The *Peoples* Decision – Two Years Later: Where Are We At And What Have We Learned?

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The *Peoples* Decision – Two Years Later: Where Are We At And What Have We Learned?

In October 2004, the Supreme Court of Canada ("SCC") issued its decision in *Peoples Department Stores Inc. (Trustee of) v. Wise*[1] ("*Peoples*"). Both corporate and insolvency practitioners alike across the country waited and hoped with great anticipation that this decision would clarify, once and for all, to what extent directors of insolvent or "near-insolvent" corporations are required to consider and take into account the interests of creditors when making governance decisions. While a close analysis of the decision seems to suggest the extinguishment of any further controversy on this issue, the decision nonetheless sparked a tremendous amount of debate. In particular, it has been suggested the SCC could have outlined clearer and less ambiguous guidelines for directors of financially vulnerable entities but it did not do so. As a result, it has also been suggested that insolvency and corporate counsel are left with advising their clients utilizing the less than ideal and somewhat ambiguous guidelines outlined by the Court. However, after all is said and done, it may be that *Peoples* did no more than simply clarify pre-existing duties and their corresponding remedies which are available to creditors or others who are aggrieved by decisions made by directors of corporate debtors.

Subsequent lower court treatment of *Peoples* across the country in the two years since the decision was released has confirmed the main principle clearly ruled upon by the SCC; namely, that directors owe no fiduciary duty to the creditors of a corporate debtor. It is the corporation to whom directors owe a fiduciary duty, and this duty of loyalty is not altered when a corporation is in the nebulous "vicinity of insolvency". The SCC was certainly clear and unambiguous on this point. For the most part, lower courts have also confirmed a further principle outlined in *Peoples*, namely, that creditors are but one stakeholder among many others whose interests ought to be considered by directors of insolvent or near insolvent corporations in light of the broad statutory duty of care imposed on directors. Finally, subsequent decisions considering *Peoples* have also confirmed that the remedies available to aggrieved creditors or others are perhaps somewhat broader than was readily perceived prior to the release of the SCC's reasons. This paper analyzes a sampling of these lower court decisions all of which have considered and attempted to apply the principles found in *Peoples* since the landmark ruling by the SCC two years ago.

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[1] [2004] 3 S.C.R. 461, 2004 SCC 68.

I. The SCC Decision in *Peoples*

Before a review of subsequent lower court decisions is undertaken, it would perhaps be helpful and useful to outline the highlights of the principles contained in the *Peoples* decision itself.

As will be noted below, the SCC in *Peoples* clarified that while the directors of a corporation may take the interests of other stakeholders into account in order to maximize the value of the corporation when exercising their powers and discharging their duties, this in no way affects the "content of the fiduciary duty" owed under paragraph 122(1)(a) of the *Canada Business Corporations Act*[2] (the "CBCA"). Indeed, the Court confirmed and expressly clarified that a directors' fiduciary duty is owed to the corporation and that this duty is not altered "when a corporation is in the 'vicinity of insolvency'".[3] The "interests of the corporation are not to be confused with the interests of the creditors or those of any stakeholders".[4] Therefore, the SCC left no doubts and perhaps was as clear as it could have been in confirming that directors owe no fiduciary duty to the creditors of a corporation, even when the corporation is in the vicinity of insolvency.

Briefly, the facts in *Peoples* were as follows. Lionel, Ralph, and Harold Wise ("the Wise brothers") were the majority shareholders, the officers, and the directors of Wise Stores Inc. ("Wise"). Wise acquired Peoples Department Stores Inc. ("Peoples") and the Wise brothers subsequently became its only directors. Wise and Peoples began to experience severe inventory problems as the result of shared warehousing arrangements and parallel bookkeeping. In an attempt to address this problem, the Wise brothers adopted a joint inventory procurement policy, which had been recommended to them by the vice-president of finance and administration for Wise and Peoples. Under this policy, which was implemented on February 1, 1994, any purchases made from North American suppliers were to be made by Peoples and any purchases from overseas suppliers were to be made by Wise. However, this policy did not prove to be effective; both Peoples and Wise declared bankruptcy before the end of 1994. People's Trustee in Bankruptcy (the "Trustee") claimed the Wise brothers, as directors of Peoples, had acted in breach of their duties under subsection 122(1) of the CBCA

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[2] R.S.C. 1985, c. C-44; paragraph 122(1)(a) of the CBCA states that every "director and officer of a corporation in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation".

[3] *Supra* note 1 at para. 46.

[4] *Supra* note 1 at para. 43.

and had also been privy to reviewable transactions in which Peoples had engaged whereby Peoples had transferred its assets to Wise for less than fair market value, contrary to section 100 of the *Bankruptcy and Insolvency Act*[5] (the "BIA"). While the trial judge held that the Wise brothers had acted contrary to both subsection 122(1) of the CBCA and section 100 of the BIA, the Quebec Court of Appeal reversed these findings. The appeal by the Trustee was dismissed by the SCC.

When considering the fiduciary duty as outlined in section 122(1)(a) of the CBCA which requires the directors and officers of a corporation to "act honestly and in good faith with a view to the best interests of the corporation",[6] the SCC in *Peoples* held that this duty should not simply be read as a duty to act in "the 'best interests of the shareholders'" as "[f]rom an economic perspective, the 'best interests of the corporation' means the maximization of the value of the corporation".[7] Further, when considering whether directors are acting with a view to the "best interests of the corporation", the SCC further held that it may "be legitimate given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, ***suppliers, creditors***, consumers, governments and the environment" [emphasis added].[8] Accordingly, although directors owe no fiduciary duty to the creditors of a corporation, directors are entitled to consider the interests of creditors, among others, when discharging their fiduciary duty to the corporation. As such, the court recognized that any honest and good faith attempt by directors to redress a corporation's financial deterioration ought to benefit all stakeholders even though the director's fiduciary duty is only owed to the corporation itself.

As for the other significant duty located in the CBCA, namely the "duty of care" found in section 122(1)(b),[9] the SCC held that this duty is very broad and that the "identity of the beneficiary is much

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[5] R.S.C. 1985 chap. B-3.

[6] *Supra* note 2.

[7] *Supra* note 1 at para. 42.

[8] *Ibid.*

[9] Paragraph 122(1)(b) of the CBCA states that every "director and officer of a corporation in exercising their powers and discharging their duties shall exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances".

more open-ended, and it appears obvious that it must include creditors".[10] Therefore, the SCC expressly held that directors clearly owe a statutory "duty of care" to creditors, among others.

Another important finding of the SCC was on the standard of care which is to be applied to the director's broad statutory duty of care. The SCC found that the actions of directors are to be assessed objectively.[11] The court, in reviewing the reasonableness of director's decisions, will explore the factual aspects of the circumstances surrounding the action taken including those facts about which the directors knew or should have known.[12] This "business judgment rule" accepted by the SCC ensures the court will only examine whether the directors made a "reasonable" decision not a "perfect" decision. Provided the decision taken is within a range of reasonableness, the SCC held that a court ought not to substitute its opinion for that of the board.[13]

An intriguing aspect of the *Peoples* decision is that in addition to any claims that may be made by creditors against directors of insolvent corporations based on the statutory duty of care, the SCC also expressly hinted that creditors may also avail themselves of the derivative action provisions of the CBCA or the oppression remedy under the CBCA. The SCC noted that as "creditors' interests increase in relevancy as a corporation's finances deteriorate",[14] the more likely these remedies ought to be available to creditors.

As mentioned above, the SCC held that the interests of creditors should not be read in to the fiduciary duty that directors owe to the corporation. Accordingly, as it was found that the Wise brothers implemented the joint procurement policy with a view to the best interests of the corporation, they were not found to have breached their fiduciary duty owed under section 122(1)(a) of the CBCA. Further, a significant finding was that the decision of the Wise brothers to implement the joint inventory procurement policy was reasonable in the circumstances. Accordingly, the Wise brothers did not breach their duty of care owed under section 122(1)(b) of the CBCA. As for s. 100

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[10] *Supra* note 1 at para. 57.

[11] *Supra* note 1 at para. 63.

[12] *Supra* note 1 at para. 67.

[13] *Ibid.*

[14] *Supra* note 1 at para. 49.

of the BIA, the Wise brothers were not in breach of that section for the consideration that Peoples received from Wise for the purchased goods was not striking.

II. Subsequent Lower Court Decisions

In the two years since the SCC issued its reasons in *Peoples*, the decision has been mentioned and referred to in numerous cases across the country. It is apparent from a review of these decisions that the courts are still struggling somewhat with the principles outlined by the SCC and their implications. Some of these cases include the following:

Re Stelco Inc.[15]

Stelco involved an appeal from an order of Mr. Justice Farley[16] whereby he had removed two directors during the corporation's highly publicized restructuring. These directors had been nominated by companies with whom they were associated, and which held approximately 20% of the corporation's shares which were acquired during the currency of the restructuring. These directors were appointed by the other board members who were filling two vacancies on the board. The current and retired employees (the "Objecting Employees") objected to their appointment because they feared these directors would attempt to maximize shareholder value at the expense of the interests of the employees. Farley J. had claimed to have the authority to remove these directors by virtue of the discretionary power granted the court in section 11 of the *Companies' Creditors Arrangement Act*[17](the "CCAA") and the court's inherent jurisdiction.

The Ontario Court of Appeal allowed the appeal. In so doing, the court stated that the *discretionary jurisdiction* under the CCAA does not extend to interfering with corporate actions that take place during the restructuring process unless they were explicitly permitted by the CCAA. Further, it was also noted that the court's *inherent jurisdiction* could be used to fill in statutory functional gaps or vacuums but it could not be used where no such gap existed. As the CBCA already addressed the removal of directors, it was found to be inappropriate to rely on the court's inherent jurisdiction on

[15] (2005), 75 O.R. (3d) 5, 253 D.L.R. (4th) 109 (C.A.).

[16] *Re Stelco Inc.* (2005), 7 C.B.R. (5th) 310, 137 A.C.W.S. (3d) 475 (Ont. S.C.J.).

[17] R.S.C. 1985, c. C-36.

that issue. Without necessarily deciding the point, the court also stated that in exercising the court's supervisory functions under the CCAA, the court is not exercising inherent jurisdiction but rather statutory discretion under s. 11 and other statutory powers that are imported into s. 11 from other statutes by way of s. 20 of the CCAA.

In *Stelco*, the restructuring was at a stage where the board was considering competing bids for the corporation's capital raising process. The Objecting Employees argued there was a reasonable apprehension that the newly appointed directors they sought to be removed would not act in the best interests of the corporation but rather they may consider the best interests of the shareholders in considering the bids that were being made.

The court noted the Objecting Employees had not sought to remove the newly appointed directors on the basis of the oppression remedy located in the CBCA presumably because no oppressive conduct had yet occurred. However, the court also stated that as there was a statutory scheme in place dealing with the election, appointment, and removal of directors, there was no legislative gap to fill via the court's inherent jurisdiction.

In allowing the appeal and reinstating the newly appointed directors, the court considered that the nature of the duties owed to a corporation by its directors, namely the "statutory fiduciary duty" and the statutory "duty of care", do not change "when the company approaches, or finds itself in, insolvency".[18] Blair J.A. cited with approval the following passages from *Peoples*:

> The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders. . . . in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment. . . . [In the context of] the shifting interest and incentives of shareholders and creditors. . . it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors

[18] *Supra* note 15 at para. 59.

> must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.[19]

However, the court also noted that in determining whether directors have fallen afoul of these obligations, there must be more than the risk of anticipated misconduct before the court will intervene and remove a director from office.

The newly appointed directors had also argued that as their appointment by the other members of the board was a "business decision", the court should grant deference to that decision and relied on *Peoples* in this regard. Farley J. had held that as the decision to appoint directors was "quasi-constitutional" in the sense that the other members of the board were merely filling a vacancy, the same deference ought not to be afforded to that type of decision as opposed to decisions regarding the management of the business and affairs of the corporation.

The Court of Appeal disagreed with Farley J. and held that these types of decisions deserve the same deferential approach and therefore it was an error in declining to give effect to the business judgment rule in the circumstances of this case.[20] In so doing, the court affirmed this aspect of the *Peoples* decision as well.

Thus far, insolvency practitioners have focussed on the Court of Appeal's statements in *Stelco* regarding inherent jurisdiction vs. statutory discretion as the most significant result of this decision. However, over time it may be that the significance of *Stelco* is also its confirmation that even during the course of a restructuring, the court supervising a CCAA proceeding ought to tread lightly on decisions made by a board of directors if those decisions could be considered truly "business decisions".

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[19] *Supra* note 15 at para. 60, citing *supra* note 1 at paras. 42, 43, and 47.

[20] *Supra* note 15 at para. 70.

Harbert Distressed Investment Master Fund, Ltd.("Harbert") et al. v. Calpine Canada Energy Finance II ULC et al.[21]

In this case, the Nova Scotia Supreme Court was asked, among other things, to apply the oppression remedy found in the Nova Scotia *Companies Act*[22] in favour of Harbert, a creditor. The court, in quoting from *Peoples*, noted that the oppression remedy located in the various corporate statutes in Canada are said to grant the "broadest rights to creditors of any common law jurisdiction".[23]

The court indicated that oppression claims are fact driven. If the court is able to find, on the facts, that certain conduct was oppressive, unfairly prejudicial, or unfairly disregarded a complainants' interests, the court is able to fashion a remedy. Although the court ultimately dismissed Harbert's oppression claim by reason that, among other things, Harbert's sophistication was such that it was not harmed by the conduct of the Respondents, the court did conclude that Harbert was a proper "complainant" entitled to seek relief. The dismissal of Harbert's claim was based solely on the particular facts as found by the court.

This case, as with the *Stelco*[24] case, is instructive as it confirms yet another principle outlined in *Peoples*, namely, that although directors do not owe fiduciary duties to creditors, creditors are not without recourse if directors or others act in a manner that is either oppressive (oppression remedy) or if directors do not exercise the appropriate level of care, diligence and skill in managing the corporation, and creditors suffer a loss as a result (the statutory duty of care).

Carr v. Cheng[25]

This case involved an application by a shareholder for leave to commence a derivative action pursuant to sections 232 and 233 of the British Columbia *Business Corporations Act* (the "BCA") on behalf of Dorset College Inc. ("Dorset") against, among others, a director of Dorset - Eddy Cheng. The proposed derivative action included allegations of financial mismanagement, breach of fiduciary

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[21] (2005), N.S.R. (2d) 276, 2005 NSSC 211.

[22] *Companies Act*, R.S.N.S. 1989, c. 81.

[23] *Supra* note 24 at para. 105.

[24] *Supra* note 18.

[25] (2005), 47 B.C.L.R. (4th) 361, 2005 BCSC 445.

duty and negligence. As a result of an amendment to the BCA, the B.C. Supreme Court, per Dillon J., had to consider the difference between whether the proposed action was "in the interests of the corporation" as opposed to whether it was "in the best interests of the corporation". Dillon J. held, referring to *Peoples*, that the "best interests of the corporation" did not simply mean "the best interests of the shareholders".[26] With a view to maximizing the value of the corporation and preventing the deterioration of the corporation's financial stability, the "best interests of the corporation" can, depending on the circumstances, include the consideration of other interests.[27]

Although this case did not involve a creditor of Dorset seeking to commence the derivative action, the court confirmed, consistent with the finding in *Peoples*, that it is able to consider not just shareholders' interests but other interests as well, including creditors, when considering whether it is in the best interests of the corporation to allow a derivative action against a director to proceed.

J.S.M. Corp. (Ontario) Ltd.("JSM") v. Brick Furniture Warehouse Ltd.[28]

This case involved a commercial tenancy dispute. The Plaintiff JSM was a landlord that had entered a lease with The Brick Furniture Warehouse Ltd. ("Brick Ltd.") which later assigned its interest as tenant to The Brick Furniture Warehouse (Windsor) Ltd. ("Brick (Windsor)") both of which, as it turned out, were essentially 'shell' corporations. Both Brick Ltd. and Brick (Windsor) were members of the Brick Furniture Group of Companies (the "Brick Group"). Brick (Windsor) subsequently sublet the premises to another member of the Brick Group who later assigned its interest to yet another member of the Brick Group ("Brick Corp."). The landlord consented to the sublease and its assignment. Both the original subtenant and Brick Corp. as assignee had sufficient assets to satisfy the rental obligations to Brick (Windsor) under the sublease which, the landlord reasonably expected by reason of its consent to the sublease, would then be paid to the landlord under the head lease. Subsequently, the sublease was purportedly amended to allow for an early termination by Brick Corp. but the landlord was never made aware of this purported amendment. Ultimately, Brick Corp. purported to rely on the early termination clause in the "amended" sublease and Brick (Windsor) subsequently defaulted under the head lease by failing to pay rent and the head lease was

[26] *Ibid* at para. 25.

[27] *Ibid.*

[28] (2006), 146 A.C.W.S. (3d) 267 (Ont. S.C.J.).

terminated. However, when the landlord sought to claim from Brick (Windsor), it became apparent there were insufficient assets to satisfy the landlord's claims. Accordingly, the landlord commenced action not only against Brick (Windsor) but also against various members of the Brick Group, including Brick Corp., as well as several directors of various members of the Brick Group all of which had common ownership. In doing so, the landlord relied on a number of different causes of action including the oppression remedy located in the relevant corporate statutes (certain members of the Brick Group were incorporated in various jurisdictions across Canada).

In dealing with the nature of the oppressive conduct alleged by the Plaintiff, the Ontario Superior Court of Justice stated as follows:

> What was oppressive and unlawful in this case was for the Brick Enterprise (Brink Windsor, Brick Warehouse and Brick Corp.) to first create reasonable expectations and reliance on the part of the Landlord, J.S.M., that Brick Corp. would meet the rental obligations of the Gateway Plaza through the sublease, and then, through invidious corporate and contractual maneuverings [sic] amongst related and affiliated corporations, seek to defeat those reasonable expectations.[29]

The court also indicated that Brick (Windsor)'s actions in allowing its subtenant to escape its obligations to pay rent to Brick (Windsor) and for it to relieve the assignee of the sublease (Brick Corp.) from its similar obligations to pay rent was oppressive to its creditor, the landlord.[30]

In examining whether or not JSM was indeed a "complainant" that had standing to seek to redress this oppressive conduct, the court indicated that as a creditor, JSM was certainly a proper complainant in respect of Brick (Windsor), its tenant. Further, the court concluded JSM was also a complainant under the CBCA and was therefore a proper person to seek an oppression remedy under that Act in respect of *Brick Corp,* the assignee of the sub-lease.[31] The court made this finding even though at the time of the assignment to Brick Corp., JSM was *not* a creditor of Brick Corp. In doing so, the Court relied at least in part on the *Peoples* decision and noted one of the SCC's reasons

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[29] *Ibid* at para. 69.

[30] *Supra* note 28 at para. 71.

[31] *Supra* note 28 at para. 77.

for not extending director's fiduciary duties to creditors was because of the availability of such a broad oppression remedy.[32] The court also stated that the defendants knew at all times that JSM stood in a "creditor role" *vis a vis* the Brick Group and would be injured by their actions.[33]

This case is somewhat remarkable and significant in that the Plaintiff did not have a direct contractual relationship with Brick Corp. and therefore it was not a "creditor" of that entity at the time the acts complained of occurred. Nevertheless, the court exercised its discretion and held that Brick Corp. was responsible to the Plaintiff on the basis of the oppression remedy and on the basis of the underlying "representations" made to JSM in the consent to sublease regarding who was going to indirectly be responsible for paying the rent. It should also be noted the various directors of the Brick Group were not liable under the oppression remedy but rather the liability in this regard only extended to Brick (Windsor) as tenant, and the other corporate entities of the Brick Group including Brick Corp. Nevertheless, on the appropriate facts, it is apparent a similar action could be made out against directors who have acted in an oppressive manner or where they have unfairly disregarded the interests of creditors, among others.

HSBC Bank Canada et al. v. Dillon Holdings Ltd. et al.[34]

In *Dillon*, the Plaintiffs included HSBC Bank Canada (the "Bank") and the Receiver and Trustee in Bankruptcy (the "Trustee") of Terry Forest Products Limited ("Terry Forest"). The Bank had loaned significant sums of money to Terry Forest based, at least in part, on certain representations made by representatives of Terry Forest as to that entity's financial well being. When Terry Forest became insolvent, the Bank suffered a large shortfall and it, together with the Trustee, began to investigate what had happened to the company's assets. They learned rather quickly that certain directors or other representatives of the company had engaged in possible fraudulent conduct including possible fraudulent misrepresentations concerning the company's inventory at the time the loans were extended. There were also certain suspicious transfers of cash to various related parties. An action was then commenced. The claims alleged against the Defendants were based on fraud, deceit, negligence, breach of fiduciary duty, unjust enrichment, and related causes of action.

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[32] *Supra* note 28 at para. 83.

[33] *Supra* note 28 at para. 82.

[34] [2005] O.T.C. 443, 140 A.C.W.S. (3d) 292 (S.C.J.).

At paragraph 215 of the decision, the Ontario Superior Court of Justice, per Cameron J., outlined the duties owed to the corporation by directors and officers. Consistent with the principles enunciated in *Peoples*, the court confirmed the statutory fiduciary duty is owed to the corporation and only to the corporation, but the 'best interests of the corporation' may be defined in the context of the interests of all its stakeholders, including its creditors.[35] Also, the court confirmed and succinctly summarized the statutory duty of care and the standard of care expected of directors as follows:

> The statutory duty of care in s. 134(1)(b) is owed to more than just the corporation. It is also owed to the creditors. Directors and officers will not be held in breach of the statutory duty of care if they act prudently and on a reasonably informed basis, judged objectively. Their business decisions must be reasonable in light of all the circumstances about which they knew of ought to have known. In assessing the impugned conduct the court should be reluctant to second guess the application of business judgment and expertise to the considerations involved in corporate decision making. The court can, however, determine whether an appropriate degree of prudence and diligence was brought to bear in reaching a reasonable business decision. The director's conduct must have caused injury to the plaintiff before liability can be found. See *Peoples v. Wise* at paragraph 54-67.[36]

In discussing and applying the facts of this case to the duty of care owed to creditors, among others, the court indicated that Mr. Dillon, one of the directors of Terry Forest, owed a duty of care to a number of stakeholders and that "there is nothing in the circumstances which would have rendered the duty of care to [Terry Forest] inconsistent with the duty of care to HSBC and other creditors".[37] In other words, the court confirmed yet another concept outlined in *Peoples*, namely that the interests of shareholders and creditors alike remain aligned even as a corporation approaches insolvency. It is for that reason the duty of care is capable of being satisfied by directors even though the duty is owed to all types of different stakeholders.

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[35] *Ibid* at para. 215.

[36] *Supra* note 34 at para. 217.

[37] *Supra* note 34 at para. 297.

The court concluded:

> Mr. Dillon breached his duty of care to [Terry Forest] and to HSBC with respect to managing its financial operations. He was the President of [Terry Forest] and its controlling shareholder. He controlled the general operations of [Terry Forest], the banking relationship with HSBC, and reporting to HSBC…He should have taken reasonable steps to protect [Terry Forest]'s assets including those securing HSBC's loan.[38]

The court also noted that Mr. Dillon's actions, by leaving what turned out to be a rogue "totally in control of a critical asset, inventory, without any periodic independent confirmation of its volume or value",[39] effectively contributed to the finding of a breach of his statutory duty of care.

The significance of this case is apparent. The Bank was entitled to recover damages from a director of a debtor corporation because that particular director did not effectively manage the corporation which resulted in a direct loss to the Bank. As such, this decision highlights one of the many remedies that may be available to aggrieved creditors. In reviewing how a corporation was managed prior to the crystallization of a creditor's loss (usually by way of an insolvency proceeding), creditors may find they may well have recourse against inattentive and, quite frankly, negligent directors. If a debtor corporation did not become insolvent as a result of innocent and unfortunate circumstances, creditors may not only be left with seeking to recover their losses from the debtor corporation's assets. In the *Dillon* case, the statutory duty of care under the relevant corporate statute proved to be a powerful tool for recovery by the Bank.

Alvi v. Misir[40]

This case is an example of a lower court, with respect, misconstruing at least one of the significant principles determined in *Peoples*.

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[38] *Supra* note 34 at para. 299.

[39] *Supra* note 34 at para. 299.

[40] (2004), 73 O.R. (3d) 566 (S.C.J.).

The Plaintiffs, shareholders of a corporation which became insolvent, sought to claim damages against certain of the corporation's directors for, among other things, breach of the statutory fiduciary duty and breach of the statutory duty of care. Referring to *Peoples*, the Ontario Superior Court of Justice confirmed that the directors of a corporation owe their fiduciary duty "only to the corporation, always bearing in mind the interests of all the stakeholders, including shareholders and creditors generally".[41] Accordingly, the shareholders did not have standing to advance claims based on the statutory fiduciary duty as those claims could only be advanced by the corporation itself.

However, the court went on to state, contrary to the view expressed in *Peoples*, that:

> The same must be said for the statutory duty of care. The directors owe their statutory duty of care to the corporation and not to the shareholders.[42]

As such, the court held the shareholders similarly did not have standing to advance claims against directors and officers based on the statutory duty of care because the court said only the corporation could advance those claims.

As was seen in *Dillon*, which was decided after *Alvi*, creditors and other stakeholders including shareholders, are indeed entitled to advance claims against directors or others based on the statutory duty of care located in the relevant corporate statutes across the country. Interestingly, the court in *Dillon* referred to the *Alvi* decision but only for the proposition that the fiduciary duty is not owed to shareholders.[43] The court in *Dillon* did not refer to *Alvi* when it analyzed the statutory duty of care. It may be that because the *Alvi* decision was rendered shortly after the release of the SCC's reasons in *Peoples*, the full import and significance of *Peoples* had not yet had time to resonate with the court. It is perhaps for that reason that *Alvi* remains an isolated decision.

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[41] *Supra* note 40 at para. 45.

[42] *Supra* note 40 at para. 46.

[43] *Supra* note 34 at para. 216.

III. Conclusion

Both the SCC in *Peoples* and the lower courts that have interpreted and applied the reasoning and the principles located therein, have each confirmed that directors owe no fiduciary duty to a corporation's creditors but rather this 'duty of loyalty' is owed solely to the corporation. However, when considering what actions are in the best interests of the corporation, it is also clear that directors are entitled to take into account the interests of a number of stakeholders, including creditors. It is also relatively clear that notwithstanding the court's statement in *Alvi*, directors do owe a statutory duty of care to a number of stakeholders, including creditors. The statutory duty of care owed to each of these stakeholders does not vary or alter while the corporation approaches insolvency as, for example, the interests of creditors and shareholders alike will be continue to be aligned. Moreover, in analyzing whether this statutory duty of care has been breached, the court will apply the "business judgment rule" and therefore will not second guess a board's business decision if that decision was within a range of reasonableness. This business judgment rule will apply whether the impugned decision was made prior to an insolvency proceeding or during a restructuring. Finally, in the two years since the decision in *Peoples* was released, it is also evident that creditors now have more of an arsenal at their disposal to seek to recover their losses that are occasioned by a corporate insolvency than perhaps it was thought to be the case prior to *Peoples*. In so far as directors are concerned, these remedies include not only examining whether the statutory duty of care has been breached, but also possibly taking advantage of the oppression remedy located in the relevant corporate statutes or, if necessary, the derivative action that is also available in those same statutes, which would allow the corporation to seek to redress any perceived breaches of the fiduciary duty owed to the corporation by its directors.

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