2021

Pluralism and Convergence: Judicial Standardization in Canadian Corporate Law

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Citation Details

Camden Hutchison, "Pluralism and Convergence: Judicial Standardization in Canadian Corporate Law" Osgoode Hall LJ (2021) 58:1 163.

Pluralism and Convergence: Judicial Standardization in Canadian Corporate Law

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This article uses statistical analysis of judicial decisions to address whether (and to what extent) the common law of corporations varies among the provinces. The primary findings are: (1) as measured by the number of case citations, provincial courts of appeal favour precedent from their home provinces; (2) the Supreme Court of Canada exerts a powerful standardizing influence across the provinces; and (3) on balance (and despite the "home province" bias of provincial courts of appeal), Canadian corporate law is largely homogeneous, with little variation among provincial jurisdictions. This article concludes that—for a variety of reasons—it is unlikely that any province will develop a distinctive body of corporate law.

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DOES THE COMMON LAW of corporations vary among the provinces? The answer is less evident than it might seem. Under the Canadian constitutional system, the provinces, territories, and the federal government share co-extensive powers to incorporate private businesses.[1] Moreover, any Canadian corporation, regardless of jurisdictional origin, may freely conduct business anywhere across Canada.[2] Finally, entrepreneurs may choose the law of any Canadian province[3] when incorporating a business,[4] even without a physical presence in the incorporating jurisdiction.[5] This set of "choice-of-law" rules creates the theoretical possibility

1. As first held by the Judicial Committee of the Privy Council, see *Citizens Insurance Company of Canada v Parsons* [1881] UKPC 49 [*Citizens*]. Provincial legislatures are given the exclusive power to make laws in relation to "The Incorporation of Companies with Provincial Objects." See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92.11, reprinted in RSC 1985, App II, No 5. *Citizens* ruled that the federal Parliament can also make laws in relation to the incorporation of companies, despite the absence of any express constitutional authorization.
2. *Bonanza Creek Gold Mining Company Limited v R*, [1916] 1 AC 566.
3. Territorial corporations have the same freedom. For simplicity of language, the terms "province" and "provincial" are used to encompass both provinces and territories for the remainder of this article.
4. As discussed herein, incorporators may also choose the federal *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*].
5. In other words, Canadian corporate law is characterized by "jurisdictional mobility." See Ronald J Daniels, "Should Provinces Compete? The Case for a Competitive Corporate Law Market" (1991) 36 McGill LJ 130 at 156-59. See also Poonam Puri et al, *Cases, Materials and Notes on Partnerships and Canadian Business Corporations*, 6th ed (Thomson Reuters, 2016) at 68-69, 168-71.

of a "market" for corporate law, in which incorporators select jurisdictions with favourable legal regimes and avoid jurisdictions with antiquated or inefficient legal rules.[6] In the United States, a similar federal system led to active competition among the states, with Delaware emerging as the leading corporate jurisdiction.[7]

However, despite institutional similarities between Canada and the United States, Canada has never experienced significant jurisdictional competition.[8] The question of whether provincial competition in Canada is even possible was the subject of an academic exchange between Ronald Daniels (on one side of the debate) and Douglas Cumming and Jeffrey MacIntosh (on the other) that began with Daniels' pioneering article on provincial competition nearly thirty years ago.[9] According to Daniels, not only is competition among the provinces possible, it can be used to explain the progressive adoption in the 1970s and 1980s of provincial corporations legislation modelled after the *Canadian Business Corporations Act* (*CBCA*).[10] Conversely, Cumming and MacIntosh are far more skeptical regarding the scope of jurisdictional competition—in their view, the proliferation of the *CBCA* was not the result of competition, but instead reflected a culture of uniformity on the part of provincial lawmakers.[11]

Although Daniels and Cumming and MacIntosh ultimately disagree as to the viability of provincial competition, they each identify significant obstacles to an interprovincial "market" in corporate law. According to both accounts, difficulties faced by the provinces in developing their own jurisprudence have impeded

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6. For an overview of this theory in the United States context, see Roberta Romano, "Law as a Product: Some Pieces of the Incorporation Puzzle" (1985) 1 JL Econ & Org 225 at 227-32 [Romano, "Law as a Product"].
7. *Ibid*. See also Roberta Romano, *The Genius of American Corporate Law* (AEI Press, 1993) [Romano, *American Corporate Law*]. For an analysis of the historical origins of state law competition, see Camden Hutchison, "Corporate Law Federalism in Historical Context: Comparing Canada and the United States" (2018) 64 McGill LJ 109 [Hutchison, "Corporate Law Federalism"]. Today, state competition in the U.S. has significantly decreased. See Marcel Kahan & Ehud Kamar, "The Myth of State Competition in Corporate Law" (2002) 55 Stan L Rev 679.
8. Hutchison, "Corporate Law Federalism", *supra* note 7.
9. *Supra* note 5; Jeff MacIntosh, "The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law: A Second Look" (1993) University of Toronto Law and Economics Working Paper Series 18; Douglas J Cumming & Jeffrey G MacIntosh, "The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law" (2000) 20 Intl Rev L & Econ 141.
10. *Supra* note 5.
11. Cumming and MacIntosh ascribe this "impulse to achieving uniformity of provincial law" to the absence of a "competitive consciousness" among Canadian lawmakers. *Supra* note 9 at 150-51.

legislative competition.[12] Since all provincial court[13] decisions can be appealed to the Supreme Court of Canada—which exercises binding authority over all Canadian courts—no province can credibly assert jurisprudential independence.[14] This lack of independence contrasts with the federally divided judicial system of the United States, in which the Supreme Court almost never addresses state corporate law.[15] In the United States, state courts (such as the Delaware judiciary) can fashion their own internal jurisprudence with an independence unavailable to Canadian provincial courts.[16] In contrast to the "laboratories of democracy"[17] celebrated in the United States, "the Supreme Court of Canada does not tolerate divergences in the common law from province to province."[18]

Is it entirely true, however, that provinces are incapable of developing their own case law? Not according to Daniels, who argues that the Supreme Court of Canada's infrequent acceptance of corporate law appeals mitigates its standardizing influence on provincial jurisprudence.[19] My own research conducted for this article confirms Daniels' claim that it is increasingly rare for the Court to hear corporate law appeals. In the 1930s, the Court heard an average of 1.8 corporate cases per year. By the 2000s, that figure had declined to 0.6.[20] In addition to inattention by the Court, there are other reasons provincial law may not be uniform across Canada. First, certain provinces' corporations acts differ from the *CBCA*.[21] Despite its final appellate authority, the Court's interpretation of the *CBCA*—

12. *Ibid* at 154-58; Daniels, *supra* note 5 at 186-88.
13. For simplicity of language, the generic term "provincial courts" (not to be confused with inferior Provincial Courts) will be used to describe provincial superior and appellate courts for the remainder of this article.
14. Cumming & MacIntosh, *supra* note 9 at 154-58; Daniels, *supra* note 5 at 186-88. Daniels as well as Cumming and MacIntosh differ primarily in their views on the seriousness of this obstacle. See also Romano, *American Corporate Law*, *supra* note 7 at 118-28.
15. Cumming & MacIntosh, *supra* note 9 at 154-58; Daniels, *supra* note 5 at 187, n 130.
16. This lack of independence has both formal and informal aspects. According to MacIntosh, Holmes, and Thompson, "a high degree of informal comity exists amongst the provinces in the corporate law arena," due in part to the appellate authority of the Supreme Court. See Jeffrey G MacIntosh, Janet Holmes & Steve Thompson, "The Puzzle of Shareholder Fiduciary Duties" (1991) 19 Can Bus LJ 86 at 96.
17. "Laboratories of democracy" is the phrase popularized by Justice Louis Brandies. See *New State Ice Co v Liebmann*, 285 US 262 (1932) (to describe policy experimentation among the states).
18. Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Carswell, 2007), ch 8 at 12.
19. *Supra* note 5 at 187.
20. These statistics are derived from the case data discussed in Part I.A.
21. These provinces include British Columbia and Nova Scotia, whose corporations acts remain modeled after older English legislation. The Québec *Business Corporations Act,* which was revised in 2011, was inspired by the *CBCA* but includes many unique features.

a specifically worded statute with a distinct legislative history—does not *necessarily* control judicial interpretation of differently worded provincial statutes. Second, as with many things in Canada, political attitudes towards private enterprise vary among the provinces, which may be reflected in the judicial attitudes of federally appointed provincial judges.[22] Other things being equal, it would not be surprising to find different attitudes between judges from Alberta and Québec, for example.[23] Finally, given its bijural legal system, Canada has long been home to coexisting legal regimes, with federal law expressly recognizing differing legal rules across jurisdictions.[24]

Unlike Daniels or Cumming and MacIntosh, all of whom emphasize statutory law, this article addresses judge-made law in the provincial superior and appellate courts. The question of judge-made law is related to, though distinct from, the issue of legislative competition. As Daniels and Cumming and MacIntosh argue, legislative efforts to attract corporations can be undermined by a lack of judicial independence.[25] At the same time, however, given the inherently evolutionary nature of the common law adjudicatory process, provinces may develop their own jurisprudence even in the absence of intentional competition.[26]

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22. Although superior and appellate judges are federally appointed, provincial interests often play an important role in the selection process. At the very least, appointees are lawyers from the provinces in which they are appointed. The judicial appointment process is set forth by the Office of the Commissioner for Federal Judicial Affairs. See Office of the Commissioner for Federal Judicial Affairs Canada, "Guide for Candidates" (19 October 2016), online: <www.fja-cmf.gc.ca/appointments-nominations/guideCandidates-eng.html>.
23. Regional differences could potentially have significant implications for corporate law. Consider Québec's long-standing tradition of corporate protectionism, for example, or Alberta's high reliance on extractive industries.
24. Canada's ongoing commitment to reconciling the common law and civil law is evidenced by the federal *Interpretation Act,* RSC 1985, c I-21. See also David G Duff, "Canadian Bijuralism and the Concept of an Acquisition of Property in the Federal Income Tax Act" (2009) 54 McGill LJ 423 at 448-53; Aline Grenon, "Canadian Bijuralism at a Crossroad? The Impact of Section 8.1 of the Interpretation Act on Judicial Interpretation of Federal Legislation" (2014) 51 Osgoode Hall LJ 501 at 505-11; Alain Vauclair & Lyne Tassé, "Civil Law and Common Law Balanced on the Scales of Thémis: The Example of the Bankruptcy and Insolvency Act" (2003) 37 RJT 5 at 5-8.
25. Cumming & MacIntosh, *supra* note 9 at 154-58; Daniels, *supra* note 5 at 186-88.
26. Competition does not require competitive intent. Much like natural selection, if corporations select provinces with advantageous case law, this process can be accurately described as "competitive," even if provincial courts lack any competitive consciousness. For analogies between the common law and natural selection, see E Donald Elliott, "The Evolutionary Tradition in Jurisprudence" (1985) 85 Colum L Rev 38; Herbert Hovenkamp, "Evolutionary Models in Jurisprudence" (1985) 64 Tex L Rev 645; Richard A Posner, *Economic Analysis of Law*, 1st ed (Little, Brown and Company, 1973); George L Priest, "The Common Law Process and the Selection of Efficient Rules" (1977) 6 J Leg Stud 65; Paul H Rubin, "Why is the Common Law Efficient?" (1977) 6 J Leg Stud 51.

Leaving aside the normative issue of whether such competition is desirable, the problem this article addresses is essentially empirical: Is there, in fact, meaningful variation in provincial corporate law?

To answer this question, this article employs two methodological strategies. First, I present a quantitative analysis of judicial citations since Canadian Confederation. Measuring the frequency with which provincial courts of appeal cite decisions from their home provinces (as compared to decisions from other provinces) provides useful information regarding the scope of interprovincial influence. Second, I present a qualitative analysis of three major corporate law decisions: *Teck Corp. v. Millar*,[27] *Pente Investment Management Ltd. v. Schneider Corp.*,[28] and *BCE Inc. v. 1976 Debentureholders*.[29] Each of these cases and their citation histories illustrate the complex process of judicial standardization.

My findings based on these methods are: (1) as measured by case citations, provincial courts of appeal favour precedent from their home provinces, a phenomenon that has increased over time; (2) the Supreme Court of Canada exerts a powerful standardizing influence across the provinces; and (3) on balance (and despite the "home province" bias of provincial courts of appeal), Canadian corporate law is largely homogeneous, with little provincial variation. Consistent with Cumming and MacIntosh, no single province exhibits a distinctive corporate jurisprudence.[30] Thus, my primary conclusion is that while provincial courts of appeal apply nationally standardized legal rules, they do so by citing judicial decisions issued in their home provinces. In other words, even though provincial courts favour their own "domestic" precedent, their substantive jurisprudence is essentially uniform.

This conclusion has important implications, both for Canadian corporate law and Canadian federalism more generally. Considerable variation in the economic, political, and social conditions of each province raise questions as to whether a distant, centralized appellate court without significant corporate expertise is the ideal institution for developing corporate legal rules. If provincial courts had greater latitude for doctrinal innovation, in what ways might corporate law evolve? Might the greater experience of provincial courts in adjudicating corporate law disputes result in clearer and more practical jurisprudence?

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27. (1972), 33 DLR (3d) 288 [*Teck*].
28. (1998), 42 OR (3d) 177 [*Pente*].
29. 2008 SCC 69 [*BCE*].
30. The possible exception is Ontario, which is more influential than the other provinces, though still subordinate to the Supreme Court of Canada. See Part II.B, below.

Is it possible that greater variation, rather than standardization, could better serve Canadian business?[31] I return to these questions in the conclusion of this article.

Following this introduction, the remainder of this article is organized in three parts. Part I presents a quantitative analysis of corporate judicial citations. This analysis reveals important trends in citation practices, including the growing tendency of courts of appeal to cite decisions from their home provinces. Part II assesses the citation histories of *Teck*, *Pente*, and *BCE*. In different ways, the legacies of each of these cases show the unifying influence of the Supreme Court of Canada. Part III concludes by assessing the past, present, and potential future of provincial variation in corporate law.

I. STATISTICAL TRENDS IN JUDICIAL CITATIONS

One measure of legal diversity—or the absence thereof—is the extent to which provincial courts favour their own precedent. If provincial courts of appeal primarily cite "internal" precedent (*i.e.*, citations to decisions within their home provinces), it may be evidence that provinces have developed their own case law. Alternatively, if each provincial court of appeal cites the same pool of leading cases, it may be evidence of jurisprudential uniformity across Canada. To determine which of these patterns characterizes Canadian corporate law, I analyzed a dataset of all corporate law decisions by all Canadian courts of appeal from 1867 to 2017. These data shed light on current citation practices as well as how they have changed over time.

A. CASE SELECTION AND METHODOLOGY

My dataset[32] includes citation statistics for all reported corporate law decisions of all Canadian courts of appeal (including the Supreme Court of Canada and the Judicial Committee of the Privy Council) from 1867 to 2017.[33] "Corporate law" decisions were identified using a custom WestlawNext Canada search that filtered nine subcategories within Westlaw's "Business associations" Canadian Abridgment Digests classification, and which excluded decisions relating solely

31. *Supra* note 27.
32. Part II.A, below, is adapted from another article that uses different citation data from the same dataset. See Camden Hutchison, "The Patriation of Canadian Corporate Law" (2020) 70 UTLJ 107 at 113-15 [Hutchison, "Patriation"].
33. Many of the modern provincial courts of appeal were not established until after 1867. With respect to the years prior to the creation of a given province's court of appeal, the dataset includes decisions on appeal issued by a panel or other appellate body of the provincial superior trial court.

or primarily to adjacent fields of law such as bankruptcy, securities, et cetera. This initial search resulted in 2,328 reported cases. All reported cases that did not include any judicial citations in the majority reasons were excluded from analysis, leaving a total of 1,444 cases.[34] Although this search procedure is not perfect—it necessarily excludes any cases not properly coded within Westlaw's Canadian Abridgment Digests, for example—I am confident that it captures the vast majority of reported corporate law decisions by Canadian courts of appeal between 1867 and 2017.

After creating the dataset, a research assistant and I recorded the judicial citations in each decision, coding each citation on several variables including the identities of the citing and cited courts. For cases with multiple reasons, we only recorded citations contained within the majority judgment—citations within dissents and minority concurrences were excluded.[35] Each cited case was counted once per decision, even if cited multiple times within a single judgment.[36] Finally, no distinction was made between positive and negative citations—all citations were recorded, regardless of whether the citing court was following or distinguishing the cited case.[37] Once recorded, these data allowed analysis of the citation patterns of each provincial court of appeal, as well as the Supreme Court of Canada. More specifically, the data permitted the testing of several hypotheses regarding interprovincial influence, as discussed in Part I.B, below. A summary of these statistics for each jurisdiction (plus the Supreme Court of Canada) is included in the Appendix, see Part IV.

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34. Most cases in the dataset that do not include any judicial citations are very brief pro forma decisions with no citations to any sources.
35. There are arguments for and against including citations within dissents and minority concurrences. Since my primary research question concerns the development of common law, I chose to systematically exclude judicial reasons without formal precedential authority.
36. Again, there are arguments for and against counting citations once per decision, versus once per individual citation. I ultimately decided that recording each separate instance of the same citation within a single decision might distort the data by overweighting the legal influence of certain cases based on arbitrary factors (such as the citation styles of different judges). In reality, it was relatively rare for a single case to be cited multiple times within the same decision.
37. The decision to count all citations equally was based on three considerations: (1) even negative citations indicate some degree of legal influence; (2) as a practical matter, it is sometimes difficult to distinguish between positive and negative citations; and (3) true negative citations are relatively rare.

B. ANALYSIS OF VARIOUS COURTS' RELATIVE INFLUENCE

To assess various sources of influence on the common law of corporations, I tested five hypotheses using the citation data in the dataset. These hypotheses are: (1) decisions of the Supreme Court of Canada influence provincial jurisprudence; (2a) Ontario decisions influence the jurisprudence of other provinces; (2b) Ontario's influence has increased following the creation of the Commercial List; (3) British Columbia decisions influence the jurisprudence of other provinces; and (4) provincial courts are more likely to cite precedent from their home provinces. The reasons for these hypotheses—and the empirical validity of each—are discussed as follows.

1. HYPOTHESIS 1: THE SUPREME COURT OF CANADA

My first hypothesis is that decisions of the Supreme Court influence provincial jurisprudence. This hypothesis is suggested not only by the theoretical arguments of Cumming and MacIntosh,[38] but also by the simple fact of the Court's appellate authority. Unsurprisingly, the data indicate that the Court does have a significant influence on provincial courts, at least as measured by judicial citations. For most provinces, the Court is the second-most cited source after "internal" citations.[39] For *all* provinces, the Court is at least the third-most cited source. The percentage of Supreme Court citations by different provincial courts of appeal ranges from a high of 34.55 per cent in Newfoundland and Labrador to a low of 12.9 per cent in Québec.[40] For all cases in the dataset (excluding Privy Council decisions), the average percentage of Court citations is 25.49 per cent. The fact that more than one in four judicial citations refer to decisions of the Supreme Court shows the importance of the Court's influence. For its own part, the Court cites itself more than any other judicial source: 51.42 per cent of the Court's citations are to itself.

Moreover, the Court's influence appears to be growing, albeit gradually. While 25.49 per cent of all citations are to the Supreme Court of Canada, this figure increases to 28.04 per cent when limiting analysis to years after 2008. As discussed in Part II, below, the 2008 *BCE* decision had a major impact on

38. Cumming & MacIntosh, *supra* note 9 at 154-58.
39. The Supreme Court of Canada is the most-cited source of the Court of Appeal of Newfoundland and Labrador.
40. The fact that, among the provinces, Newfoundland and Labrador would cite the Supreme Court of Canada the most and Québec would cite it least, is itself unsurprising. Newfoundland and Labrador has very little internal precedent to cite, while Québec is the most independent province on several dimensions, including language, politics, and its unique bijural legal system.

corporate law, particularly in the areas of fiduciary duty and oppression remedy jurisprudence. *BCE* and its predecessor, *Peoples Department Stores Inc. v. Wise*,[41] are frequently cited by nearly every provincial court of appeal, so it is not surprising to see a (slight) uptick in Court citations after 2008. This trend, together with *BCE*'s doctrinal influence, suggest that the Court's influence may be growing.

2. HYPOTHESIS 2A: ONTARIO

Of all the provinces, Ontario is the most likely to have the greatest influence on corporate law. Not only is it the largest province by population, it also has the largest provincial economy, accounting for over 38 per cent of both population and gross domestic product (GDP).[42] Given Ontario's large volume of business litigation, the sophistication of the Ontario corporate bar, and Toronto's status as the financial capital of Canada, there are many reasons Ontario would be an especially influential jurisdiction. Although no Canadian province plays the same role as Delaware in the United States, Ontario is the most likely candidate for the leading jurisdiction in Canada.[43]

As measured by citation statistics, Ontario plays a major role in corporate law across Canada. Tellingly, the province's share of all citations is greater than its share of cases: Ontario accounts for 24.93 per cent of cases in the dataset, while citations to Ontario represent 31.47 per cent of all citations (surpassing the Supreme Court of Canada). If one excludes Supreme Court cases, Ontario's share of provincial citations climbs to 38.73 per cent—almost exactly equal to its share of population and GDP. The picture of Ontario's influence is complicated somewhat by the wide variation in citation rates across provinces. For example, while 63.74 per cent of total citations by the Court of Appeal for Ontario are

41. 2004 SCC 68 [*Peoples*].
42. Provincial demographic and economic statistics are available through Statistics Canada. For demographic statistics, see "Population estimates on July 1st, by age and sex" (last visited November 2020), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000501>. For economic statistics, see "Gross domestic product, expenditure-based, provincial and territorial, annual" (last visited November 2020) online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610022201>.
43. In the United States context, Gregory Caldeira has shown that state appellate courts with greater "legal capital" (*i.e.*, quantity of decisions rendered) exert greater influence on other state courts. See Gregory A Caldeira, "The Transmission of Legal Precedent: A Study of State Supreme Courts" (1985) 79 American Political Science Rev 178 at 183. Transposed to Canada, this theory would suggest that the Court of Appeal for Ontario should be more influential than other provincial courts of appeal.

to Ontario decisions,[44] this same figure is only 11.23 per cent for the Court of Appeal of Newfoundland and Labrador.[45] The high rate of citations by the Court of Appeal for Ontario is particularly significant—since Ontario accounts for nearly 25 per cent of all cases in the dataset, its court of appeal's citation practices substantially affect the national average. If citations by the Ontario Court of Appeal are excluded from the analysis, the average percentage of Ontario citations is only 21.23 per cent.

Ontario's influence is magnified by the citation practices of the Supreme Court of Canada. The Court cites Ontario more than any other province: 24.01 per cent of the Court's citations are to Ontario decisions, making Ontario the Court's second-most cited source after decisions of the Court itself. These citations are particularly consequential, in that the Court's citation of individual cases often raises their influence across Canada, a phenomenon discussed in Part II, below. This has occurred with several decisions that were not widely cited outside Ontario until after being cited by the Supreme Court. Through this process, the Court has strengthened Ontario's influence in other Canadian jurisdictions. Moreover, Ontario's influence is not limited to corporate law. As previous scholars have shown, Ontario was historically the leading judicial province across *all* areas of law, the influence of its court of appeal at times rivalling that of the Supreme Court itself.[46]

3. HYPOTHESIS 2B: THE COMMERCIAL LIST

In explaining the success of Delaware, Daniels and Cumming and MacIntosh emphasize the state's specialized judiciary. Unlike most courts, the Delaware Court of Chancery and the Supreme Court of Delaware have developed specialized corporate legal expertise, providing businesses with a predictable and efficient litigation forum. Indeed, the expertise and reliability of the Delaware judiciary is one of the state's primary advantages in attracting and retaining corporations.[47] Writing in 1991, Daniels noted the absence of any similar forum in Canada.[48] That same year, the "Commercial List"—a roster of judges focusing exclusively on business and commercial litigation—was created in Ontario. Writing nine years

44. After Ontario, Manitoba is the province that cites Ontario the most, at 35.99 per cent of citations.
45. Prior to 2018, the appeal division of the Supreme Court of Newfoundland and Labrador served as the Newfoundland and Labrador court of appeal.
46. See Ian Greene et al, *Final Appeal: Decision-making in Canadian Courts of Appeal* (James Lorimer & Company, 1998) at 146.
47. Romano, *American Corporate Law*, *supra* note 7 at 39-40.
48. Daniels, *supra* note 5 at 170.

later, Cumming and MacIntosh acknowledged the Commercial List's existence, but characterized it as a "far cry" from the Delaware judiciary and questioned the commitment of any province to specialization in corporate law.[49]

Given that two decades have passed since Cumming and MacIntosh's assessment, it is worth reconsidering the Commercial List's impact. The central question for the purposes of this article is whether or not the creation of the Commercial List increased Ontario's legal influence. Based on citation statistics, the answer appears to be no. If the Commercial List increased Ontario's influence, one would expect to see an increase in Ontario citations after 1991. If anything, the opposite occurred. For all years prior to 1991, Ontario decisions represented 36.22 per cent of citations in the dataset. For all years after 1991, this same figure declined to only 29.18 per cent. Even within Ontario, less than a third of all corporate cases after 1991 have originated from the Commercial List, mitigating its influence. Using the Commercial List is optional, and it is unclear why less than a third of litigants elect to use it.[50] Whatever the reason, there is no evidence that the Commercial List has increased Ontario's legal influence. Hypothesis 2b can therefore be rejected.

4. HYPOTHESIS 3: BRITISH COLUMBIA

In addition to Ontario, I also examined whether British Columbia influences the law of other provinces. Why British Columbia? There are three primary reasons. First, British Columbia is (potentially) an attractive incorporation jurisdiction.[51] British Columbia's *Business Corporations Act*,[52] which does not follow the *CBCA* model, includes several features to attract businesses, such as an absence of director residency requirements,[53] substantial flexibility in issuing shares,[54] and a menu of alternative business entities, including "unlimited liability companies,"

49. Cumming & MacIntosh, *supra* note 9 at 157.
50. Per the Consolidated Practice Direction Concerning the Commercial List, cases on the Commercial List must feature a material connection to the Toronto region, though this does not adequately explain its relatively infrequent use. See Ontario, Superior Court of Justice, *Consolidated Practice Direction Concerning the Commercial List* (SCJ: July 2014) at part V.
51. This potential is perhaps unrealized. There are fewer incorporations in British Columbia than under the *CBCA*, and only 18.96 per cent more than Alberta (a province with 12.5 per cent less population).
52. *Business Corporations Act*, SBC 2002, c 57 [*BCA*].
53. This is in contrast with the *CBCA*, which requires at least 25 per cent of directors be resident Canadians. See *CBCA*, s 105(3).
54. *BCA*, *supra* note 55, ss 52, 69.

"benefit companies," and "community contribution companies."[55] Second, British Columbia would appear to exert an outsized effect on corporate law, with well-known decisions such as *Teck*, *Diligenti v. RWMD Operations Kelowna Ltd.*,[56] and *MacMillan Bloedel Ltd. v. Binstead*[57] featuring prominently in case law nationwide. Finally (and perhaps most importantly), it is useful to compare Ontario citations against those of another province to fully understand Ontario's influence. In order to draw such a comparison, nearly any province would suffice, but I happen to teach in British Columbia and am most familiar with British Columbia law.[58]

As measured by case citations, British Columbia is much less influential than Ontario. Unsurprisingly, the appellate court that cites British Columbia the most is the British Columbia Court of Appeal, at a rate of 56.46 per cent. The other provincial courts of appeal cite British Columbia far less often, at an average rate of 6.19 per cent. Similarly, only 4.19 per cent of the Court's citations are to British Columbia decisions.[59] This is somewhat surprising given the influential role of decisions such as *Teck* in recent Supreme Court of Canada jurisprudence. Specific British Columbia decisions such as *Teck* may not be representative, however. As discussed in Part II, the Court occasionally cites isolated decisions to support specific doctrinal choices without following the broader case law of the cited jurisdiction.

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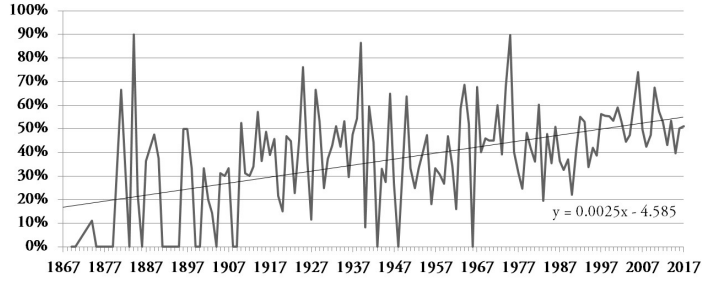
55. Unlimited liability companies, which combine the share structure of a corporation with the unlimited liability of a partnership, are often used by U.S. corporations investing in Canada to claim foreign tax credits and offset U.S. tax. See Elie S Roth, "Welcome Back Stranger: A Canadian Perspective on the Taxation of Privately-Owned Business Entities and Owners" (2018) 24 Trusts & Trustees 120 at 121. The *BCA* also offers two hybrid social enterprise forms: the Legislative Assembly of British Columbia enacted legislation regarding "community contribution companies" in 2012 and more recently enacted legislation providing for the creation of "benefit companies." Both of these entities combine aspects of for-profit and not-for-profit organizational forms. Both have also been the subject of academic critique. See *e.g.* Angela Lee, "Vague, Voluntary, and Void: A Critique of the British Columbia Community Contribution Company Hybrid Model" (2015) 48 UBC L Rev 179; Carol Liao, "A Critical Canadian Perspective on the Benefit Corporation" (2017) 40 Seattle UL Rev 683. The *BCA* does not provide for limited liability companies, however, a deficiency it shares with all other Canadian corporations acts.
56. (1976), 1 BCLR 36.
57. (1983), CarswellBC (BC SC) 540.
58. There are additional, more principled reasons for choosing British Columbia. Of the larger Canadian provinces, Québec is unrepresentative due to its legal and linguistic differences from the rest of Canada, while Alberta's reliance on extractive industries may be unrepresentative as well.
59. Even adjusting for population, the Supreme Court cites Ontario roughly twice as often as British Columbia.

5. HYPOTHESIS 4: INTERNAL CITATIONS

Internal citations—judicial citations by a court of appeal to decisions within its home province—are the most common category of citations. Seven out of ten provincial courts of appeal cite internal decisions more than any other source,[60] often by a wide margin. In two courts of appeal—British Columbia and Ontario—more than 50 per cent of citations are internal, with Ontario featuring the highest percentage of 63.74 per cent. While not a provincial court, the Supreme Court of Canada displays a similar pattern of favouring its own precedent, citing itself 51.42 per cent of the time.

Not only are internal citations the most common category of citations, their prevalence is increasing over time. The following graph shows internal citations as a percentage of all Canadian citations over the entire time series, including the linear trendline.[61]

FIGURE 1: MEAN PERCENTAGE OF INTERNAL CITATIONS, BY YEAR



60. The exceptions are the Manitoba Court of Appeal and the Prince Edward Island Court of Appeal, which cite Ontario decisions the most, and the appeal division of the Supreme Court of Newfoundland and Labrador (now the Court of Appeal of Newfoundland and Labrador), which cites the Supreme Court the most.

61. For each year, the total percentage of internal citations was calculated as the average percentage of internal citations for each case reported that year. In calculating these percentages, it was important to restrict the denominator to *Canadian* citations and to exclude citations to other countries, including England and the United States. These foreign citations account for most citations early in the time series, but only a small portion of citations in the later years of the time series. Including foreign citations in the denominator would therefore artificially exaggerate the increase in internal citations. For an analysis of historical changes in national citation patterns, see Hutchison, "Patriation", *supra* note 34.

Although there is significant variation early in the times series,[62] the graph shows a clear trend of increasing internal citations over time. While several years early in the time series saw no internal citations at all, the average rate of internal citations has risen above 50 per cent in the last two decades.

Does this mean that Canadian law is diversifying along provincial lines? Not necessarily. Independent of diversification, the increase of internal citations likely reflects the growth of case law in each province.[63] As the volume and variety of provincial cases has grown, it has become easier for provincial courts (as well as the counsel arguing before them) to identify internal citations rather than importing "external" case law from other jurisdictions. For this reason, there is nothing about internal citations that *necessarily* distinguishes provincial law, particularly if they express legal principles that already exist in other provinces. Moreover, in order to adopt an extra-provincial legal principle, a court need cite an extra-provincial decision only once—in subsequent cases, it can simply cite its own decision citing the original decision. Thus, although it is possible that internal citations reflect differentiation in provincial law, it is just as likely that internal citations actually express uniform rules. In other words, the jurisprudence of different provinces may reference different cases, while nevertheless converging on substantive legal standards.

C. SUMMARY OF TRENDS IN JUDICIAL CITATIONS

The data provide contradictory evidence regarding diversity in corporate law. On the one hand, the Supreme Court of Canada is a major source of judicial citations across Canada, as is (to a lesser extent) Ontario. These citations likely have a standardizing effect across the provinces. Moreover, the Supreme Court cites Ontario more than any other province, and Ontario cites the Supreme Court more than any source except Ontario. These mutual citation patterns tend to reinforce the homogeneity of the law. On the other hand, however, the largest source of judicial citations for most courts of appeal is decisions from their home provinces, a phenomenon which is increasing over time. This pattern would suggest that each province is developing its own jurisprudence. Reconciling

62. This is partly because there are fewer cases earlier in the times series. Given the law of large numbers (and a central tendency in results), a greater of number of cases should result in less variance. The law of large numbers is a statistical principal which holds that a greater number of observations results in regression toward the mean.

63. There was very little internal case law early in the time series, particularly for smaller provinces. In these early decades, provincial courts were much more likely to rely on English precedent.

this evidence and clearly assessing the substantive diversity of corporate law—as opposed to merely nominal diversity in case citations—requires a closer, more qualitative look at how cases are actually cited. This is the question that will be addressed by Part II, below.

II. CASE STUDIES OF JUDICIAL STANDARDIZATION

By itself, the statistical evidence regarding pluralism versus convergence is inconclusive. Determining which of these patterns best characterizes Canadian corporate law requires additional contextual analysis. By examining, in qualitative terms, how specific cases are cited, we can better understand the homogenizing pressures on the courts of the respective provinces. For this article, I examined the citation histories of three cases: *Teck*, *Pente*, and *BCE*. Each of these cases has had a significant influence on Canadian corporate law.[64] *Teck*, a 1972 Supreme Court of British Columbia decision, expanded the discretion of boards of directors to oppose hostile takeovers, and (in *obiter dicta*) suggested that directors' fiduciary duties are *not* limited to shareholders, but rather encompass a broader conception of the interests of the company as a whole. *Teck* has had a major influence on Canadian takeover jurisprudence and was cited by the Supreme Court of Canada in *Peoples*. *Pente*, a 1998 Court of Appeal for Ontario decision, drew from older cases such as *Teck*, but modernized and clarified Canadian takeover law. In the years since it was decided, *Pente* has become a central case in the law of contested takeovers. Finally, *BCE* is among the most important corporate law decisions in Canada, as it standardized oppression jurisprudence across the provinces and infused it with a broad conception of the fiduciary duty derived from *Teck*. Underscoring its influence, key aspects of *BCE* have been codified in *CBCA* section 122(1.1). Examining these cases and their subsequent citation histories illustrates the process of judicial standardization.

A. *TECK CORP V. MILLAR*

Teck involved a takeover contest between Teck Corporation ("Teck") and Canadian Exploration Ltd. ("Canex")[65] for control of Afton Mines Ltd. ("Afton"), a publicly-traded junior mining company. Following unsuccessful takeover negotiations between Teck and Afton, Teck acquired a majority of Afton's shares on the open market. To block Teck's efforts to take control of the company, Afton

64. They are also standard cases in corporate law syllabi (I teach all three).
65. Canex was a wholly-owned subsidiary of Placer Development Ltd.

entered into an "ultimate deal"[66] with Canex that granted Canex 30 per cent of Afton's stock and development rights in Afton's mining assets. In response, Teck sued Canex, Afton, and the Afton board of directors[67] to prevent the ultimate deal with Canex. Citing established case law, Teck claimed the directors were actuated by an improper purpose in issuing shares to Canex. In response, the Afton directors argued that the Canex deal was in the best interests of the company. Departing from English precedent,[68] Justice Berger ruled in favour of the defendants, holding that directors may issue company shares to frustrate a hostile takeover so long as they act in good faith and have reasonable grounds to believe the takeover would cause substantial damage to the company's interests.[69] In *obiter dicta*, Justice Berger also stated that directors' fiduciary duties, although owed to the company, may encompass "interests lying beyond those of the company's shareholders in the strict sense."[70]

Despite being a lower court trial decision, *Teck* has become one of the most influential cases in Canadian corporate law. Until relatively recently, the number of takeover cases in Canada was small enough that *Teck* was regularly cited by provincial courts of appeal. For this reason, Cumming and MacIntosh highlight *Teck* as a "startling" example of nationwide reliance on a small number of corporate law decisions, which has resulted in a "national, and not a provincial, jurisprudence."[71] Subsequent to Cumming and MacIntosh's assessment, the Supreme Court of Canada's decision to cite *Teck* so as to broaden the scope of the fiduciary duty has only heightened the decision's influence. As will be discussed,[72] the Court's creative interpretation of the *Teck* decision highlights its influence on corporate law.

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66. In the Canadian mining industry, an "ultimate deal" is a transaction whereby a major mining company purchases rights to develop the mining assets of a junior mining company. See Frank Iacobucci, "The Exercise of Directors' Powers: The Battle of Afton Mines" (1973) 11 Osgoode Hall LJ 353 at 355.
67. The named defendant, Chester Millar, was the president of Afton and a member of its board of directors.
68. Although prior Canadian cases were not uniform on the issue, the traditional English rule was represented by *Hogg v Cramphorn* (1963), [1967] Ch 254, which the court explicitly declined to follow.
69. In subsequent case law, this rule is sometimes referred to as the "improper purpose" test. I avoid that term, because it has been used to describe several similar but distinct tests in different cases. I prefer to describe the *Teck* test as the "reasonable grounds" test. See *Teck*, *supra* note 27 at 315.
70. *Ibid* at 314.
71. Cumming & MacIntosh, *supra* note 9 at 155. See also MacIntosh, Holmes & Thompson, *supra* note 16 at 96.
72. See nn 98-99 and accompanying text.

As of this writing, *Teck* has been cited in fifty-five Canadian cases: twenty-one in British Columbia; fourteen in Ontario; nine in Alberta; two each in Newfoundland and Labrador, Nova Scotia, Québec, and Saskatchewan; once in Manitoba; and twice by the Supreme Court.[73] The fact that *Teck* has been cited most often in British Columbia is consistent with Hypothesis 4, which posits that provincial courts favour decisions from their home province. *Teck* has had an influence in other provinces as well, however, particularly Ontario. If anything, *Teck*'s two citations by the Supreme Court understate its jurisprudential influence, as it was used by the Court to dramatically alter the traditional conception of fiduciary duties.[74]

Indeed, the manner in which *Teck* is cited is, in certain ways, more important than the number of times it has been cited. Significantly, most decisions that cite *Teck*, both within and outside British Columbia, make no mention of its province of origin, instead treating it as a general precedent universally applicable across Canada. In these citations, *Teck* is most often cited for its "reasonable grounds" standard regarding takeover defenses, and for the related principle that subjective good faith is relevant to the propriety of directors' actions. In general, these citations are consistent with the pattern, described by Cumming and MacIntosh, of provincial courts heavily relying on a small pool of Canadian decisions.

A few examples serve to illustrate. In the 1981 Ontario case of *Re Royal Trustco Ltd*,[75] involving a failed takeover bid, Justice Eberle cited *Teck* as a "most helpful decision" and a "good example" of an area of law that, "while developing, is still in a somewhat unsettled state."[76] Although Justice Eberle stopped short of formally adopting *Teck* as precedent, in the following case of *First City Financial Corp. v. Genstar Corp.*,[77] decided by the same Ontario court only a few weeks later, Justice Reid characterized *Royal Trustco* as a "reaffirmation" of *Teck*, writing that "[t]he right and indeed the obligation of directors to take steps that they honestly and reasonably believe are in the interests of the company and its

73. *Teck* has also been cited in Australia, New Zealand, and Hong Kong, as well as—surprisingly—seven times in the United Kingdom. See *Tang Kam-Yip and Others v Yau Kung School and Others* [1986] HKLR 448 (CA); *HNA Irish Nominees Ltd v Kinghorn (No 2)* [2012] FCA 228; *Latimer Holdings Ltd v Sea Holdings New Zealand Ltd* [2003] 9 NZCLC 263 [*Latimer Holdings*].
74. *Peoples, supra* note 43 at para 42.
75. 1981 CarswellOnt 120 (H Ct J) [*Royal Trustco*]. *Royal Trustco* (and *First City Financial Corp v Genstar Corp*) were decided by the Ontario Supreme Court, the predecessor to the Superior Court of Justice.
76. *Ibid* at para 14.
77. (1981), 33 OR (2d) 631.

shareholders in a take-over contest or in respect of a take-over bid, is perfectly clear and unchallenged."[78] Similarly, the 1984 Manitoba decision of *Olson v. Argus Industrial Supply Ltd.*,[79] which addressed the issuance of shares by a privately-held corporation in order to dilute a controlling shareholder, stated that "the law in Canada" on takeover contests was "was set out by Berger J. in the leading case of [*Teck*]."[80] In relying on *Teck*, the Manitoba Court of Appeal provided no explanation, as a formal legal matter, as to why *Teck* was binding in Manitoba. Finally, in the matter of *ASI Holdings Inc.*,[81] involving a contested rights offering, the Supreme Court of Newfoundland and Labrador cited *Teck* on the twin issues of the relevance of directors' subjective good faith in the context of a hostile takeover and the substantive standard for directors' conduct in resisting a change of control.[82] As in *First City Financial Corp. v. Genstar Corp.*, *Olson v. Argus Industrial Supply Ltd.*, and other similar cases, the court cited *Teck* without mentioning its British Columbia origins. In treating *Teck* as a general precedent of nationwide application, courts have flattened the distinction between the law of the different provinces.[83]

Despite these cases, *Teck* did not become the universal standard in Canadian corporate law. Although *Teck* has been influential, it has never been the final word on directors' duties in takeover contests. A survey of the case law reveals that *Teck*'s "reasonable grounds" test has been significantly modified—if not outright disregarded—by certain provincial courts of appeal. In the 1987 Nova Scotia case *Exco Corp. v. Nova Scotia Savings & Loan Co.*, Justice Richard acknowledged *Teck*, but characterized the case law on defensive tactics as "somewhat inconclusive," with "no clear line of authority."[84] On this basis, Justice Richard substantially

78. *Ibid* at para 53.
79. 9 DLR (4th) 451 (Man CA).
80. *Ibid* at 454.
81. *Re ASI Holdings Inc*, 1995 CarswellNfld 558 (Nfld SC) [*ASI 1995*]; *Re ASI Holdings Inc*, 1996 CarswellNfld 115 (Nfld SC(TD)).
82. In this case, the court found that the directors did not have reasonable grounds to believe the hostile shareholder would cause substantial damage to the interest of the company, and therefore ruled that the directors were motivated by an improper purpose. *Re ASI Holdings (1995)*, *supra* note 82 at paras 20-21.
83. To be clear, this phenomenon is not isolated to *Teck*. Canadian courts routinely cite extra-provincial cases without discussing their jurisdiction of origin. Occasionally, courts even cite extra-provincial statutes. For example, in the case of *Bowater Canadian Limited v RL Crain Inc*, the Ontario court of appeal cites the Alberta *Business Corporations Act* to establish the "applicable principle of corporate law" under the *CBCA*. (1987) 46 DLR (4th) 161 (Ont CA) at 164.
84. *Exco Corp v Nova Scotia Savings & Loan Co,* 1987 CarswellNS 44 (NS SC(TD)) at paras 343-44 [*Exco*].

narrowed the holding from *Teck*, stating that when a corporation issues shares, "directors must be able to show that the considerations upon which the decision to issue was based are consistent only with the best interests of the company and inconsistent with any other interests."[85] Justice Richard specified, moreover, that "[t]his burden ought be on the directors once a treasury share issue has been challenged."[86] This decision departed from *Teck* by setting a stricter standard for target directors.[87] What *Exco* shows is that notwithstanding certain cases' prominence, provincial courts are capable of fashioning their own jurisprudence.

Indeed, subsequent case law recognized a clear doctrinal split between the lenient approach of *Teck* and the more rigorous standard of *Exco*. Cases such as *347883 Alberta Ltd. v. Producers Pipelines Ltd.*,[88] *820099 Ontario Inc. v. Harold E Ballard Ltd.*,[89] and *Pente* recognized an important substantive distinction between *Teck* and *Exco*. In *Producers*, a 1991 Saskatchewan decision regarding the validity of a "poison pill,"[90] the Court of Appeal for Saskatchewan consulted *Teck*, *Exco*, and even the Delaware case of *Unocal Corp. v. Mesa Petroleum Co.*,[91] ultimately ruling that in order to satisfy their fiduciary obligations, directors must "show that their acts were reasonable in relation to the threat posed and were directed to the benefit of the corporation and its shareholders as a whole."[92] In terms of procedural requirements placed on boards of directors, *Producers* went further than *Unocal*, stating that "any defensive action should be put to the shareholders for prior approval where possible, or for subsequent ratification if not possible."[93] *Producers* pointedly ignored the suggestion in *Teck* that directors' fiduciary duties are owed to the "corporation" as a whole, instead following the traditional principle that "the corporation cannot be considered as an entity separate from its shareholders."[94] Since 1991, *Producers* has been cited in seventeen Canadian cases, representing a stricter standard of directors' duties in takeover contests.

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85. *Ibid* at para 341.
86. *Ibid*.
87. In the view of Richard J (explaining his departure from *Teck*), "the pronouncements in *Teck* go beyond what was required to decide that case" (*ibid* at 170-71). *Exco* also declined to follow *Teck*'s broad conception of the fiduciary duty, instead equating "the interest of the company" with "the general body of shareholders." *Ibid* at 175-76.
88. (1991), 92 Sask R 81 [*Producers*].
89. (1991), 25 ACWS (3d) 853.
90. A "poison pill" is a common term for a shareholder rights plan designed to deter hostile takeovers.
91. 493 A.2d 946 (Del Sup Ct 1985) [*Unocal*].
92. *Producers*, *supra* note 89 at 402.
93. *Ibid*. *Unocal* imposed no such requirement.
94. *Producers, supra* note 89 at 18.

Thus, notwithstanding suggestions that *Teck* emerged as the "leading case,"[95] takeover doctrine actually developed along multiple, competing lines, with different Canadian courts selecting different legal standards.[96]

Crucially, *Teck* did not achieve universal acceptance until *after* its citation by the Supreme Court of Canada, and then for reasons having little to do with the primary ruling of the original decision. In *Peoples*, the Court cited *Teck* not for its "reasonable grounds" standard, but rather for its *obiter dicta* regarding the fiduciary duty, a discussion that ranged beyond the bounds of the central holding in the case. Despite the fact that *Peoples* was governed by section 122(1)(a) of the *CBCA*, and that *Teck* was decided under a superseded version of the British Columbia companies act, the Court relied heavily on Justice Berger's *obiter dicta*,[97] famously expanding his modest language regarding the best interests of the company[98] into the following, much stronger statement:

> [w]e accept as an accurate statement of law that in determining whether they 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.[99]

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95. See *e.g.* Cumming & MacIntosh, *supra* note 9 at 155.
96. Even the British Columbia Court of Appeal has cited the *Producers* standard. See *Hamelin v Seven Mile High Group Inc*, 1994 CarswellBC 154 (BCCA).
97. The decision to use *Teck* to interpret the *CBCA* is all the more puzzling given the Court's explicit pronouncement that it was interpreting the statutory fiduciary duty under the *CBCA*, not the common law fiduciary duty. In *Peoples*, the Court wrote, "[t]his appeal does not relate to the non-statutory duty directors owe to shareholders. It is concerned only with the statutory duties owed under the CBCA." See *Peoples*, *supra* note 43 at para 42. Following this statement, the Court, citing *Teck* for authority, asserted that "[i]nsofar as the statutory fiduciary duty is concerned, it is clear that the phrase the 'best interests of the corporation' should be read not simply as the 'best interests of the shareholders'" (*ibid*).
98. It is debatable whether Justice Berger's *obiter dicta* encompasses non-shareholder interests at all. His discussion is framed as accepting, *arguendo*, that "[t]he company's shareholders are the company…and therefore no interests outside those of the shareholders can legitimately be considered by the directors." See *Teck*, *supra* note 27 at 313. He then alludes to circumstances in which considering the interests of employees and the broader community would be consistent with the interests of shareholders, concluding that the law should allow directors the flexibility to "observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense" (*ibid* at 314). Although the passage is ambiguous, Justice Berger never authorizes directors to advance other stakeholder interests *at the expense of* shareholders, as implied by the language of the Court. Indeed, the decision in *Teck* hinges on the Supreme Court of British Columbia's acceptance that the Canex deal was better for shareholders.
99. *Peoples, supra* note 43 at para 42.

The Court's citation changed the way *Teck* is cited across Canada. Prior to *Peoples*, courts cited *Teck* primarily for its "reasonable grounds" test. Indeed, no court had ever cited *Teck* for its *obiter dicta* regarding the fiduciary duty until the Court's citation in *Peoples*.[100] Following *Peoples*, however, nearly half of the decisions citing *Teck* have referred to its expansion of the fiduciary duty (although far more cases simply cite *Peoples* directly). Although *Teck* was an important decision prior to *Peoples*, its current association with the nature of the fiduciary duty is both recent and directly the result of its treatment by the Supreme Court. Why the Court chose to highlight *Teck*—a lower court decision from over thirty years prior—rather than more recent cases, such as *Exco* and *Producers*, is a mystery.[101] Whatever the Court's rationale, its citation of *Teck* is a telling example of its significant influence on corporate law. Prior to *Peoples*, *Teck*'s discussion of the fiduciary duty had received relatively little attention, but it has since become one of the primary reasons that the case continues to be cited.

The *Teck* decision, its subsequent history, and its interpretation by the Supreme Court of Canada provide important insights into Canadian corporate law. One of the lessons is that Canadian courts pay scant attention to jurisdiction of origin when citing cases.[102] Most decisions citing *Teck* never specify that it is a British Columbia case applying British Columbia law. Instead, courts treat *Teck* as a representative example of a national body of jurisprudence. At the same time, *Teck* also shows that Canadian law has not been substantively uniform, as *Teck* coexisted with competing lines of cases such as *Exco* and *Producers*. Finally, the history of *Teck* demonstrates the influence of the Supreme Court, which infused the case with a novel interpretation.

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100. Most courts simply ignored that aspect of the decision.
101. In their factum, counsel to the bankruptcy trustee for Peoples Department Stores Inc. argued that directors' duties are owed to "the corporation" as a whole (rather than any specific stakeholder group), but that the corporation's creditors become the most relevant interest if the corporation approaches or enters insolvency. To support this argument, counsel cited several cases from non-Canadian jurisdictions as well as commentary in the Dickerson Report (a legislative report authored by the drafters of the *CBCA*), but *not* the *obiter dicta* in *Teck* regarding the scope of directors' fiduciary duties. Appellant's counsel cited *Teck* only for the proposition that directors' fiduciary duties are "objective" in nature and therefore not satisfied by good faith alone. See *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 (Factum of the Appellant). Since the arguments presented to the Court were limited to the rights of creditors, the Court's view that fiduciary duties may encompass "*inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" would appear to be *sui generis*, even in light of *Teck*. Nor do the Court's reasons present any coherent policy argument for expanding fiduciary duties. See *Peoples*, *supra* note 43 at para 42.
102. It would be interesting to know whether this is also true for other areas of law.

B. *PENTE INVESTMENT MANAGEMENT LTD V. SCHNEIDER CORP*

Decided in 1998, *Pente* involved a takeover contest for control of Schneider Corporation ("Schneider"), a publicly-traded Ontario food products company. At the time of the transaction, Schneider was controlled by the Schneider family through a dual-class share structure. The litigation arose when Maple Leaf Foods, Inc. ("Maple Leaf"), one of Schneider's competitors, made an unsolicited takeover offer that was rejected by Schneider in favour of a competing offer from Smithfield Foods, Inc. ("Smithfield"), a U.S. company. Despite Maple Leaf's willingness to increase its offer, the Schneider family entered a lock-up agreement with Smithfield, which the Schneider board facilitated by waiving a standstill agreement.[103] In response, Maple Leaf and minority shareholders of Schneider sued under the oppression remedy to block the Smithfield deal.[104]

Although the Court of Appeal for Ontario ruled in favour of the Schneider board, its decision heightened the standard of directors' duties relative to earlier cases (such as *Teck*) by reviewing both the procedural sufficiency and substantive reasonableness of the Schneider board's decision-making. Specifically, the court emphasized the sanitizing effect of creating a special committee of independent directors to oversee the sale process.[105] Following prior case law, the court also ruled that in order to bring a successful oppression remedy claim, plaintiffs must demonstrate both the existence and violation of their "reasonable expectations" (which they had failed to do).[106] Other aspects of the decision included an explicit rejection of Delaware's "Revlon duties"[107] and an implicit rejection of any duties owed by controlling shareholders to minority shareholders. Although it did not revolutionize corporate law, *Pente* represented an important clarification of takeover and oppression jurisprudence. Perhaps more importantly, for the

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103. See *Pente*, *supra* note 28.
104. *Ibid*.
105. The Schneider board established a special committee consisting of the independent non-family directors to review the Maple Leaf offer and consider other strategic alternatives. *Ibid* at para 3.
106. *Pente* was hardly the originator of this standard. Many Canadian courts trace the inspiration for the "reasonable expectations" standard to a 1972 English case. See *Ebrahimi v Westbourne Galleries Ltd*, (1972), [1973] AC 360 (HL (Eng)).
107. See *Revlon, Inc v MacAndrews & Forbes Holdings, Inc,* 506 A.2d 173 (Del Sup Ct 1986) [*Revlon*]. Although the court was quite clear that "Revlon is not the law in Ontario", its characterization of *Revlon* as requiring an auction process during the sale of a corporation was not entirely accurate. Although *Revlon* requires that boards maximize shareholder value during a sale transaction, nowhere does it state that a formal auction is the required means of doing so. This has been confirmed in subsequent Delaware cases. See *e.g. Paramount Communications, Inc v QVC Network, Inc,* 637 A.2d 34 (Del Sup Ct 1994).

purposes of this article, *Pente* shows the power of the Supreme Court of Canada to "springboard" certain cases to national prominence.

Given that *Pente* is one of many cases citing *Teck*, it is worth examining at the outset how *Teck* factors into *Pente*'s analysis. Like most cases, *Pente* cites *Teck* primarily for its "reasonable grounds" requirement, stating that "[i]f there are no reasonable grounds to support an assertion by the directors that they have acted in the best interests of the company, a court will be justified in finding that the directors acted for an improper purpose."[108] Unlike many cases, however, *Pente* directly addresses *Teck*'s extra-provincial origins by specifying that it was "adopted as the law in Ontario" in the earlier case of *Olympia & York Enterprises Ltd. v. Hiram Walker Resources Ltd.*[109] *Pente* also cites *Teck* for the proposition that directors are not the agents of majority shareholders.[110] This second citation is interspersed among several Ontario citations, creating the impression that *Teck* is on equal footing with Ontario precedent.[111] Thus, although *Pente* acknowledges that *Teck* is an "external" case—and not without more binding authority in Ontario—it treats the decision as an integrated feature of Ontario jurisprudence.

If *Teck* influenced *Pente*, how has *Pente* influenced subsequent cases? As measured by case citations, *Pente* is the more influential of the two decisions. As of this writing, *Pente* has been cited in 105 Canadian cases, nearly twice as many as *Teck* in less than half the time period.[112] More than half of the cases citing *Pente* (fifty-seven) have been Ontario decisions. Tellingly, *Pente*'s citations outside of Ontario increased following the *Peoples* decision, which cited *Pente* for the Canadian version of the "business judgment rule."[113] Prior to *Peoples*, fully 80 per cent of citations to *Pente* were included within Ontario decisions. After *Peoples*, only 45.21 per cent of citations to *Pente* are in Ontario decisions, as provincial courts outside Ontario have cited *Pente* with greater frequency. This is almost certainly due to the Supreme Court of Canada, which bestowed significant institutional prestige on *Pente* in 2004.

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108. *Pente*, *supra* note 28 at para 33. Note, however, that *Pente*'s interpretation of *Teck* places the burden of persuasion on the directors.
109. (1986), 59 OR (2d) 254. In this case, the Ontario Divisional Court "adopted" *Teck* based on two factors: the inherent persuasiveness of Justice Berger's analysis and *Teck*'s prior citation by Ontario courts.
110. *Pente*, *supra* note 2 at para 34.
111. *Ibid*.
112. *Pente* has also been cited once in New Zealand. See *Latimer Holdings Ltd v Sea Holdings New Zealand Ltd* [2003] 9 NZCLC 263.
113. *Peoples*, *supra* note 43 at para 65.

Peoples has also influenced why *Pente* is cited. Unlike most prior decisions, *Peoples* did not cite *Pente* for its approach to hostile takeovers,[114] but rather for its articulation of the business judgment rule, a concept inspired by Delaware jurisprudence. In citing *Pente,* the Court directly quoted the following language:

> "The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination."[115]

Although *Pente* has been cited for a wide variety of legal principles, most of its citations post-*Peoples* have focused on the business judgment rule. Prior to *Peoples*, seven out of thirty cases citing *Pente* (approximately 23.33 per cent) cited it for the business judgment rule. Beginning with *Peoples*, forty out of seventy-four cases (approximately 54.04 per cent) have cited it for the business judgment rule, a more than two-fold increase. Moreover, decisions citing *Pente* rarely discuss its provincial origins,[116] but often specifically mention its approval by the Supreme Court of Canada, suggesting that courts are directly influenced by the Supreme Court's citation choices.

In this fashion, the Supreme Court has altered *Pente*'s place within Canadian law. Specifically, the Court's actions have (1) increased the frequency with which *Pente* is cited; (2) broadened the range of citing courts; and (3) focused attention on *Pente*'s discussion of the business judgment rule. Although *Pente* was an important decision even prior to *Peoples*, its influence has been magnified (and redirected) by the Court.

C. *RE BCE INC.*

Among the cases discussed in this article, *BCE* has had the greatest impact. It is, without question, one of the most important corporate law decisions in decades. *BCE*'s most salient feature is its affirmation of the principle, first expressed in *Peoples*, that fiduciary duties are owed to "the corporation" as a whole, not to shareholders per se.[117] Equally important, *BCE* consolidated oppression jurisprudence by (1) establishing a two-pronged test for oppression remedy claims, (2) elaborating the factors that give rise to "reasonable expectations,"

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114. *Ibid*. *Peoples* was not a takeover case.
115. *Ibid* at para 65 (quoting *Pente*) [emphasis in original].
116. Several decisions cite *Pente* in parallel with other cases from other provinces expressing similar legal principles. If anything, this heightens the impression that Canadian law is uniform. See *Re Argo Protective Coatings Inc*, 2006 NSSC 283.
117. *BCE* strengthened this principle by applying it in the context of a corporate sale.

and (3) providing preliminary explications of the terms "oppression," "unfair prejudice," and "unfair disregard."[118] Finally, and lamentably, the Court conflated the fiduciary duty under *CBCA* section 122(1)(a) with the oppression remedy under section 241, merging them into a single, overlapping standard of conduct and undermining the clarity of the Court's oppression analysis.[119] For better or for worse, each of these developments has had a major influence on Canadian jurisprudence.

As measured by judicial citations, *BCE* has been hugely influential. As of this writing, *BCE* has been cited in 573 Canadian cases.[120] In general, the distribution of citations per province mirrors their respective populations, with the exceptions of a disproportionately high number of British Columbia cases (132) and a relatively low number of cases in Québec (74). Although much of the scholarly analysis of *BCE* has focused on its expansion of the fiduciary duty, the vast majority of judicial decisions that cite *BCE* focus on its two-pronged oppression remedy test. Following *BCE*, the Court's requirement that plaintiffs establish both a breach of the plaintiff's reasonable expectations and conduct by the defendant amounting to "oppression," "unfair prejudice," or "unfair disregard" has become the universal standard for assessing oppression remedy claims.[121] After the oppression remedy, the second-most frequent reason for citing *BCE* is its discussion of the approval standard for plans of arrangement under *CBCA* section 192.[122] In fact, very few cases cite *BCE* for its interpretation of the fiduciary duty, which appears to be an issue that rarely appears in litigation.

One of the most striking aspects of *BCE*'s citation history is the lack of attention paid in subsequent decisions to the fact that *BCE* was decided under the *CBCA*. Most cases in the dataset were decided under provincial statues, the interpretation of which is not, *a priori*, controlled by the *CBCA*. Nevertheless, few decisions citing *BCE* hesitate to apply it directly to provincial statutes. Most decisions treat *BCE* as if it were announcing uniform law. For example, in *Carlson Family Trust v. MPL Communications Inc.*,[123] decided under the Alberta *Business*

118. *Supra* note 29 at paras 62-68, 89-94.
119. See Jeffrey G MacIntosh, "BCE and the Peoples' Corporate Law: Learning to Live on Quicksand" (2009) 48 Can Bus LJ 255 at 261 [MacIntosh, "BCE and Peoples"].
120. *BCE* has also been cited once in Australia. See *HNA Irish Nominees Ltd v Kinghorn (No 2)* [2012] FCA 228.
121. *BCE*, *supra* note 29 at para 56. *BCE* has been highly influential despite the fact that its oppression discussion was arguably *obiter dicta*. See Puri et al, *supra* note 5 at 429.
122. *CBCA*, *supra* note 4, s 192.
123. 2009 ABQB 77 [*Carlson*].

Corporations Act,[124] the Court of Queen's Bench recognized that "several cases provide summaries of the law in relation to the oppression remedy in Alberta,"[125] but then disregarded these cases by focusing on the "leading case" of *BCE*.[126] Given that the legal test for oppression under *BCE* is clearer and more precise than the standards articulated in previous Alberta cases, this decision to follow *BCE* was entirely reasonable, but it also represented a substantive change to the common law of Alberta, bringing it into closer convergence with other Canadian provinces.[127] Similar developments have taken place in Ontario. In *Palumbo v. Quercia*,[128] the Ontario Commercial List was asked to interpret the oppression remedy under the Ontario *Business Corporations Act* (*OBCA*).[129] In doing so, the court made the striking statement that "[t]he test for establishing oppression under s 248 of the *OBCA* has been clarified and largely settled by the Supreme Court of Canada in [*BCE*]."[130] This statement—which effectively equates the *CBCA* and the *OBCA*—strongly suggests that there is no distinction between the oppression remedy under the two statutes. In fairness, the *CBCA* and *OBCA* are very similar laws. However, even British Columbia, whose corporations act does not follow the *CBCA* model, has adopted the Court's jurisprudence. To give but one example, in *Jaguar Financial Corp. v. Alternative Earth Resources Inc.*,[131] the British Columbia Court of Appeal cited *BCE* to interpret section 227 of the British Columbia *Business Corporations Act*,[132] a provision similar, though by no means identical, to section 241 of the *CBCA*.[133] The court also cited extensively from the Court of Appeal for Ontario's interpretation of the *OBCA* in *Rea v.*

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124. RSA 2000, c B-9.
125. The Court of Queen's Bench cited two cases in particular. See *Keho Holdings Ltd v Noble* (1987), DLR (4d) 368 (Alta Can); *First Edmonton Place Ltd v 31588 Alberta Ltd* (1988), Carswell Alta 103.
126. In addition to relying on *BCE*'s oppression remedy analysis, *Carlson* also followed *BCE* in construing directors' fiduciary duties as a general obligation "to act in the best interests of the corporation, viewed as a good corporate citizen." *Carlson*, *supra* note 126 at para 78.
127. As stated explicitly in the subsequent case of *Murphy v Cahill*, prior Alberta case law "has been overtaken, so far as the legal content of oppression is concerned, by the Supreme Court of Canada decision in [*BCE*]." 2013 ABQB 335 at para 77.
128. 2018 ONSC 5034 [*Palumbo*].
129. RSO 1990, c B.16 [*OBCA*].
130. *Palumbo*, *supra* note 131 at para 79.
131. 2016 BCCA 193.
132. *BCA*, *supra* note 55, s 227.
133. Most notably, although the *CBCA* protects "any security holder, creditor, director or officer," the *BCA* only protects "shareholders." *CBCA*, *supra* note 4, s 241; *BCA*, *supra* note 55, s 227(2).

Wildeboer,[134] strengthening the impression that oppression jurisprudence is uniform across Canada.[135] Moreover, in cases such as *Firebird Global Master Fund II Ltd. v. Energem Resources Inc.*,[136] *Morgan v. Dadi*,[137] and *Herber v. Guse*,[138] British Columbia courts have cited *BCE*'s broad conception of directors' duties while deciding oppression claims.[139] As these cases illustrate, case law across Canada has been significantly influenced by the Supreme Court of Canada, particularly in the area of oppression jurisprudence.

In one sense, *BCE*'s oppression test has been a positive development. Prior to *BCE*, oppression jurisprudence was vague and inconsistent, as it rested on a confusing mélange of Canadian and English cases without any clear unifying principle.[140] The two-pronged *BCE* test, by contrast, has the advantages of clarity, simplicity, and uniformity across the provinces. The Supreme Court of Canada's conception of "reasonable expectations" is appropriately contextual, and while *BCE's* discussion of the terms "oppression," "unfair prejudice," and "unfair disregard" is hardly conclusive (as the Court itself acknowledges), these concepts may yet be clarified by future lower court decisions.[141]

Beyond the mechanism of the test itself, however, other aspects of the *BCE* decision leave much to be desired. The expansion of fiduciary duties to encompass "shareholders, employees, creditors, consumers, governments and the environment"[142] provides scant guidance to boards of directors as to how to appropriately weigh these interests,[143] exacerbates the agency-cost problem

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134. 2015 ONCA 373 at para 186.
135. Although most decisions ignore textual differences between the *CBCA* and provincial statutes, some decisions do highlight discrepancies. See *e.g. Runnalls v Regent Holdings Ltd*, 2010 BCSC 1106.
136. 2011 BCSC 622.
137. 2011 BCSC 1446.
138. 2014 BCSC 1908.
139. Although each of these decisions cite *BCE* at length, it is unclear whether they mean to introduce *BCE*'s broader conception of directors' duties to the *BCA*.
140. See Brian Cheffins, "The Oppression Remedy in Corporate Law: The Canadian Experience" (1988) 10 U Pa J Intl Bus L 305 at 306-14.
141. See Jassmine Girgis, "The Oppression Remedy: Clarifying Part II of the BCE Test" (2018) 96 Can Bar Rev 484 at 494-502.
142. *BCE*, *supra* note 29 at para 40.
143. See Sarah P Bradley, "BCE Inc v 1976 Debentureholders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" Case Comment, (2009-2010) 41 Ottawa L Rev 325; Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48 Can Bus LJ 232; MacIntosh, "BCE and Peoples", *supra* note 122. Surprisingly, the Court leaves this balancing to the "business judgment of directors". *BCE*, *supra* note 29 at para 40.

intrinsic to corporate governance,[144] and encourages the inefficient use of corporate economic resources.[145] Surprisingly, the Supreme Court of Canada leaves this balancing of interests to the "business judgment of directors," which only heightens the inherent conflict.[146] Moreover, the Court conflates the fiduciary duty with the concept of "reasonable expectations" when it states (for example) "the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation."[147] This conflation of different concepts undermines the clarity of the *BCE* test itself and, if taken at face value, could severely limit shareholders' ability to successfully bring oppression remedy claims.[148] If, as the Court states, "reasonable expectations" are tied to the "best interests of the corporation," and the balancing of competing interests is subject to the business judgment rule, it becomes difficult to imagine any situation (absent explicit self-dealing) in which a claimant's "reasonable expectations" would

144. In any corporate decision-making context, directors face the temptation of favoring their own personal or financial interests over those of shareholders. The broader the range of "stakeholder" interests to which directors owe fiduciary duties, the easier it becomes for directors to justify self-interested decisions. This danger was recognized in *Unocal*, *Revlon*, and even *Teck* as particularly acute during a potential change of control. Iaccobucci, *supra* note 141 at 251-53. See also William T Allen, "Our Schizophrenic Conception of the Business Corporation" (1992) 41 Cardozo L Rev 261 at 275; Stephen M Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 Nw U L Rev 547 at 581-82; Mark Van Der Weide, "Against Fiduciary Duties to Corporate Stakeholders" (1996) 21 Del J Corp L 27 at 54-55, 69-70.

145. Since shareholders are the corporation's residual claimants, they have the strongest interest in maximizing firm value. Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991) at 34-39; Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89 Geo LJ 439 at 443-44, 448, 450-52; Andrew C Inkpen & Anant K Sundaram, "The Corporate Objective Revisited" (2004) 15 Organization Science 350 at 353-56; Michael C Jensen, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function" (2001) 12 Bus Ethics Q 235 at 236; Duane Windsor, "Shareholder Wealth Maximization" in John R Boatright, ed, *Finance Ethics: Critical Issues in Theory and Practice* (John Wiley & Sons, 2010) 437 at 446-48; Michael E DeBow & Dwight R Lee, "Shareholders, Nonshareholders, and Corporate Law: Communitarianism and Resource Allocation" (1993) 18 Del J Corp L 393 at 415-22.

146. *BCE*, *supra* note 29 at para 40.

147. *Ibid* at para 66.

148. Without explanation and without citing prior cases, the Court merges the fiduciary duty under *CBCA* section 122(1)(a) and the oppression remedy under section 241, stating "this case does involve the fiduciary duty of the directors to the corporation, and particularly the 'fair treatment' component of this duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy" (*ibid* at para 36).

not be met.[149] The directors can always claim the "interests of the corporation" required protecting another interest group. Under this open standard, directors are granted full discretion to manage the corporation as they see fit, heightening the danger of unaccountable management.

All things considered, oppression jurisprudence under *BCE* raises serious analytical problems. The case has helpfully standardized oppression doctrine under a judicially administrable legal test, but it has also confused the oppression remedy with a significantly expanded fiduciary duty, rendering both concepts less clear. Although *BCE*'s conception of the "interests of the corporation" as a broad collection of stakeholder interests might seem to promote corporate social responsibility, it is equally likely to weaken accountability to any specific stakeholder group. Unfortunately, this conception is now entrenched in statutory law by Parliament's adoption of *CBCA* section 122(1.1), which has effectively codified *BCE*[150]—a rare example of legislation conforming to its judicial construction. This is all to say that, given the prominent role of the Supreme Court of Canada, *BCE* has left its mark on the Canadian corporate legal landscape, though not necessarily for the better. In a more decentralized judicial system, the case's problematic aspects might have been contested in the respective provincial courts of appeal.

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149. According to the Court, "[i]n considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule" (*ibid* at para 40). Also, "[t]here is no principle that one set of interests—for example the interests of shareholders—should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way" (*ibid* at para 84). Thus, directors cannot be held accountable to any particularistic interest.

150. *CBCA, supra* note 4, s 122(1.1); *BCE*, *supra* note 29 at para 38. The *CBCA* section 122(1.1) differs from the *BCE* in certain respects. First, s 122(1.1) specifically includes "retirees and pensioners," who were not mentioned in *BCE*. Second, "the long-term interests of the corporation" are an optional component of the fiduciary duty under s 122(1.1), while language in *BCE* implies that directors must always consider "the long-term interests of the corporation," at least when "the corporation is a going concern." Finally—and most importantly—*all* of the interests under s 122(1.1) are interests that directors "may consider," while *BCE* seems to imply that directors *must* consider stakeholder interests in certain circumstances. Thus, perhaps section 122(1.1) clarifies that advancing stakeholder interests is an optional, rather than mandatory, aspect of the fiduciary duty. As of this writing, no provincial corporations acts have been amended to reflect the *CBCA*, and no published cases have specifically considered section 122(1.1).

D. THE INFLUENCE OF THE SUPREME COURT OF CANADA

Teck, *Pente*, and *BCE* illustrate the important role of the Supreme Court in standardizing corporate law. Although *Teck* and *Pente* were influential decisions in their own right, their legacies have added weight—and have been understood in particular ways—due to the citation practices of the Supreme Court. *Teck*'s citation in *Peoples* significantly altered the legal principle for which the case is recognized. Prior to *Peoples*, *Teck* was cited primarily for its flexible standard regarding defensive tactics. Following *Peoples*, *Teck* has become associated with an expansive conception of the fiduciary duty only alluded to in the original decision. Similarly, not only has the Supreme Court raised *Pente*'s influence, particularly outside Ontario, it has also associated *Pente* with the business judgment rule. Finally, *BCE* is the clearest example of the Court's influence. *BCE* standardized the oppression remedy across Canada, while clearly affirming the broad conception of the fiduciary duty first expressed in *Teck*. Although different courts in different provinces are capable of developing different doctrines, these three cases show the power of the Court to unify the law across Canada.

III. CONCLUSION

This article began with a simple question: Does the common law of corporations vary among the provinces? In light of the evidence presented, answering this question requires the reconciliation of two contradictory phenomena: the widespread, increasing prevalence of internal citations, and the unifying influence of the Supreme Court of Canada. These phenomena appear contradictory in that a high prevalence of internal citations suggests differentiation among the provinces, whereas close adherence to the doctrinal pronouncements of the Supreme Court suggests the opposite.

On the one hand, the provinces have clearly developed their own case law. Provincial courts increasingly draw on internal precedent to address a wide range of legal issues. As discussed in Part II, most provincial courts of appeal cite decisions from their home province more than any other source, often considerably so. On the other hand, the Supreme Court of Canada has clearly had a unifying effect on corporate law. Not only is it the second-most cited source in most provinces, but the areas of law on which it has most clearly spoken (*e.g.*, the oppression remedy) are effectively standardized across Canada.

How to reconcile this puzzle? One explanation is the growth of provincial case law. In past decades, it was difficult for provincial courts to cite relevant internal precedent due to the low volume of corporate litigation in Canada,

particularly outside of Ontario and Québec. Citing cases from beyond a court's province was often a practical necessity. Moreover, once an "external" case had been cited for a particular legal rule, subsequent courts could then cite the internal *citing* decision, rather than the external *cited* decision, thereby "domesticating" extra-provincial case law. Over time, the stock of internal decisions in each province has grown such that provincial courts have less need to cite decisions from other provinces.[151] Thus, high rates of internal citations are compatible with doctrinal convergence, especially given the unifying role of the Supreme Court of Canada. As discussed in this article, landmark cases such as *Peoples* and *BCE* demonstrate the Court's standardizing influence on the provinces. Through its decisions, the Court has reinterpreted established precedent, altered traditional legal principles, and created its own novel jurisprudence; all of which has been passed down to lower provincial courts. Ultimately, Cumming and MacIntosh's hypothesis regarding the Supreme Court's institutional role is correct: the Court has limited diversity and encourages standardization.

Does this mean provincial innovation is impossible? Not necessarily. As emphasized by Daniels, the Supreme Court of Canada's involvement in corporate law has become increasingly infrequent over time. In decades past, the Court issued several corporate law decisions per year. Today, several years can pass without a single corporate law decision rendered by the Court.[152] The reasons for this reduction in corporate decisions are complex, but factors include the legislative repeal of certain appeals "as of right,"[153] the "constitutionalization" of the Court's docket following adoption of the *Charter of Rights and Freedoms*,[154]

151. For a capital-investment analysis of legal precedent, see William M Landes & Richard A Posner, "Legal Precedent: A Theoretical and Empirical Analysis" (1976) 19 JL & Econ 249.
152. The Court issued no corporate law decisions at all in 2003, 2005-2007, and 2009-2013.
153. See Donald R Songer, Susan W Johnson & Jennifer Barnes Bowie, "Do Bills of Rights Matter?: An Examination of Court Change, Judicial Ideology, and the Support Structure for Rights in Canada" (2013) 51 Osgoode Hall LJ 297 at 320, 323; Daniels, *supra* note 5 at 187; Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (James Lorimer & Company, 2000) at 86; Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (University of Toronto Press, 2008) at 44-45 [Songer, *Transformation*].
154. CQLR c C-12; Daniels, *supra* note 5 at 187; Songer, *Transformation*, *supra* note 159 at 7-8.

and an apparent lack of interest on the part of individual justices.[155] In the future, these and other factors could further reduce the Court's involvement in corporate law.

Were the Supreme Court of Canada to withdraw itself from corporate law entirely, allowing greater space for experimentation by individual provinces, the result could be the development of more economically responsive legal rules. This is particularly true given the Court's limited subject matter expertise. The Court is a pre-eminent authority on Canadian constitutional law, but is not, by any stretch of the imagination, a specialized commercial court. Today, the Court rarely deals with corporate matters—largely by choice—and few of its current justices possess meaningful corporate legal experience.[156] This is in contrast with the trial and appellate courts of the larger provinces, which hear a greater volume and wider variety of business and commercial cases. As discussed in Part II above, the provinces of Ontario, Alberta, and Québec have established specialized judicial lists that hear commercial matters exclusively. Compared to the Supreme Court, provincial courts may be better suited to the development of corporate law due to their greater experience with business litigation, their closer connection to regional economic concerns, and—arguably—their greater detachment from national politics. Moreover, greater provincial autonomy and nationwide standardization are not mutually exclusive outcomes. If corporate law were allowed the flexibility to develop from the "bottom-up," provincial courts would retain the freedom to emulate developments in other provinces.[157]

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155. The vast majority of cases heard by the Supreme Court are on leave to appeal, meaning the Court has nearly complete discretionary control over its own docket, subject to a vague statutory requirement that cases accepted by the Court be of "public importance." See *Supreme Court Act*, RSC 1985, c S-26, s 40(1). Under this standard, the Court's docket has become dominated by constitutional, criminal, and other forms of public law, while private law cases have become a relatively small minority. Songer states that private economic disputes represent 27.3 per cent of the Court's docket (while corporate/contract cases represent only 5.2 per cent). Songer, *Transformation*, *supra* note 151 at 53-67. These developments likely reflect shared attitudes among individual justices as to which cases are of public importance. The process of granting leave to appeal—which involves a written submission by the petitioner seeking appeal, the drafting of a memorandum by an individual law clerk, and a formal decision by a three-justice panel (with the possibility of discretionary involvement by any other justice)—is described above (*ibid* at 46–53).

156. Although several of the Court's current justices have commercial litigation experience, none is an academic or professional expert in corporate law per se. The last recognized business law expert on the Court was Frank Iacobucci, who retired in 2004.

157. The democratic accountability of this process is assured by provincial legislatures' ability to overrule court decisions through legislative amendments. This accountability is not clearly present in the context of Supreme Court decisions.

Over time, as provincial courts learned from the experiences of other provinces, an optimal set of legal rules might eventually emerge.[158] For the foreseeable future, however, Canadian corporate law remains unified under the Supreme Court, which is unlikely to be the optimal arrangement from an economic perspective.

158. The ability of the common law to produce practical, efficient legal rules for the governance of business relations has been recognized for over a century, extending at least as far back as 1912. See Rt Hon Sir Frederick Pollock, *The Genius of the Common Law* (Columbia University Press, 1912) at 108-09; For a theoretical discussion, see Elliott, *supra* note 26; Hovenkamp, *supra* note 26; Posner, *supra* note 26; Priest, *supra* note 26; Rubin, *supra* note 26. Although the Supreme Court is itself a common law court, capable of "learning" from provincial case law, its infrequent engagement with corporate law and its unique institutional role within the Canadian constitutional system leave it relatively removed from practical business concerns.

IV. APPENDIX: CITATION PERCENTAGES

NOTE: The tables below show the citation percentages (*i.e.*, the percentage of citations to decisions of each province and the Supreme Court of Canada) for each provincial court of appeal, as well as the Supreme Court. The largest source of citations for each court is highlighted in bold. The category "other" includes citations to territorial courts, the Tax Court of Canada, and the Federal Court of Appeal. All percentages are rounded to two decimal points.

COURT OF APPEAL OF ALBERTA	
Alberta	**39.66%**
British Columbia	6.36%
Manitoba	3.53%
New Brunswick	1.19%
Newfoundland and Labrador	0.41%
Nova Scotia	1.88%
Prince Edward Island	0.00%
Québec	0.46%
Ontario	16.61%
Saskatchewan	1.83%
Supreme Court of Canada	26.86%
Other	1.19%

BRITISH COLUMBIA COURT OF APPEAL	
Alberta	3.08%
British Columbia	**56.46%**
Manitoba	0.73%
New Brunswick	0.15%
Newfoundland and Labrador	0.54%
Nova Scotia	0.65%
Prince Edward Island	0.15%
Québec	0.55%
Ontario	16.82%
Saskatchewan	1.14%
Supreme Court of Canada	19.20%
Other	0.46%

MANITOBA COURT OF APPEAL	
Alberta	4.33%
British Columbia	7.23%
Manitoba	23.78%
New Brunswick	0.92%
Newfoundland and Labrador	0.54%
Nova Scotia	1.59%
Prince Edward Island	0.88%
Québec	0.57%
Ontario	**35.99%**
Saskatchewan	2.90%
Supreme Court of Canada	20.33%
Other	0.93%
COURT OF APPEAL OF NEW BRUNSWICK	
Alberta	7.80%
British Columbia	6.76%
Manitoba	0.93%
New Brunswick	**34.27%**
Newfoundland and Labrador	0.00%
Nova Scotia	0.28%
Prince Edward Island	0.00%
Québec	0.00%
Ontario	17.80%
Saskatchewan	1.58%
Supreme Court of Canada	26.15%
Other	1.98%
NEWFOUNDLAND AND LABRADOR COURT OF APPEAL	
Alberta	5.73%
British Columbia	5.74%
Manitoba	1.44%
New Brunswick	0.00%
Newfoundland and Labrador	33.78%
Nova Scotia	3.24%
Prince Edward Island	0.00%

Québec	1.57%
Ontario	11.23 %
Saskatchewan	1.35%
Supreme Court of Canada	**34.55%**
Other	1.37%
NOVA SCOTIA COURT OF APPEAL	
Alberta	1.64%
British Columbia	8.02%
Manitoba	2.17%
New Brunswick	0.49%
Newfoundland and Labrador	0.55%
Nova Scotia	**42.46%**
Prince Edward Island	0.16%
Québec	1.19%
Ontario	17.22%
Saskatchewan	1.09%
Supreme Court of Canada	24.51%
Other	0.49%
COURT OF APPEAL OF QUEBEC	
Alberta	8.51%
British Columbia	6.77%
Manitoba	0.00%
New Brunswick	0.00%
Newfoundland and Labrador	0.00%
Nova Scotia	1.17%
Prince Edward Island	0.00%
Quebec	**41.67%**
Ontario	19.36%
Saskatchewan	1.82%
Supreme Court of Canada	12.90%
Other	7.79%

PRINCE EDWARD ISLAND COURT OF APPEAL	
Alberta	25.00%
British Columbia	0.00%
Manitoba	0.00%
New Brunswick	0.00%
Newfoundland and Labrador	0.00%
Nova Scotia	0.00%
Prince Edward Island	0.00%
Québec	0.00%
Ontario	**40.83%**
Saskatchewan	0.00%
Supreme Court of Canada	34.17%
Other	0.00%

COURT OF APPEAL FOR ONTARIO	
Alberta	2.53%
British Columbia	3.36%
Manitoba	0.70%
New Brunswick	0.06%
Newfoundland and Labrador	0.30%
Nova Scotia	0.60%
Prince Edward Island	0.11%
Québec	0.66%
Ontario	**63.13%**
Saskatchewan	0.35%
Supreme Court of Canada	26.03%
Other	1.26%

COURT OF APPEAL FOR SASKATCHEWAN	
Alberta	8.22%
British Columbia	7.29%
Manitoba	4.87%
New Brunswick	0.27%
Newfoundland and Labrador	0.00%
Nova Scotia	0.88%
Prince Edward Island	0.00%

Québec	1.46%
Ontario	20.22%
Saskatchewan	**38.94%**
Supreme Court of Canada	14.17%
Other	3.69%
SUPREME COURT OF CANADA	
Alberta	4.65%
British Columbia	4.19%
Manitoba	2.18%
New Brunswick	0.11%
Newfoundland and Labrador	2.40%
Nova Scotia	1.20%
Prince Edward Island	0.37%
Québec	6.12%
Ontario	24.01%
Saskatchewan	0.82%
Supreme Court of Canada	**51.42%**
Other	2.53%