, by the National Bureau of Economic Research (Chicago: University of Chicago Press, 2005) 581.

Gadhoum, Yoser. "Power of Ultimate Controlling Owners: A Survey of the Canadian Landscape" (2006) 10 Journal of Management Governance 79.

Gouvin, Eric J. "Resolving the Subsidiairy Director's Dilemma" (1995-1996) 47 Hastings L.J. 287 (HEIN).

Grantham, Ross. "Liability of Parent Companies for the Actions of the Directors of their Subsidiaries" (1997) vol. Company Lawyer 138 (WEST).

Gray, Wayne D. "A solicitor's perspective on Peoples v. Wise" (2005) 41 Can. Bus. L.J. 184.

Hadden, Tom. "The Regulation of Corporate Groups in Australia" (1992) 15 U.N.S.W.L.J. 61.

Haddy, Simon. "A Comparative Analysis of Directors' Duties in a Range of Corporate Structures" (2002) 20 Company and Securities Law Journal 138.

Hamilton, Robert W. "The Crisis in Corporate Governance: 2002 Style" (2003) 40 Houston L. Rev. 1 (HEIN).

Harding, Matthew. “Dual Listed Companies: Understanding Conflict of Interest for Directors” (2002) 25:2 U.N.S.W.L.J. 594.

Hill, Jennifer. “Corporate Groups, Creditor Protection and Cross Guarantees: Australian Perspectives” (1995) 24 Can. Bus. L.J. 321.

Ho, Lusina & Lee, Pey-Woan. “A director’s duty to confess: a matter of good faith” (2007) 66:2 C.L.J. 348 (WEST).

Keay, Andrew. “The Duty of Directors to Exercise Independent Judgment” (2008) 29:10 Company Lawyer 290 (HEIN).

Khimji, Mohamed F. “Peoples v. Wise – Conflating Directors’ Duties, Oppression, and Stakeholder Protection” (2006) 39 U.B.C.L. Rev. 209 (QL).

Kluver, John. “Entity v. Enterprise Liability: Issues for Australia” (2004-2005) 37 Conn. L. Rev. 765 (HEIN).

Koh, Pearlie. “The Nominee Director’s Tangled Lot” (2007) Sing. J.L.S. 148, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1074763>.

Krackhardt, Oliver. “New Rules for Corporate Governance in the United States and Germany – A model for New Zealand?” (2005) 36 Victoria University of Wellington Law Review 319 (QL).

Kroszner, Randall S. & Strahan, Philip E. “Bankers on boards: monitoring conflicts of interests and lender liability” (2001) 62 Journal of Financial Economics 415.

Landers, Jonathan M. “A unified approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy” (1975) 42:4 U. Chicago L. Rev. 589 (HEIN).

La Porta, Rafael, Lopez-de-Silanes, Florencio & Shleifer, Andrei. “Corporate Ownership Around the World” (1999) LIV:2 Journal of finance 471.

Leckey, Robert.“Harmoniser le droit dans un espace multilingue et pluri-juridique : un point de vue canadien” (2008) Rev. D. U. 39.

Lee, Ian B. “Peoples Department Stores v. Wise and the “Bests Interest of the Corporation” (2005) 45 Can. Bus. L.J. 212.

Lee, Pey-Woan. “Serving two masters – The dual loyalties of the nominee director in corporate groups” (2003) J. Bus. Law 449 (WEST).

MacIntosh, Jeffrey G. "Institutional Shareholders and Corporate Governance in Canada" (1996) 26 Can. L.J. 145.

Markovic, Martin. "The Law of Shadow Directorships" (1996) 6 Australian J. Corp. L. 3 (QL).

Macpherson, Darcy L. "The Supreme Court Restates Directors' Fiduciary Duty – A comment on Peoples Department Stores v. Wise" (2005) 43 Alta. L. Rev. 383 (QL).

Martel, Paul. "Harmonization of the Canada Business Corporations Act with Quebec Civil Law - Revision Proposal: The Duties of Loyalty of Directors of Federal Business Corporations: Impact of the Civil Code of Québec" (2008) 42 R.J.T. 147 (QL).

Melamed, A. Douglas & Calabresi, Guido. "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85:6 Harvard L. Rev. 1089 (HEIN).

Montgomery, Kathryn E. "Market Shift – The role of Institutional Investors in Corporate Governance" (1996) 26 Can. Bus. L.J. 189.

Morck, Randall, Percy, Michael, Tian, Gloria & Yeung, Bernard. "The Rise and Fall of the Widely Held Firm" in Randall Morck, ed., *A History of Corporate Governance Around the World*, by the National Bureau of Economic Research (Chicago: University of Chicago Press, 2005) 65.

Morck, Randall, Tian, Gloria and Yeung, Bernard. "Who owns whom? Economic nationalism and family controlled pyramidal groups in Canada" in Lorraine Eden & Wendy Dobson, eds., *Governance, Multinational and Growth* (Cheltenham: Edward Elgar Publishing Limited, 2005) 44.

Morck, Randall & Yeung, Bernard. "Agency Problems in Large Family Business Groups" (2003) 27:4 Entrepreneurship Theory and Practice 367.

Mountfort, April. "Nominee Directors : Are Appointers Vicariously Liable for Breaches of Director's Duties" (2001) 75 Austr. L. J. 231.

Nachane, D.M., Ghosh, Saibal & Ray Partha. "Bank nominee directors and corporate performance: micro evidence for India" (19 March 2005) Economic and Political Weekly 1216, online: Munich Personal RePEc Archive (Munich University Library) <http://mpra.ub.uni-muenchen.de/1714/>.

Noonan, Chris & Watson, Susan. "The Nature of Shadow Directorship: Ad Hoc Statutory Intervention or Core Company Law Principle" (2006) J. Bus. L. 763.

Olsen, John F. & Adams, Michael T. "Composing a Balanced and Effective Board to Meet New Governance Mandates" (2004) 59:2 Bus. Law. 421 (QL).

Orts, Eric W. "Beyond shareholders: Interpreting corporation constituency statutes." (1992) 61 Geo. Wash. L. Rev. 14 (HEIN).

Oswald, Lynda J. "Shareholders v. Stakeholders: Evaluating corporate constituency statues under the takings clause" (1998) 24 J. Corp. L. 1(Westlaw).

Padfield, Stefan J. "In search of a higher standard: rethinking fiduciairy duties of directors of wholly-owned subsidiaries" (2004-2005) 10 Fordham J. Corp. & Fin. L. 79 (HEIN).

Parkinson, J.E. "The modification of directors' duties" (1980) J. Bus. L. 335.

Parsons, Ross W. "The Directors' Duty of Good Faith" (1967) 5 Melbourne U. L. Rev. 395.

Perreault, Chantal, Bourgeois, Karine & Bouthillier, Julie. "L'accès à l'information des administrateurs et des actionnaires du Québec" in Service de la formation permanente du Barreau du Québec : *Développements Récents sur les abus de droit* (Cowansville: Yvon Blais, 2005) 199.

Pichhadze, Aviv. "Mergers, Acquisitions, and Controlling Shareholders: Canada and Germany Compared" (2003) 18 B.F.L.R. 341.

Pillay, Sukanya. "Forcing Canada's Hand? The Effect of the Sarbanes-Oxley Act on Canadian Corporate Governance Reform" (2004) 30 Man. L.J. 285 (QL).

Pizer, Jason. "Holding an Appointer Vicraiosly Liable for its Nominee Direcor's Wrongdoing – an Australian Roadmap" (1997) 15 C & S.L.J. 81.

Prentice, Daniel D. "Some Aspects of the Law relating to Corporate Groups in the United Kingdom" (1998) 13 Conn. J. Int'l L. 205 (HEIN).

Ramsay, Ian M. "Allocating Liability in Corporate Groups: An Australian Perspective" (1998-1999) 13 Conn. J. Int'l L. 329 (HEIN).

Ramsay, Ian M. & Blair, Mark. "Ownership Concentration, Institutional Investment and Corporation Governance: An Empirical Investigation of 100 Australian Companies" (1993-1994) 19 Melbourne U. L. Rev. 153.

Redmond, Paul. "Nominee Directors" (1987) 10 U.N.S.W.L.J. 194.

Rousseau, Stéphane. "La gouvernance d'entreprise à la croisée des chemins: comment restaurer la confiance des investisseurs à la suite de l'affaire Enron?" in Service de

la formation permanente du Barreau du Québec : *Développements récents en droit des affaires* (Cowansville: Yvon Blais, 2003) (REJB).

Rousseau, Stéphane & Gauthier, Bastien. "Le devoir de loyauté de l'administrateur désigné par un investisseur institutionnel" in Service de la formation continue du Barreau du Québec : *Développements Récents en litige commercial*, (Cowansville: Yvon Blais, 2007) (REJB).

Sargent, Neil C. "Corporate Groups and the Corporate Veil in Canada: A Penetrating Look at Parent-Subsidiary Relations in the Modern Corporate Enterprise" (1988) 17 Man. L.J. 156.

Sarra, Janis. "Corporate Group Insolvency: Seeking the Forest and the Trees" (2008) 24 B.F.L.R. 63 (WEST).

Sarra, Janis. "The Corporation as Symphony: Are Shareholders First Violin or Second Fiddle?" (2003) 36 U.B.C.L. Rev. 403 (QL).

Shub, Oscar. "Separate Corporate Personality: Piercing the Corporate Viel" (2006) 56:2 Federation of Defense and Corporate Counsel Quarterly 253.

Sievers, A.S. "Finding the Right Balance: The 2GB Case Revisited" (1993) 3:1 Austl. J. Corp. L. 1.

Strasser, Kurt A. "Piercing the veil in Corporate Groups" (2004-2005) 37 Conn. L. Rev. 637 (HEIN).

Thomas, (Justice) E.W. "The role of nominee directors and the liability of their appointers" in Ian Ramsay, ed., *Corporate Governance and the Duties of Company Directors,* Centre for Corporate Law and Securities Regulation (Melbourne : Faculty of Law of the University of Melbourne, 1997) 148.

Thomson, Leigh. "Nominee and multiple directors and confidential information" in John H. Farrar, ed., *Contemporary Issues in Company Law* (Auckland: Commerce Clearing House (New Zealand), 1987) 161.

Useem, Michael. "Corporate Governance is Directors Making Decisions: Reforming the Outward Foundations for Inside Decision Making" (2003) 7:3 Journal of Management and Governance 241.

Veasey, E. Norman & Di Guglielmo, Christine T. "How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors" (2007-2008) 63 Bus. Law. 761 (HEIN).

Wade, Cheryl L. "The Interplay between Securities Regulation and Corporate Governance: Shareholder Activism, the Shareholder Proposal Rule, and Corporate

Compliance with Law" in Janis Sarra, ed., *Corporate Governance in Global Markets* (Vancouver: UBC Press, 2003) 156.

Weinrib, Arnold S. "Information and Property" (1988) 38 U.T.L.J. 117.

Worthington, Sarah. "Reforming Directors' Duties" (2000) 64 Mod. L. Rev. 439.

Wright, Robert. "Enron: The Ambitious and the Greedy" (2003) 16 Windsor Rev. Legal Soc. Issues 71 (QL).

Yeo, Mark. "The Myth of Undivided Loyalty" (1990) 11:7 Company Lawer 149 (WEST).

Yeung, Karen. "Corporate groups: legal aspects of the management dilemma" (1997) L.M.C.L.Q. 208.

SECONDARY MATERIAL: OTHER SOURCES

Ayeung, Susanna. "Nominee Directors: Sui Generis or Merely a Breed of Directors" (Paper presented to the One-Day Symposium on Accountability, Governance and Performance in Transition, 20 February 2004).

Conglianese, Cary & Michael, Michael L. *After the Scandals: Changing Relationships in Corporate Governance* (Regulatory Policy Program Report RPP-09, John F. Kennedy School of Government, Harvard University, 2006), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911653>.

Darams, Jamie. *Behind the Board: The Theoretical and Practical Concerns For the Nominee Director in Australia*, (Thesis, University of Adelaide, 1999) [unpublished].

Foram, Frank R., Lee, Stephen C. & Mackie, Howard. "The Dilemma for Nominee Directors" in *Corporate Liability*, vol. II (Toronto: Federated Press, Governance and Liability: Papers from recent conferences and articles from recent journals, 1996) 1.

Hill, Jennifer. *Institutional Investors and Corporate Governance in Australia* (Legal Studies Research Paper No. 08/37) (Sydney: Sydney Law School, 2008).

Hill, Jennifer. *Regulatory Responses to Global Corporate Scandals* (Legal Studies Research Paper No. 06/35) (Sydney: Sydney Law School, 2005), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886104>.

Laurin, André. "The "Nominee" director and conflicting loyalties" (May 2006) Corporate Governance and Securities Law bulletin, online : Lavery De Billy < http://lavery.ca/upload/pdf/bulletins/060504a.pdf >.

Loke, Alexander. “The painters in the Cathedral: economic efficiency and the corporate fiduciary duty of loyalty” (Paper presented at the Socio-Legal Studies Association (U.K.) Annual Conference, 6-8 April 2004) (Singapore, Singapore: National University of Singapore, 2004), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=496142>.

Paskell-Mede, Mindy & Nicholl, John. “*Directors’ Liability from Private Rights of Action”* (Final Report presented to Industry Canada, Ottawa) (25 May 1994) [unpublished].

Ramsay, Ian M. & Stapledon, Dr. Geof P. *Corporate Groups in Australia*, (Working Paper No. 26) (Melbourne: Faculty of Law of Melbourne Public Law and Legal Theory, 2002), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=286116>.

Valsan, Calin. “2007: A Canadian Corporate Ownership Survey” (Working Paper Series) (Lennoxville: Williams School of Business – Bishop’s University, 2008), online: SSRN < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158544 >.

Weiser, Jay. *Measure of Damages for Violation of Property Rules: Breach of Confidentiality* (Research Paper 01-19) (Stanford, US: Stanford Faculty of Law, 2001), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=277172>.

GOVERNEMENT DOCUMENTS

Alberta, *Proposals for a new Alberta Business Corporations Act* (Report No. 36) (Edmonton: Alberta Institute of Law Research and Reform, 1980).

Austl., Commonwealth, Companies and Securities Advisory Committee, *Annual Report of the Companies and Securities Advisory Committee 1999-2000,* by Convenor R.A. St. John (Sydney: Companies and Securities Advisory Committee, 2000), online: Corporations and Markets Advisory Committee <http://www.camac.gov.au/camac/camac.nsf/ByHeadline/PDFAnnual+Report+1999+2000/$file/CASAC_Annual_Report_1999-2000.pdf >.

Austl., Commonwealth, Company Securities and Advisory Committee, *Corporate Groups* (Final Report) (Sydney: Company Securities and Advisory Committee, 2000), online: Corporations and Markets Advisory Committee < http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/$file/Corporate_Groups,_May_2000.pdf>.

Austr., Commonwealth, Corporations and Market Advisory Committee, *The Duties and Liabilities of Nominee Directors and Alternate Directors* (Report No. 8) Chaired by Professor Harold A.J. Ford (Sydney: Companies and Securities Law Review Committee, 2 March 1989), online: Australian Government Takeovers Panel: <http://www.takeovers.gov.au/content/Resources/cslrc/cslrc_report_no_8.aspx>.

Austl., Commonwealth, Companies and Securities Law Review Committee, *The Duties and Liabilities of Nominee Directors and Alternate Directors*, (Discussion Paper - No. 7) Chaired by Professor Harold A.J. Ford (Sydney: Australian Government Takeovers Panel, 1987), online: Australian Government Takeovers Panel <http://www.takeovers.gov.au/content/Resources/cslrc/cslrc_discussion_paper_no_7.aspx>.

Canada, *Beyond Compliance: Building a Governance Culture* (Final Report) (Ottawa: Joint Committee on Corporate Governance, November 2001), online: Canadian Institute of Chartered Accountants <http://www.cica.ca/multimedia/Download_Library/Research_Guidance/Risk_Management_Governance/Governance_Eng_Nov26.pdf>.

Canada, *Canada Business Corporations Act Discussion Paper on Directors' Liability* (Ottawa: Industry Canada, November 1995), online: Government of Canada < http://dsp-psd.pwgsc.gc.ca/Collection/C2-280-7-1995E.pdf >.

Canada, Senate of Canada, "The Governance Practices of Institutional Investors" (Ottawa: Report of the Standing Senate Committee on Banking, Trade and Commerce, 1998) (Chair: Hon. Michael Kirby), online: Parliament of Canada <http://www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/bank-e/rep-e/rep16nov98-e.htm#TABLE%20OF%20CONTENTS>.

Canada, Task Force to Modernize Securities Legislation in Canada, *Some Obstacles to Good Corporate Governance in Canada and How to Overcome Them* (Final Report) by Randall Morck & Bernard Yeung (Ottawa: Canada Steps Up, 2006) 281, online: Task Force to Modernize Securities Legislation in Canada < http://www.tfmsl.ca/docs/V4(5)%20Morck.pdf >.

Department of Justice Canada, "*Some Thoughts on Bijuralism in Canada and the World*" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism* (Booklet 2) by Marie-Claude Gervais & Marie-France Séguin (Ottawa : Department of Justice Canada, 24 June 2003), online: Department of Justice Canada < http://www.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b2-f2/bf2a.html#general>.

U.K., Institute of Directors, *Nominee Directors* (London: Guide to Boardroom Practice No. 8, 1985).

U.K., Committee on the financial aspects of corporate governance, *Report of the committee on the financial aspects of corporate governance* (London: Gee a division of Professional Publishing Ltd., 1992).

U.K., H.C., “Roles and responsibilities of nominee directors” in “First Report from the Committee of Public Accounts”, HC 33, Sessional papers (1985-1986) (President: Sheldon Roberts).

U.K., Scottish Law Commission, *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (Scottish Law Commission Discussion Paper No. 105) (Edinburgh: Scottish Law Commission, 1998) (BAILII).

U.K., H.C., Company Law Reform Bill in Standing Committee D, Session 2005-2006, col. 601 (11 July 2006), online: House of Commons <http://www.publications.parliament.uk/pa/cm200506/cmstand/cmscclaw.htm>.