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To Whom Are Directors' Duties Owed? Evidence from Canadian M&A Transactions

*Camden Hutchison**

One of the most contentious issues in corporate law is the proper scope of fiduciary duties. Many scholars have argued that fiduciary duties are owed exclusively to shareholders, while others have advocated a broader conception of directors' fiduciary obligations, potentially encompassing a wide variety of stakeholder and community interests. This debate has both normative and positive dimensions: Not only are there theoretical disagreements as to whom directors' duties should be owed, there are also more basic disagreements as to what the law actually requires, including the extent to which business norms supplement (or undermine) legal rules. In Canada, at least, jurisprudential and statutory reforms have broadened the scope of fiduciary duties to extend their protections to stakeholder groups including creditors, employees, and the environment.

Or have they? In reality, there are reasons to believe that legal standards play a limited role in corporate governance, not least with respect to the fundamental question of in whose interests the corporation is to be governed. For public corporations, a variety of factors, including the professional norms of corporate managers, the realities of public financial markets, and the central role of shareholders in the mechanisms of corporate democracy, strongly encourage directors to prioritize shareholder interests. This article finds evidence of this phenomenon through an empirical study of "fiduciary out" provisions in Canadian M&A agreements. These provisions, which allow directors to abandon committed transactions in order to fulfill their fiduciary duties, are almost universally drafted in terms of maximizing shareholder value. Indeed, in two samples containing more than one thousand M&A agreements, only a single agreement permitted directors to consider non-shareholder interests. This evidence indicates that fiduciary duties are broader in theory than in practice.

L'une des questions les plus controversées du droit des sociétés est celle de l'étendue des obligations fiduciaires. De nombreux chercheurs ont soutenu que les obligations fiduciaires sont dues exclusivement aux actionnaires, tandis que d'autres ont défendu une conception plus large des obligations fiduciaires des administrateurs, englobant potentiellement une grande variété d'intérêts des parties prenantes et de la communauté. Ce débat a des dimensions à la fois normatives et positives : il y a non seulement des désaccords théoriques sur les personnes auxquelles les administrateurs devraient être redevables, mais il y a également des désaccords plus fondamentaux sur ce que la loi exige réellement, y compris la mesure dans laquelle les normes commerciales complètent (ou affaiblissent) les règles juridiques. Au Canada, en tout cas, les réformes jurisprudentielles et législatives ont élargi la portée des obligations fiduciaires pour étendre leur protection aux groupes de parties prenantes, y compris les créanciers, les salariés et l'environnement.

Ou l'ont-elles fait ? En réalité, il y a des raisons de croire que les normes juridiques jouent un rôle limité dans la gouvernance des entreprises, notamment en ce qui concerne la question fondamentale de savoir dans l'intérêt de qui l'entreprise doit être gouvernée. Pour les entreprises publiques, divers facteurs, notamment les normes professionnelles des gestionnaires d'entreprise, les réalités des marchés financiers publics et le rôle central des actionnaires dans les mécanismes de la démocratie d'entreprise, encouragent fortement les administrateurs à donner la priorité aux intérêts des actionnaires. Cet article met en évidence ce phénomène par une étude empirique des clauses de « retrait fiduciaire » contenues dans les accords de fusion et d'acquisition canadiens. Ces dispositions, qui permettent aux administrateurs de renoncer à des transactions engagées afin de remplir leurs obligations fiduciaires, sont presque toutes rédigées en termes de maximisation de la valeur actionnariale. En effet, dans deux échantillons comprenant plus de mille accords de fusion et d'acquisition, un seul accord autorisait les administrateurs à prendre en considération les intérêts des non-actionnaires. Ces éléments indiquent que les obligations fiduciaires sont plus larges en théorie qu'en pratique.

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Introduction

One of the most contentious issues in corporate law is the proper scope of fiduciary duties.[1] Many scholars have argued that fiduciary duties are owed exclusively to shareholders,[2] while others have advocated a broader conception of directors' fiduciary obligations, potentially encompassing a wide variety of stakeholder and community interests.[3] This debate has both normative and positive dimensions: Not only are there theoretical disagreements as to whom directors' duties *should* be owed, there are also more basic disagreements as to what the law *actually* requires, including the extent to which business norms supplement (or undermine)

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1 A note on language: Under Delaware law, "fiduciary duties" comprise two distinct duties, the duty of care and the duty of loyalty. In Canada, directors owe a duty of care and the "fiduciary duty," which is the counterpart to Delaware's duty of loyalty. This article focuses on the second of these two duties (i.e., the duty of loyalty in Delaware and the fiduciary duty in Canada).

2 The relevant literature is far too extensive to summarize in a single footnote, but notable examples include Stephen M Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97:2 Nw UL Rev 547 [Bainbridge, "Director Primacy"]; Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89:2 Geo LJ 439; Ann M Lipton, "What We Talk About When We Talk About Shareholder Primacy" (2019) 69:4 Case W Res L Rev 863 at 866, 870–72; Leo E Strine Jr, "Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit" (2012) 47:1 Wake Forest L Rev 135 [Strine, "What We Talk About When We Talk About Shareholder Primacy"]; Leo E Strine Jr, "The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law" (2015) 50:3 Wake Forest L Rev 761 [Strine Jr, "The Dangers of Denial"]; Robert J Rhee, "A Legal Theory of Shareholder Primacy" (2018) 102:5 Minn L Rev 1951. To be clear, few scholars argue that directors owe a duty to maximize short-term stock prices. However, many scholars deny that directors owe enforceable duties to non-shareholders.

3 Perhaps the most influential and prolific proponent of this view is the late Lynn Stout. See Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85:2 Va L Rev 247; Lynn A Stout, "Bad and Not-so-Bad Arguments for Shareholder Primacy" (2002) 75:5 S Cal L Rev 1189 [Stout, "Bad and Not-so-Bad Arguments for Shareholder Primacy"]; Lynn A Stout, "New Thinking on 'Shareholder Primacy'" (2012) 2:2 Accounting Economics & L 1 [Stout, "New Thinking on 'Shareholder Primacy'"]; Lynn A Stout, "On the Rise of Shareholder Primacy, Signs of its Fall, and the Return of Managerialism (in the Closet)" (2013) 36:2 Seattle UL Rev 1169 [Stout, "On the Rise of Shareholder Primacy"]; Lynn A Stout, "The Toxic Side Effects of Shareholder Primacy", Response, (2013) 161:7 U Pa L Rev 2003 [Stout, "The Toxic Side Effects of Shareholder Primacy"]. See also Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006) 44:2 Alta L Rev 299; Jill E Fisch, "Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy" (2006) 31:3 J Corp L 637; Richard Marens & Andrew Wicks, "Getting Real: Stakeholder Theory, Managerial Practice, and the General Irrelevance of Fiduciary Duties Owed to Shareholders" (1999) 9:2 Bus Ethics Q 273; Leonard I Rotman, "Debunking the End of History Thesis for Corporate Law" (2010) 33:2 Boston College Intl & Comp L Rev 219 at 219; D Gordon Smith, "The Shareholder Primacy Norm" (1998) 23:2 J Corp L 277 at 279.

legal rules.[4] In the Delaware legal context, case law has made increasingly clear that fiduciary duties are owed to shareholders,[5] but different jurisdictions feature different legal standards and exceptions continue to exist even under Delaware law.[6]

Although much of the literature on fiduciary duties has focused on the United States, debates regarding directors' duties are also active in Canada. The Canadian legal context differs, however, in that unlike Delaware, Canadian law has seemingly embraced a "stakeholder" conception of the corporation.[7] In the past twenty years, Canadian law has shifted from a traditional, shareholder-oriented conception of fiduciary duties[8] to a more flexible and discretionary standard of balancing competing stake-

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4 Discussions of the normative appeal of shareholder wealth maximization and its status as a positive legal requirement are often closely related. See Bainbridge, "Director Primacy", *supra* note 2; Stephen M Bainbridge, "Making Sense of the Business Roundtable's Reversal on Corporate Purpose" (2021) 46:2 J Corp L 285 at 287 [Bainbridge, "Making Sense of the Business Roundtable's Reversal"]; Jonathan R Macey, "Corporate Law as Myth" (2020) 93:5 S Cal L Rev 923 at 949; Marens & Wicks, *supra* note 3 at 275–86; Smith, *supra* note 3 at 278–79. See generally Henry G Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53:2 Va L Rev 259. See generally N Craig Smith & David Rönnegard, "Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools" (2016) 134:3 J Bus Ethics 463.

5 In Delaware law, the fiduciary duty is a common law duty with no statutory definition. Its object and scope are therefore derived from case law. In the takeover context, the case of *Revlon Inc v MacAndrews & Forbes Holdings, Inc*, 506 A (2d) 173 at 182 (Del Sup Ct 1986) [*Revlon*] established that directors owe a specific duty to maximize shareholder value when a sale of the corporation becomes inevitable. This rule was expanded in *eBay Domestic Holdings Inc v Newmark*, 16 A3d 1 (Del Ct Ch 2010). See also *TW Services v SWT Acquisition Corp*, Fed Sec L Rep (CCH) T94344 (Del Ch Mar 2 1989). Chancellors Leo Strine and William Allen have affirmed their view that the primary object of corporate law is protecting shareholders' interests, see William T Allen, "Our Schizophrenic Conception of the Business Corporation" (1992) 14 Cardozo L Rev 261 at 268; Strine Jr, "The Dangers of Denial", *supra* note 2.

6 As a general matter, directors of Delaware corporations are insulated from judicial review by the business judgment rule, which allows directors to take any actions that, in their business judgement, are plausibly in the long-term interests of the corporation. See Blair & Stout, *supra* note 3 at 299–306. For specific exceptions, see Del C tit 8 § 203 (1953); *Credit Lyonnais Bank Nederland NV v Pathe Communications Corp*, 1991 WL 277613 at para 47 (Del Ct Ch (demonstrating that these exceptions include (1) Delaware's antitakeover statute and (2) the shift in directors' duties from shareholders to creditors "in the vicinity of insolvency").

7 For purposes of this article, the term "stakeholder" is used generically to refer to non-shareholder stakeholders.

8 See *Martin v Gibson* (1907), 15 OLR 623 at 626, 632, [1907] OJ No 85; *Teck Corporation Ltd v Millar* (1972), 33 DLR (3d) 288 at 313, [1972] BCJ 566 [*Teck*] (which states "The classical theory is that the directors' duty is to the company. The company's shareholders are the company and therefore no interests outside those of the shareholders can legitimately be considered by the directors").

holder interests.[9] In *Peoples Department Stores Ltd. v. Wise*[10] and *BCE Inc. v. 1976 Debentureholders*,[11] the Supreme Court of Canada held that it may be legitimate, in certain circumstances, for directors to consider not only shareholders but also "employees, suppliers, creditors, consumers, governments and the environment."[12] These Supreme Court decisions have been ratified by amendments to the *CBCA*, which explicitly empower officers and directors to consider a range of stakeholder interests (including, perhaps redundantly, the "long-term interests of the corporation").[13]

These changes have not been without controversy. Many scholars, including myself, have criticized *BCE* for providing insufficient guidance to corporate directors, undermining important shareholder protections, and exacerbating the agency problems inherent in corporate governance.[14] Even scholars sympathetic to the goals of corporate social responsibility have lamented that *BCE* confused more than clarified.[15] Despite norma-

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9 See *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 39 [*BCE*]; *Canada Business Corporations Act*, RSC 1985, c C-44, ss 122(1)(a), 122(1.1) [*CBCA*]. (The CBCA, as well as its provincial analogs, requires that both directors and officers act "honestly and in good faith with a view to the best interests of the corporation", s 122(1)(a). In this context, the precise meaning and scope of the word "corporation" is unclear, though it had traditionally been understood to mean the corporation's shareholders. This presumption was changed by decisions of the Supreme Court of Canada and the 2019 addition of *CBCA* s. 122(1.1)).

10 2004 SCC 68 [*Peoples*].

11 See *BCE*, *supra* note 9.

12 See *Peoples*, *supra* note 10 at para 42; *BCE*, *supra* note 9 at para 39 (these interests are included within the interests of "the corporation" in both cases.)

13 See *CBCA*, *supra* note 9, s 122(1.1).

14 See Sarah P Bradley, "*BCE Inc v 1976 Debentureholders*: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2010) 41:2 Ottawa L Rev 325 at 337, 341, 344; Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48:2 Can Bus LJ 232 at 237; Camden Hutchison, "Pluralism and Convergence: Judicial Standardization in Canadian Corporate Law" (2021) 58:1 Osgoode Hall LJ 163 at 190–92; Jeffrey G MacIntosh, "*BCE* and the Peoples' Corporate Law: Learning to Live on Quicksand" (2009) 48:2 Can Bus LJ 255 at 255; J Anthony Vanduzer, "*BCE v. 1976 Debentureholders*: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision Since *Peoples*" (2010) 43:1 UBC L Rev 205 at 226–68.

15 See Jeffrey Bone, "Corporate Environmental Responsibility in the Wake of the Supreme Court Decision of *BCE Inc. and Bell Canada*." (2009) 27 Windsor Rev Legal Soc Issues 5; Carol Liao, "A Critical Canadian Perspective on the Benefit Corporation" (2017) 40:2 Seattle UL Rev 683 at 701–03; Evguenia Paramonova, "Steering Toward 'True North': Canadian Corporate Law, Corporate Social Responsibility, and Creating Shared Value" (2016) 12:1 JSDLP 25 at 42–43; Thomas Posyniak, "Realizing a 'Pious Wish' of Peoples and BCE: Enforcement of Pluralist Theory and Corporate Environmental Responsibility" (2012) 23 J Envtl L & Prac 69 at 73; Ed Waitzer & Johnny

tive disagreements regarding the proper scope of fiduciary duties, what many of these scholars share in common is an underlying assumption that the *law* of fiduciary duties is an important determinant of managerial behavior. Implicit within legal debates regarding the nature of fiduciary duties is a belief that these duties *matter* for purposes of corporate decision making.

There are, in fact, reasons to believe that legal standards play a limited role in corporate governance, not least with respect to the fundamental question of in whose interests the corporation is to be governed. For public corporations, a variety of factors, including the professional norms of corporate managers,[16] the realities of public financial markets,[17] and the central role of shareholders in the mechanisms of corporate democracy,[18] strongly encourage directors to prioritize shareholder interests.[19] In other words, just because directors are permitted to consider "employees, suppliers, creditors, consumers, governments and the environment[20]" does not mean they actually do so, and indeed, directors have strong incentives to focus exclusively on shareholders. Complicating the issue as an empirical matter, businesses face competing incentives to signal their commitment to stakeholders. As corporations face increasing scrutiny from activists, governments, and consumers, presenting themselves as socially responsible can be an effective business strategy, even if purely optical.[21] The result of these complex dynamics is that it can be difficult to know—

Jaswal, "*Peoples*, *BCE*, and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439 at 442.

16 Jeffrey N Gordon, "The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices" (2007) 59:6 Stan L Rev 1465 at 1529.

17 See Manne, *supra* note 4 at 260–68.

18 Not only do shareholders hold the exclusive power to elect directors, they also have the power to bring derivative and oppression lawsuits. See Isabelle Martin, "The Use of Transnational Labour Law in Steering Socially Responsible Corporate Governance Towards Increased Worker Protection" (2018) 33:2 CJLS 159 at 167.

19 For empirical evidence from the United States that directors do not protect stakeholders in "going private" transactions, see Lucian A Bebchuk, Kobi Kastiel & Roberto Tallarita, "For whom Corporate Leaders Bargain" 93 S Cal L Rev. The authors find that in going private transactions, directors bargain for "substantial benefits for their shareholders as well as for themselves" (at 1472), but not for stakeholders, despite the existence of antitakeover laws.

20 See *BCE*, *supra* note 9 at para 40.

21 See Bainbridge, "Making Sense of the Business Roundtable's Reversal", *supra* note 4 at 316 (for an excellent discussion of this dynamic with respect to the Business Roundtable). For an argument that corporations' responses to these pressures are substantive rather than optical, see Michal Barzuza, Quinn Curtis & David H Webber, "The Millennial Corporation: Strong Stakeholders, Weak Managers" (12 April 2022) [unpublished, archived at SSRN] at 3–4.

as an empirical matter—in whose interests corporations are actually being governed.

This article addresses this empirical problem by analyzing "fiduciary out" provisions. More specifically, I examine two samples[22] of Canadian public M&A transactions, with the aim of identifying the specific interests (i.e., shareholders or stakeholders) prioritized by directors. A "fiduciary out" is a common provision in corporate acquisition agreements[23] that allows the target corporation to back out of a committed sale, contingent upon receiving a more favorable offer from a third party. These provisions are referred to as "fiduciary outs" because they allow target company directors to exercise their fiduciary duty to maximize shareholder value in a sale, a specific obligation known as "*Revlon* duties" in the United States.[24] Although this duty to maximize shareholder value is specific to Delaware law—and has been explicitly disclaimed by Canadian courts[25]—Canadian M&A agreements have featured fiduciary outs for decades. It is now standard practice for Canadian acquisition agreements to allow target company directors to abandon a sale in favor of a "Superior Proposal."[26]

Fiduciary outs provide revealing evidence regarding directors' legal and business considerations. Unlike sanctimonious public statements regarding corporate social responsibility, the terms of acquisition agreements are legally binding on the corporations that sign them, and can potentially give rise to director liability for breach of fiduciary duties. For this reason, they are often drafted and negotiated by outside counsel with

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22 The two samples were designed to capture both large and small public M&A transactions. The samples comprise (1) the 100 largest Canadian M&A transactions over the past 20 years and (2) a broader sample of over 2,000 smaller M&A transactions. See Section III.A for a discussion of data collection and methodology.

23 In this article, the term "acquisition agreement" refers generically to any negotiated transaction document used to acquire a corporation, including arrangement agreements, amalgamation agreements, and asset purchase agreements. In the Canadian context, public acquisitions are most often structured as plans of arrangement, see Bradley A Freelan, Gesta A Abols & Neil Kravitz, "Canadian Mergers and Acquisitions (M&A): Acquiring a Public Company" (23 July 2020) at 7, online (pdf): *Fasken Martineau DuMoulin LLP* <www.fasken.com> [perma.cc/ 8KH6-CE4L].

24 So named because they were established by *Revlon*, *supra* note 5.

25 See e.g. *Pente Investment Management Ltd v Schneider Corp*, 42 OR (3d) 177 [1998] OJ No 4142 [*Pente*] ("*Revlon* is not the law in Ontario. In Ontario, an auction need not be held every time there is a change in control of a company" (note that, despite the court's language, *Revlon* does not require an auction) at para 61.

26 As discussed in Part III below, "Superior Proposal," "Superior Offer," or another similar term is often a defined concept in corporate acquisition agreements. Typically, a "Superior Proposal" is an alternative offer that satisfies specified criteria, thereby triggering the fiduciary out. One of the key findings of this article is that, even in Canada, Superior Proposals are usually defined in terms of maximizing shareholder value.

a sophisticated understanding of the relevant legal risks.[27] More so than what directors say, the content of fiduciary outs reveals what directors *actually believe*. Thus, if corporate directors (or their legal counsel) believe directors are accountable to stakeholders, then we should expect the language of fiduciary outs to allow consideration of stakeholder interests. If, however, directors believe their fiduciary duties are exclusively enforceable by shareholders, then we should expect the language of fiduciary outs to be limited to shareholder interests.[28]

The evidence in this article suggests that in the M&A context, directors are primarily concerned with protecting shareholder interests. Nearly all fiduciary outs in a sample of large Canadian M&A transactions, and nearly 70% of fiduciary outs in a sample of smaller M&A transactions, are specifically contingent upon benefiting shareholders. Tellingly, only a single fiduciary out provision among more than 1,000 agreements makes any reference to stakeholder interests or the collective interests of "the corporation."[29] Despite the absence of *Revlon* duties in Canada, fiduciary outs specifically address the economic interests of shareholders.[30]

The remainder of this article proceeds as follows. Part II discusses fiduciary outs and their relationship to directors' duties. This part also discusses related developments in Canadian corporate law. Part III presents empirical evidence regarding fiduciary out provisions, while Part IV discusses the significance of this evidence to Canadian fiduciary duties. In the M&A context, at least, the evidence suggests that directors prioritize shareholder interests. Part V concludes by questioning the extent to which Canadian law meaningfully benefits stakeholders.

I. The Role of Fiduciary Outs

Fiduciary outs play an important role in M&A transactions. A corporate acquisition agreement represents a binding commitment on the part of both the buyer and the seller to consummate an acquisition. For public company acquisitions, there is inevitably a delay of several months be-

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[27] In many public M&A transactions, the target corporation's board of directors creates a special committee of independent directors to review and approve the sale. The special committee and the target corporation itself often retain separate legal counsel (typically large corporate law firms), both of which approve the language of the fiduciary out.

[28] What I mean by "believe" in this context is the belief that shareholders or stakeholders can inflict meaningful consequences on directors if their interests are not protected.

[29] See "Merger Agreement between the London Stock Exchange Group Plc and TMX Group Inc" (9 February 2011), Exhibit B to Schedule 5.5, online (pdf): <www.tmx.com> [perma.cc/54D3-7ZJC].

[30] This finding is consistent with the evidence in Bebchuk, Kastiel & Tallarita, *supra* note 19.

tween the signing of the agreement and the closing of the deal. During this window, the buyer is exposed to a risk of nonconsummation if the seller pursues an alternative transaction. To reduce this risk, the seller is often contractually prohibited from soliciting, discussing, or entering into any alternative transaction with another potential buyer (on pain of liability for breach of contract).[31] A fiduciary out is a narrow exception to this contractual restriction, allowing target company management to pursue a superior offer.[32]

A. The Evolution of Fiduciary Outs

Although they are today used in many countries, fiduciary outs were originally a product of Delaware jurisprudence. In 1986, the *Revlon* decision held that directors owe a duty to maximize shareholder value once a sale of the corporation has become inevitable. This duty was elaborated in *Paramount Communications Inc v QVC Network Inc*,[33] which held that directors cannot absolve themselves of their duty to maximize share value by entering into a binding acquisition agreement. In *Paramount*, the board of directors of the target corporation (Paramount Communications, Inc.) agreed to a merger agreement with Viacom, Inc. which included a range of "deal protection" measures, including a non-solicitation provision, a $100 million termination fee, and a lock-up option on approximately 20% of Paramount's stock. When QVC Network, Inc. made a competing, higher-priced offer for Paramount, Paramount's board of directors refused to entertain the offer, citing their contractual obligations to Viacom. Both the Delaware Court of Chancery and the Delaware Supreme Court held that Paramount's directors had violated their duties under *Revlon*. Thus, *Paramount* established that—under Delaware law—directors may not contractually avoid their legal duties to shareholders.[34]

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[31] Researching the seller and negotiating a transaction represents a substantial investment of time and resources on the part of the buyer. By reducing the risk of seller opportunism, non-solicitation provisions help resolve the moral hazard problem that would otherwise deter buyers from making initial offers.

[32] Note that even if the target corporation validly exercises its fiduciary out, it is generally required to pay a breakup fee (which effectively increases the minimum price for any alternative buyer).

[33] 637 A (2d) 34 at para 47 (Del Sup Ct 1994) [*Paramount*].

[34] See generally *CBCA, supra* note 9, s 122(2) (the Delaware rule parallels this provision, though the substance of the fiduciary duty is different under Canadian law).

Revlon, *Paramount*, and subsequent Delaware decisions[35] led to the development of modern fiduciary outs.[36] To accommodate directors' legal duties, parties often include provisions in acquisition agreements that allow target company directors to pursue a higher-value offer. Although buyers typically accept these provisions, they often insist that the contractual language be drafted as narrowly as possible, so that the provision itself is strictly limited to directors' legal duties, and so that it only captures alternative offers that provide a higher financial value to shareholders. A common drafting technique is to limit exercise of the fiduciary out to a "Superior Proposal" (or similar term), which is defined in the agreement as an alternative acquisition that is more favorable, from a financial point of view, to the shareholders of the target corporation.[37] In Delaware, this language reflects the legal reality of shareholder primacy. Interestingly, however, practitioners in other jurisdictions with different fiduciary standards—Canada among them—have adopted similar language.

B. Developments in Canadian Corporate Law

Unlike directors of Delaware corporations, Canadian directors do not owe *Revlon* duties. However, the flexibility of directors to consider "employees, suppliers, creditors, consumers, governments and the environment" is a relatively recent development. Prior to *BCE*, it was generally assumed by courts and practitioners that directors' fiduciary duties were intended to protect shareholders, despite the statutory fiduciary duty referring to the "the best interests of the corporation,"[38] and despite the clear rejection of *Revlon* duties in Canadian jurisprudence. This ambiguity as to the beneficiaries of directors' duties is reflected in *Pente*, which explicitly rejected *Revlon* duties while implying that directors owe their fiduciary duties to shareholders. Although the court in *Pente* emphasized "the best interests of the corporation"—and explicitly rejected the argument that directors owe duties to *specific* shareholders—it also stated that directors owe a duty to "act in the best interests of the shareholders,"[39] to recommend the "best available transaction for the sharehold-

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35 The requirement that directors negotiate a fiduciary out clause in a sale transaction was made explicit in the case of *Omnicare Inc v NCS Healthcare Inc*, 818 A (2d) 914 (Del Sup Ct 2003).

36 Note that broader (and likely legally invalid) fiduciary outs existed prior to *Paramount*. See Julian Velasco, "Fiduciary Duties and Fiduciary Outs" (2013) 21:1 Geo Mason L Rev 157 at 169–70.

37 As discussed in Part III, most fiduciary outs use this exact language.

38 *CBCA, supra* note 9, s 122(1)(a).

39 *Pente, supra* note 25 at para 45.

ers,"[40] and to "get the best transaction available to the shareholders."[41] Thus, while *Pente* alludes to conflicts of interest between individual shareholders, it never suggests that directors owe duties to non-shareholder interests. In this sense, *Pente* is representative of pre-*BCE* jurisprudence. Although the decision is not explicitly clear as to the meaning of "the corporation," nor does it suggest that "the corporation" encompasses non-shareholder groups.[42]

This understanding of the fiduciary duty has changed in light of *BCE*. In its 2004 *Peoples* decision, the Supreme Court stated, "given all the circumstances of a given case," it may be legitimate for directors to consider "shareholders, employees, suppliers, creditors, consumers, governments and the environment."[43] This somewhat ambiguous statement was elaborated in *BCE*, which went further in holding that directors "*may be obliged* to consider the impact of their decisions on corporate stakeholders"[44] and that their duty was to "the corporation *viewed as a good corporate citizen.*"[45] *BCE* heralded a shift in corporate law, raising questions as to the fundamental nature of the fiduciary duty. Following *BCE*, were directors *required* to consider stakeholder interests (and if so, when), or was consideration of stakeholder interests purely discretionary? These questions appear to have been answered by Parliament in 2019 with the adoption of s. 122(1.1) of the *CBCA*. This section clarifies that "[w]hen acting with a view to the best interests of the corporation," directors and officers "may" consider the interests of stakeholders.[46] The use of the word "may" (as opposed to "should," "shall," or "must") seems to answer the question of whether considering stakeholders is mandatory.[47] In either case, how-

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40 *Ibid* at para 38.

41 *Ibid* at para 56.

42 See also *Teck*, *supra* note 8 (even that case, cited by the Supreme Court in favor of a stakeholder theory of the corporation, focuses on the conflict between individual shareholders. It does not imply that directors owe an enforceable duty to stakeholders).

43 *Peoples*, *supra* note 10 at para 42.

44 See *BCE*, *supra* note 9 at para 66 [emphasis added].

45 *Ibid* [emphasis added].

46 *CBCA,* s 122(1.1) (stakeholder interests are enumerated to include the interests from *Peoples* and *BCE*, plus "retirees and pensioners" and "the long-term interests of the corporation", s 122(1.1)(a)).

47 Even this conclusion is not entirely without doubt, however. Although the language of s. 122(1.1) seems clear, its meaning has not yet been fully developed by the courts. At least one lower court decision construing s. 122(1.1) has implied that directors may owe mandatory duties to creditors. See *R v KK*, [2021] OJ No 3685 at para 74, 2021 ONSC 4775.

ever, the Canadian fiduciary standard is clearly different from Delaware's.[48]

Despite these differences, fiduciary outs are commonplace in Canadian M&A transactions. Although it is difficult to know—and my research does not reveal—exactly when fiduciary outs were introduced in Canada, it is reasonable to assume they were introduced following their emergence in the United States. They were already common by 2001, the first year of my samples. They were apparently necessary prior to *BCE*, as suggested by the 2007 case of *Ventas, Inc. v Sunrise Senior Living Real Estate Investment Trust*.[49] In *Ventas*, the Ontario Court of Appeal commented on the necessity of fiduciary outs, observing that there was "no doubt" that directors owed a duty to maximize shareholder value.[50] According to the court, fiduciary outs allow directors to exercise their duty to ensure that shareholders receive the best offer available.[51] Although certain language in *Ventas* suggests fiduciary outs are less necessary in Canada,[52] *Ventas* also shows that fiduciary outs play an important role in Canadian M&A.

The question posed by this article is whether, and to what extent, the law and practice of fiduciary duties have changed in light of *Peoples*, *BCE*, and the amendments to the *CBCA*. Do fiduciary outs continue to be tied to maximizing shareholder value? Have they evolved to reflect broader considerations of a plurality of stakeholder interests? How do directors conceive their duties (as revealed by legally binding contractual language)? The answers to these questions—discussed in Part III below—provide insight into the practical significance of legal changes to fiduciary duties.

II. Fiduciary Outs in Canadian M&A Transactions

Fiduciary outs are a window into the thinking of corporate directors. These provisions reflect the concerns of directors and their legal counsel in two ways. First, from a legal perspective, fiduciary outs allow directors to pursue alternative transactions in situations, where failing to do so would violate their fiduciary duties. Second, from a business perspective, fiduciary outs allow directors to fulfill their own self-conception of their

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48 Note that as a formal matter, amendments to the *CBCA* do not affect provincial law. Nor do *Peoples* or *BCE*, both of which construed the *CBCA*. Nevertheless, there are reasons to believe that *Peoples* and *BCE* have influenced the interpretation of provincial legislation. See Hutchison, *supra* note 14 at 188–90.

49 2007 ONCA 205.

50 *Ibid* at para 53.

51 *Ibid*.

52 *Ibid* at para 54.

professional responsibilities, which may be broader (or narrower) than their formal legal responsibilities. Depending on how directors conceive their roles, these responsibilities may be limited exclusively to shareholders, or they may include a broader variety of collective stakeholder interests. For these reasons, the specific wording of fiduciary outs reveals important information regarding to whom directors believe their duties are actually owed.

A. Data Collection and Methodology

This article draws on two samples of Canadian M&A transactions: The first sample ("Sample 1") includes the 100 largest M&A transactions signed[53] between May 1, 2001 and April 30, 2021 in which the target company was a publicly-traded Canadian corporation.[54] The second, larger sample ("Sample 2") consists of *all* M&A transactions signed[55] between May 1, 2001 and April 30, 2021 in which the target company is identified by Capital IQ as a publicly-traded Canadian corporation.[56] Sample 2 includes a total of 2,078 distinct transactions. Unfortunately, because most corporations that are *currently* private are classified by Capital IQ as "private companies" (regardless of previous listing status), it was impracticable to identify all transactions in which the target company was public *at the time of the transaction*. As a practical matter, this means that Sample 2 is biased toward reverse takeover transactions,[57] acquisitions of majority stakes, and other (typically smaller) transactions in which the target company remained publicly traded following the transaction. Given

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53 Sample 1 includes a small number of signed but unconsummated transactions.

54 Transactions were manually identified using the Capital IQ transaction database and ranked by deal value. The sample was limited to transactions in which the *target* company was a public corporation for two reasons: First, fiduciary outs are far less common in acquisitions of private companies. Second, under Canadian securities law, publicly-traded corporations ("reporting issuers") are required to publicly disclose any "material change," including the public filing of "material contracts" such as acquisition agreements. These agreements are filed on SEDAR as part of the company's legal disclosure obligations. Since essentially any acquisition of a public company is a "material change" with respect to that company, but not all acquisitions *by* public companies are a material change with respect to the buyer, acquisition agreements are more widely available for acquisitions of public companies. For both consistency and convenience, I therefore limited the sample to public company acquisitions.

55 Sample 2 contains a small minority of signed but unconsummated transactions.

56 See *supra* note 54 (This sample was limited to public targets). *Ibid (*Capital IQ does not identify all acquisitions of public companies.)

57 A "reverse takeover" is a public securities offering in which an operationally defunct but registered public company "acquires" a private company (or *vice versa*) in order to provide access to the public securities market. Reverse takeovers are not unlike Special Purpose Acquisition Company transactions.

the limitations of Capital IQ's classification system, this two-sample design was intended to ensure coverage of both (1) large, economically salient M&A transactions and (2) the smaller, more speculative transactions that make up much of the Canadian M&A market.[58] Finally, to draw comparisons with the United States, I also compared the qualitative language of fiduciary out provisions in the 10 largest Canadian and 10 largest U.S. transactions over the past 20 years.

Analysis of both samples followed the same procedure: after creating each sample, a research assistant and I recorded several variables for each transaction and attempted to find the related acquisition agreement. If a particular acquisition agreement was unavailable on Capital IQ, we searched for it on SEDAR using the LexisNexis Securities Mosaic.[59] Once located, we reviewed each acquisition agreement for a fiduciary out provision. If an agreement contained a fiduciary out, we recorded the language of the provision and coded it for whether: (1) the fiduciary out is contingent upon directors' exercise of their fiduciary duties; (2) the fiduciary out can be triggered by an alternative transaction that is more favorable to the financial interests of shareholders; and (3) the fiduciary out can be triggered by an alternative transaction that is more favorable to one or more stakeholder interests (including the interests of "the corporation"). In most agreements, the interests capable of triggering the fiduciary out are set forth in the definition of "Superior Proposal," "Superior Offer," or another similar term. For the sake of convenience, I refer to fiduciary out provisions together with their related definitional terms (e.g., "Superior Proposal") as "fiduciary outs" for the remainder of this article.

Unfortunately, acquisition agreements could not be located for all transactions. According to the Canadian Securities Administrators, reporting issuers often fail to file material contracts, despite their legal obligation to do so.[60] Unsurprisingly, agreements relating to smaller trans-

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58 As reflected in Sample 2, the Canadian securities markets are highly skewed toward microcap companies. Many of the transactions in Sample 2 appear to be speculative acquisitions of early-stage mining, energy, and technology companies.

59 Not all filed acquisition agreements were available on Capital IQ. There was no clear pattern or explanation as to why Capital IQ includes certain acquisition agreements but not others.

60 See e.g. *CSA Staff Notice 51-344 – Continuous Disclosure Review Program Activities for the fiscal year ended March 31, 2015*, (2015) 38:28 OSCB 6343 at 6353; *CSA Staff Notice 51-346 – Continuous Disclosure Review Program Activities for the fiscal year ended March 31*, (2016) 39:29 OSCB 6599 at 6610; *CSA Staff Notice 51-355 – Continuous Disclosure Review Program Activities for the Fiscal Years Ended March 31, 2018 and March 31, 2017*, (2018) 41:29 OSCB 5852 at 5854. Since acquisition agreements are filed only after a transaction has been disclosed, and since public acquisition agreements rarely include indemnification provisions, the agreements themselves are not

actions were less likely to be properly filed than agreements relating to larger transactions. In Sample 1, 93 agreements out of 100 transactions could be located; in Sample 2, only 1,188 agreements out of 2,078 transactions could be located. For Sample 2, three factors appear to influence whether a given agreement was filed. First, reverse takeovers are less likely to include filed agreements: Only 48.1%[61] of reverse takeover transactions include a filed agreement, compared to 69.1% of traditional M&A transactions. Second, transactions on larger securities exchanges are more likely to include filed agreements: Approximately 88.9% of acquisitions on the Toronto Stock Exchange ("TSX") include a filed acquisition agreement, compared to only 55.7% of acquisitions on the smaller TSX Venture Exchange ("TSXV") and 53.2% on the Canadian Stock Exchange ("CSE"). The vast majority of transactions in Sample 2 are acquisitions on the TSXV (reflecting the prominence of microcap corporations in the Canadian securities markets). The third factor appearing to influence the availability of acquisition agreements is the transaction's vintage. Older transactions are less likely to include filed acquisition agreements than more recent transactions.[62] To take the first and last full years of Sample 2, only 52.1% of transactions from 2002 include a filed acquisition agreement, compared to 82.7% of transactions from 2020. Agreements in Sample 1 were more consistently available across all years.

B. The Legal Content of Fiduciary Outs

Not all acquisition agreements contain fiduciary outs. Although 95.7% of the agreements in Sample 1 (89 agreements) contain fiduciary outs, only 58.4% of the agreements in Sample 2 (694 agreements) contain fiduciary outs. In Sample 2, reverse takeovers are less likely to include fiduciary outs: only 44.3% (257 agreements) versus 73.6% (437 agreements) for traditional M&A transactions.[63] Acquisitions of corporations listed on the TSX are more likely to contain fiduciary outs than acquisitions on the TSXV or CSE: In Sample 2, approximately 83.9% of acquisitions on the TSX (177 agreements) contain fiduciary outs, compared to 54% (442

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particularly salient for disclosure purposes. This may explain why they are sometimes missing from SEDAR filings.

61 All percentages are rounded to the nearest tenth.

62 This difference across time was unsurprising, and is likely to due to improvements in filing technology and ease of enforcement.

63 This likely reflects the fact that many acquisition agreements in reverse takeover transactions are unnegotiated *pro forma* agreements.

agreements) on the TSXV and 53.3% on the CSE (49 agreements).[64] The prevalence of fiduciary outs is consistent over time, with no significant increase or decrease over the period. The legal content of fiduciary outs in each sample is described below:

1. Sample 1

Approximately 94.4% of fiduciary outs (84 agreements) in Sample 1 are contingent upon directors' exercising their fiduciary duties. The language of these provisions allows directors to pursue an alternative transaction only if doing so is consistent with or, more typically, *required* by their fiduciary duties. A textual association between fiduciary duties and pursuing a "Superior Offer" (or similar concept) is nearly universal.

Significantly, 98.9% of fiduciary outs (88 agreements) in Sample 1 are explicitly contingent upon benefiting shareholders' financial interests — note that this percentage is even higher than provisions that reference fiduciary duties. The following language in the acquisition agreement regarding CNOOC Limited's acquisition of Nexen Inc. is representative of Sample 1:

> [A 'Superior Proposal' is an 'Acquisition Proposal'] in respect of which the Board and any relevant committee thereof determines, in its good faith judgment, after receiving the advice of its outside legal counsel and its financial advisors and after taking into account all the terms and conditions of the Acquisition Proposal, including all legal, financial, regulatory and other aspects of such Acquisition Proposal and the party making such Acquisition Proposal, would, if consummated in accordance with its terms, but without assuming away the risk of noncompletion, result in a transaction which is more favourable, from a financial point of view, to Common Shareholders than the Arrangement (including any amendments to the terms and conditions of the Arrangement proposed by the Purchaser pursuant to Section 5.4(2)).[65]

The language of "more favourable, from a financial point of view, to Common Shareholders" (and variations thereon) is the most common

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64 This is consistent with an expectation that larger transactions are more likely to feature fiduciary outs. The larger the target, the greater the economic stakes, and the greater the importance of including a fiduciary out.

65 "Arrangement Agreement among CNOOC Limited, CNOOC Canada Holding Ltd and Nexen Inc" (23 July 2012), s 1.1, online (pdf): *Securities and Exchange Commission* <www.sec.gov> [perma.cc/68BC-YW6J]. The quoted language is taken from the Arrangement Agreement's defined terms section. Pursuant to s 5.4(1)(g) of the agreement, the board's fiduciary duties require recommendation of a "Superior Proposal."

phraseology found in "Superior Proposal" definitions.[66] The legal effect of this language is that in order for directors to pursue an alternative transaction, the transaction must provide greater financial value to shareholders. Thus, Canadian law notwithstanding, Canadian acquisition agreements entail a *Revlon*-like understanding of fiduciary duties. Indeed, only a single agreement in Sample 1 makes any reference to stakeholder interests.[67]

Since Canadian fiduciary duty law is often contrasted with that of the United States, I also performed a qualitative comparison of fiduciary out language in each of the 10 largest Canadian and 10 largest U.S. M&A transactions over the past 20 years. The results of this comparison—in the form of the operative language of each agreement—are set forth in the attached Appendix. As the language in the Appendix shows, the drafting of fiduciary outs in the United States and Canada is extremely similar, with almost identical language used to describe the fiduciary "out" itself. In particular, the requirement that a "Superior Proposal" be "more favorable, from a financial point of view, to shareholders" (or equivalent language) is standard in both countries.[68] The reasons for this similarity are discussed in Part IV, but suffice it to say, there is little difference between Canadian and U.S. fiduciary outs.

2. Sample 2

Approximately 95% of fiduciary outs (659 agreements) in Sample 2 refer to directors' fiduciary duties. As in Sample 1, the majority of these provisions allow directors to pursue an alternative transaction only if doing so is *required* by their fiduciary duties. Although reverse takeover agreements are slightly less likely to refer to fiduciary duties than traditional M&A agreements (93.4% versus 95.9%), the prevalence of fiduciary

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66 Indeed, similar language is used in the agreement to acquire BCE Inc., which led to the *BCE* litigation.

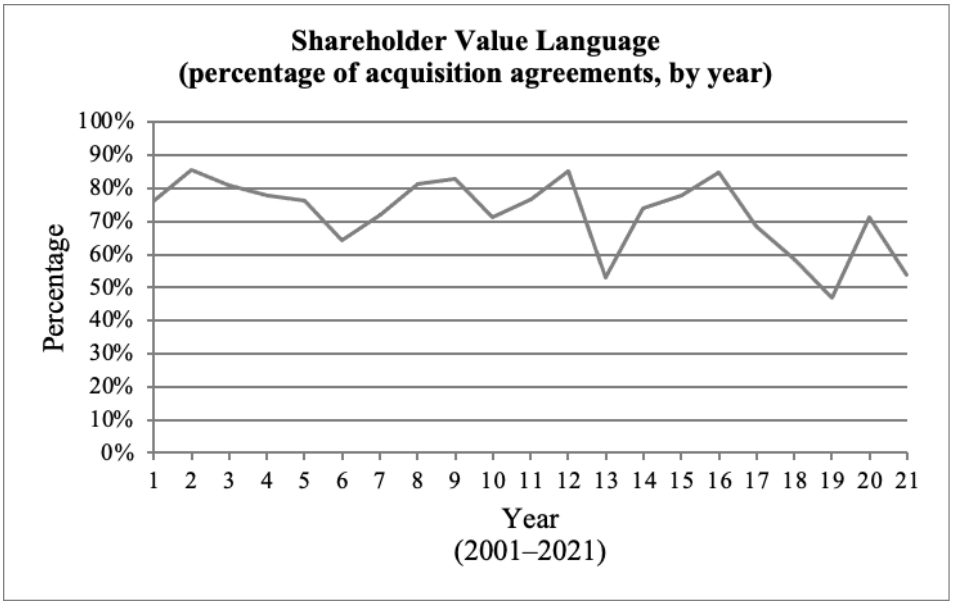
67 The fiduciary language of the "Merger Agreement between the London Stock Exchange Group Plc and TMX Group Inc", *supra* note 28 s 1.1 references "the interests of all of the stakeholders of the Party, including capital market participants, employees and the community in which the Party operates." Perhaps tellingly, this transaction was never consummated, as the parties were unable to secure the approval of the target shareholders. TMX Group Inc.'s shareholders did accept a rival (higher value) tender offer from Maple Group Acquisition Corp (see generally Euan Rocha, "Maple bid for TMX wins shareholder approval", *Reuters* (31 July 2012), online: <https://www.reuters.com/article/us-tmx-maple/maple-bid-for-tmx-wins-shareholder-approval-idINBRE87003I20120801/> [perma.cc/UX6V-3BY6].

68 Although the Appendix is limited to 10 transactions for each country, nearly every agreement in Sample 1 contains similar language.

language is otherwise consistent across transaction types, securities exchanges, and time.

Approximately 69.3% of all fiduciary outs (481 agreements) are explicitly contingent upon benefiting shareholders' financial interests.[69] This percentage is higher for non-reverse takeover transactions and for acquisitions of corporations listed on the TSX: 83% (361 agreements) and 91% (161 agreements), respectively. Remarkably, not a single agreement in Sample 2 references stakeholder interests.

By tracking changes over time, I specifically investigated whether *Peoples*, *BCE*, and the amendments to the *CBCA* have affected the content of fiduciary outs. One might hypothesize that legal practitioners would respond to these developments (1) by eliminating the strict requirement of financially benefiting shareholders (to better conform contractual practice to the law), (2) by *emphasizing* this requirement (so as to "counteract" the law), or (3) by expanding fiduciary outs to cover broader stakeholder interests. As it turns out, however, *Peoples*, *BCE*, and the amendments to the *CBCA* have not significantly affected fiduciary outs. The graph below shows the total percentage of fiduciary outs containing exclusive shareholder value language over the 20-year period.[70]



69 E.g., "more favorable, from a financial point of view, to shareholders."

70 There is little reason for a similar graph depicting the contents of Sample 1, as all but one of the fiduciary outs in Sample 1 is based on shareholder language.

As seen in the graph above, there appears to be a slight downward trend in fiduciary outs containing shareholder value language. However, the timing of this pattern is not related to any specific legal change and is more likely due to annual variation in the number of reverse takeovers, which are less likely to include shareholder value language. Ultimately, there is nothing in the data from either sample providing any indication that legal changes have affected the drafting of fiduciary outs.

III. Discussion and Analysis

The data reveal a discrepancy between the theory and practice of fiduciary duties. Despite the fact that Canadian directors may legally consider stakeholder interests—and, prior to 2019, operated under a legal framework implying an *obligation* to consider stakeholder interests—fiduciary outs in Canadian M&A almost universally privilege shareholder value. This Part IV discusses why corporate practice diverges from the "law in books,"[71] and why directors are principally concerned with the financial interests of shareholders.

A. Explaining the Content of Fiduciary Outs

If the law allows directors to consider "employees, suppliers, creditors, consumers, governments and the environment," then why do fiduciary outs focus exclusively on shareholders? As prior scholars have suggested, there are a number of reasons to expect shareholder value to remain the lodestar for directors.[72] In the context of fiduciary outs, I suggest five specific reasons, each of which are primarily grounded in business and economic factors, but which are also shaped by the broader legal context. These reasons are: (1) the exclusive role of shareholders in electing (and removing) directors; (2) fear of shareholder litigation; (3) a cultural and professional commitment to maximizing shareholder value; (4) the unwillingness of buyers to accept broad fiduciary outs; and (5) the mimetic influence of U.S. law firms.

First, under basic corporate law principles, shareholders hold the power to elect the board of directors.[73] Under Canadian law, shareholders

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71 The practical distinction between law in books and law in action was (arguably) first identified in Roscoe Pound, "Law in Books and Law in Action" (1910) 44 Am L Rev 12.

72 For example, Edward Iacobucci has argued that the discretionary nature of the business judgement rule gives directors broad latitude to consider shareholder interests (*supra* note 14 at 242). See also Edward M Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003) 39:3 Can Bus LJ 398 at 399, 410–11.

73 See e.g. *CBCA, supra* note 9, s 106(3) (and equivalent provisions of the provincial corporations acts).

can also remove directors at any time at a special meeting of shareholders.[74] No stakeholder group plays any role in choosing directors. Given that directors are, in a significant sense, accountable to shareholders, it is unsurprising that directors choose to prioritize shareholder interests.[75] In extreme cases, a board of directors that consistently fails to maximize shareholder value will eventually be replaced, typically through one of two market mechanisms. First, an activist investor or dissident shareholder may remove the board through a proxy contest,[76] or second, the firm's low stock price (caused by selling on the part of dissatisfied shareholders) may attract a hostile takeover bid.[77] Either way, the board will be replaced by new directors who are more amenable to shareholder interests. Indeed, the very fact that proxy contests and hostile takeovers are relatively rare may be evidence of their disciplining effect.[78]

If anything, accountability to shareholders is even stronger outside the M&A context. In the context of M&A transactions, self-interested directors may welcome the flexibility to consider stakeholder concerns.[79] The greater the flexibility to consider stakeholder interests, the greater the opportunity for directors to pursue their own interests.[80] That directors are constrained by fiduciary outs to consideration of shareholder interests speaks to the economic and practical realities of the market for

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74 See e.g. *CBCA, supra* note 9, s 109(1) (and equivalent provisions of the provincial corporations acts).

75 See Smith & Rönnegard, *supra* note 4 at 468.

76 See Vyacheslav Fos, "The Disciplinary Effects of Proxy Contests" (2017) 63:3 Management Science 655. For a discussion of recent developments in Canadian proxy contests, see Alex Moore & Jennifer Crawford, "The Shareholder Rights and Activism Review: Canada" (18 August 2022), online (blog): *The Law Reviews* <thelawreviews.co.uk/title/the-shareholder-rights-and-activism-review/canada>.

77 See Henry G Manne, "Mergers and the Market for Corporate Control" (1965) 73:2 J Political Economy 110 at 112. See also B Espen Eckbo, "Mergers and the Market for Corporate Control: The Canadian Evidence" (1986) 19:2 Can J Economics 236.

78 For a general discussion of changes to the corporate management paradigm and their implications for the incidence of hostile transactions, see Bengt Holmstrom & Steven N Kaplan, "Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and 1990s" (2001) 15:2 J Economic Perspectives 121.

79 In this context, it is important to keep in mind that negotiating a fiduciary out provision is the final step in a decision-making process in which directors have already considered stakeholders. Boards of directors are counseled on their broad duties to "the corporation" before finalizing a transaction (and before agreeing to a deal at all). Canadian directors are under no specific obligation to accept an acquisition that benefits shareholders. Thus, what the data cannot reveal is the extent to which stakeholder considerations influence the decision to enter a transaction in the first instance.

80 An alternative bidder might "bribe" directors by offering them indirect financial benefits or a continuing role in the successor company, for example. Directors might justify choosing such an offer in terms of protecting stakeholder interests.

corporate control (discussed below), but it also underscores corporate directors' fundamental accountability to shareholders. Without an effective stakeholder accountability mechanism (such as voting), there is little reason to expect directors to meaningfully protect stakeholder interests.

Second, directors fear shareholder litigation resulting from non-value maximizing decisions. This fear is less pressing in Canada than the United States, partly due to the broader conception of fiduciary duties. Since directors enjoy greater latitude to protect non-shareholder interests, they can more easily defend managerial decisions that reduce shareholder value. In addition, class actions are less common in Canada for a number of institutional reasons, including the "English rule" of cost shifting, lower damages awards, and lower counsel fees for plaintiff attorneys.[81] In combination, these factors mean that Canadian directors are less subject to shareholder litigation than their American counterparts. Fiduciary duty lawsuits exist in Canada, but they are less often class actions and more often individual lawsuits. Given the concentrated ownership structure of many public corporations in Canada, controlling shareholders have strong incentives to sue (or simply replace) disloyal directors.[82]

In addition to fiduciary duty claims, Canadian law also provides the oppression remedy.[83] The oppression remedy is a statutory remedy used to prevent corporate action that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer."[84] It is a powerful tool that allows shareholders to directly challenge corporate decisions.[85] Although the oppression remedy is an equitable remedy,[86] and thus rarely results in monetary damages, it is taken seriously by directors when considering strategic alternatives. The oppression remedy is not limited to shareholders—it explicitly extends to creditors[87]—but it does not protect the full range of interests encompassed

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81 See Garry D Watson, "Class Actions: The Canadian Experience" (2001) 11:2 Duke J Comp & Intl L 269.

82 Of course, the reality of concentrated ownership means that directors are often loyal to controlling shareholder interests.

83 See *CBCA, supra* note 9, s 241 (and equivalent provisions of the provincial corporations acts).

84 *CBCA, supra* note 9, s 241(2).

85 See Stanley M Beck, "Minority Shareholders' Rights in the 1980s" in *Special lectures of the Law Society of Upper Canada: Corporate Law in the '80s*, (Don Mills (ON): Richard De Boo, 1982) 311 at 312–13 (where Beck refers to the oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world").

86 See *BCE*, *supra* note 9 at para 58.

87 See *BCE*, *supra* note 9 (BCE, which was brought by creditors, is Canada's most famous oppression case).

by the fiduciary duty.[88] This means that when directors face a decision that pits shareholders against non-creditor stakeholders (employees, for example),[89] they are more likely to favor shareholders, who are empowered to vindicate their interests.[90]

Third, despite academic and political criticism of shareholder wealth maximization,[91] shareholder primacy has been widely embraced by professional corporate managers.[92] The reasons are both cultural and economic. From a cultural standpoint, the business professionals who fill the ranks of boards of directors and executive management are socialized within a network of business schools, professional organizations, and financial and accounting advisors that emphasize maximizing investor returns.[93] Many corporate managers view this objective as their central professional responsibility.[94] It is also what they get paid to do. Since managers are hired, fired, and compensated based on financial performance metrics, it is unsurprising that financial outcomes are what managers choose to prioritize. Indeed, most officers and directors are compensated primarily with stock options, which provide enormous personal financial

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88 See Vanduzer, *supra* note 14 at 251–52.

89 Although value maximizing transactions often benefit *all* stakeholders, stark tradeoffs between shareholder value and the interests of stakeholders such as creditors, employees, and local communities are not uncommon in M&A transactions (see e.g. *BCE*, *supra* note 9).

90 Note, however, that at least one case has found that shareholders did not have "reasonable expectations" ("*des attentes raisonnables*") under the oppression remedy that the board of directors would seek to maximize share value. See *Brassard c Forget*, [2010] 2010 QCCS 1530 at paras 158–161.

91 See e.g. Sarah Cliffe, "The CEO View: Defending a Good Company from Bad Investors", *Harvard Business Review* 95:3 (1 May 2017) 61 at 63, online: <www.hbr.org> [perma.cc/B3SC-TD7W]; John Friedman, "Milton Friedman Was Wrong About Corporate Social Responsibility", *Huff Post* (12 June 2013), online: <www.huffpost.com> [perma.cc/RJ69-FWQN]; Chuck Schumer & Bernie Sanders, "Schumer and Sanders: Limit Corporate Stock Buybacks", *The New York Times* (3 February 2019), online: <www.nytimes.com> [perma.cc/APS7-3VD7]; Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco: Berrett-Koehler, 2012); Jerry Useem, "The Stock-Buyback Swindle", *The Atlantic* (last modified 26 July 2019), online: <www.theatlantic.com> [perma.cc/SPU4-W3SN].

92 See Smith & Rönnegard, *supra* note 4 at 468.

93 See Edward W Miles, "The Purpose of the Business School: Alternative Views and Implications for the Future" (Cham, Switzerland; Palgrave Macmillan, 2019) at 13, online (pdf) *Brookings Institution* <www.brookings.com> [perma.cc/ R5GD-7FSK]; Lynn Parramore, "How MBA Programs Drive Inequality" (7 July 2016), online (blog): *Institute for New Economic Thinking* <ineteconomics.org/perspectives/blog/how-mba-programs-drive-inequality>; Darrell West, *The Purpose of the Corporation in Business and Law School Curricula*, (Governance Studies at Brookings, 2011).

94 See Smith & Rönnegard, *supra* note 4 at 471.

gains in high-value acquisitions. Although there has recently been an increase in the rhetoric of corporate social responsibility,[95] there is little evidence this rhetorical shift has meaningfully affected corporate governance, or that mangers are willing to sacrifice profits for the benefit of stakeholder groups.[96]

Fourth, the structure of the M&A market itself is such that buyers are unwilling to accept broad fiduciary outs. Since fiduciary outs are a specific exception to negotiated deal protections, buyers insist that they be drafted narrowly. A fiduciary out that encompasses transactions that are more favorable to *stakeholders* would allow too much optionality on the part of the seller and create unacceptable uncertainty for the buyer.[97] Assumedly, a buyer would only accept such uncertainty at a significantly reduced price, resulting in less value for shareholders—exactly the outcome that directors seem motivated to avoid. The fact that the content of fiduciary outs is so consistent across Sample 1, and that any variation in Sample 2 appears unrelated to market cycles, suggests that inclusion of a fiduciary out provision focusing exclusively on shareholder value (combined with a breakup fee) has become a stable market equilibrium.

Finally, it seems clear that U.S. legal practice has influenced the Canadian market. Contractual provisions and drafting language are transmitted through the M&A market in a process of mimesis, as law firms adopt each other's contractual innovations.[98] Eventually, the legal, business, and financial communities settle on an accepted standard. In an increasingly globalized legal industry, these standards often cross national lines—and given the enormous size and influence of the largest U.S. law firms, the structural similarities between the U.S. and Canadian legal systems, and the significant interconnectedness of the two countries' economies, the practices of large U.S. law firms have a major influence in Canada.[99] This may be why fiduciary outs that seem tailored to Delaware

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95 See e.g. "Statement on the Purpose of a Corporation" (19 August 2019), online (pdf): *Business Roundtable* <opportunity.businessroundtable.org/ourcommitment/>.

96 See Smith & Rönnegard, *supra* note 4 at 468.

97 See Velasco, *supra* note 36 at 170, 181–82.

98 Note that this adoption process can be highly imperfect, reproducing "mismatched text, ill-fitting terms, anachronisms, and outright errors" (Robert Anderson IV, "Path Dependence, Information, and Contracting in Business Law and Economics" (2019) 2020:3 Wis L Rev 553 at 558, 571). This may partly explain why Canadian acquisition agreements often contain U.S.-style fiduciary outs.

99 For evidence of this phenomenon in the context of corporate governance, see Anita I Anand, Frank Milne & Lynnette D Purda, "Domestic and International Influences on Firm-Level Governance: Evidence from Canada" (2012) 14:1 Am L & Econ Rev 68.

law have been adopted in Canada essentially unchanged.[100] In this context, it is also important to emphasize the role of Canadian law firms, many of which are themselves influential market actors. If Canadian practitioners truly believed that broadening fiduciary outs were necessary to protect their clients, they would insist on doing so. The fact that they do not speaks to the lack of meaningful stakeholder protections under Canadian law.

B. The Scope of Directors' Duties

Fiduciary outs are only part of the story when it comes to the meaning of fiduciary duties. Given that they address business situations that are by definition out of the ordinary, fiduciary outs have limited bearing on corporate governance in more ordinary circumstances. When it comes to longer-term issues such as strategic planning, financial policy, and relationships with employees, suppliers, and customers, corporate managers have greater scope to consider stakeholder interests. From a legal perspective, since directors owe their fiduciary duties to "the corporation"—an abstract concept which potentially includes a wide array of corporate constituencies—directors enjoy broad discretion in the weighing and balancing of stakeholder concerns.[101] If shareholders were to complain, the business judgement rule shelters any reasonable determination as to the best interests of the corporation.[102] Even the oppression remedy, ostensibly a shareholder protection measure, has been diluted by the Supreme Court's fiduciary duty jurisprudence. By conflating the oppression remedy with the fiduciary duty in *BCE*, the Court has limited the protective scope of the oppression remedy itself.[103] According to *BCE*'s conception of the oppression remedy's "reasonable expectations" test, shareholders may only "reasonably expect" that directors "act in the best interests of the corporation," the same open-ended standard that exists under the fiduciary duty.[104]

That said, the incentives that limit fiduciary outs to shareholder interests are even stronger outside the M&A context. Although the sale of a corporation is a focal point for management attention to shareholder val-

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[100] See Anderson, *supra* note 98 at 557–62, 571.

[101] See *BCE*, *supra* note 9 at paras 39–40.

[102] See *ibid* at para 40.

[103] See Hutchison, *supra* note 14 at 190–92.

[104] See *BCE*, *supra* note 9 at paras 60–66. Note, however, that *BCE* approves the trial judge's ruling that creditors "could not reasonably expect BCE to reject a transaction that maximized shareholder value" (*ibid* at paras 162–63). Note also that subsequent case law has reemphasized the distinction between the fiduciary duty and the oppression remedy. See e.g. *Rea v Wildeboer*, 2015 ONCA 373 at paras 44–47.

ue, the structure of corporate democracy and the reality of public financial markets exert strong pressure on directors to prioritize shareholders in all circumstances. And although shareholder and stakeholder interests can certainly be aligned, any board that consistently sacrifices shareholder value to other interests will eventually be replaced. The reality is that in a system of corporate governance that assigns final control to shareholders, and in a capitalist economic system in which shareholders are primarily motivated by profit, there is little reason for directors to prioritize anything else. Ultimately, the legal definition of fiduciary duties may be less important than it appears.

Conclusion

Fiduciary outs reveal the practical limits of fiduciary duties. The purpose of fiduciary outs is to accommodate directors' legal obligations, which means their language reflects practical understandings of those obligations' boundaries. If directors believe their fiduciary duties are primarily owed to shareholders, then fiduciary outs will be targeted to maximizing shareholder value. If, however, directors believe they owe enforceable duties to a plurality of stakeholder groups, then stakeholders will be encompassed in the drafting of fiduciary outs.

The data presented in this article suggest that directors do not believe they owe enforceable duties to stakeholders. The vast majority of fiduciary out provisions are drafted such that directors may only consider alternative transactions that provide greater value to shareholders, irrespective of stakeholder interests. If directors and their legal counsel really believed that directors owe enforceable duties to, e.g., employees, suppliers, creditors, consumers, governments, and the environment, then they would include those interests as factors to consider in evaluating alternative offers. The fact that they do not is strongly suggestive of a legal risk assessment that the danger of successful stakeholder litigation is remote.[105] In a sense, this assessment is supported by *BCE* itself, in which directors were deemed to have fulfilled their duties by merely "considering" creditors' interests.[106]

Ultimately, this article shows how formal law and practical realities can diverge. Many commentators have emphasized *BCE*'s reconceptualization of fiduciary duties, with the implication that Canadian law em-

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[105] Whereas shareholders can bring successful fiduciary duty and oppression claims.

[106] Following *BCE*, public company boards are counseled to "consider" stakeholder interests (and to document such consideration). Since stakeholder interests are almost never protected by fiduciary out provisions, it would appear that such considerations are window dressing, at least in the M&A context.

powers directors to protect stakeholders.[107] In the context of M&A transactions, however, this is not a practical reality. During a change of control, directors contractually bind themselves from considering transactions that do not maximize shareholder value, regardless of stakeholder interests. This practice raises serious questions as to the relevance of fiduciary duties to non-shareholder constituencies. It also has broader implications for corporate social responsibility: Despite the formal allowances of Canadian law, structural economic factors make it exceedingly unlikely that directors meaningfully or consistently pursue corporate objectives other than profits. To the extent we desire corporations to serve a broader vision of the common good (a question I leave unaddressed for purposes of this article), we may require stronger measures than fiduciary duties.

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[107] See e.g. Carol Hansell, "Putting Climate Change Risk on the Boardroom Table" (25 June 2020) at 16–17, online (pdf): *Hansell LLP* <www.hanselladvisory.com> [perma.cc/J936-39EA].

Appendix: "Superior Proposal" Language

The tables below include contractual language relating the concept of "Superior Proposal" (or a similar term) to the interests of shareholders in the 10 largest signed M&A transactions in Canada and the United States over the past 20 years.[108] Note that while some agreements reference fiduciary duties in the definition of Superior Proposal itself, most agreements refer to fiduciary duties (as they relate to a Superior Proposal) in a separate section of the agreement.

[108] Note that this table includes both consummated and unconsummated transactions.

Canada	United States
1. "Definitive Agreement" between 6796508 Canada Inc and BCE Inc made as of June 29, 2007 ($48.8 billion). "SUPERIOR PROPOSAL" shall mean any written Acquisition Proposal: [. . .] (v) that the Board determines, in its good faith judgment, after receiving the advice of its outside legal and financial advisors and after taking into account all the terms and conditions of the Acquisition Proposal, is on terms and conditions that are more favourable from a financial point of view to the Affected Shareholders than those contemplated by this Agreement (after taking into account for greater certainty any modifications to this Agreement proposed by the Purchaser as contemplated by Section 5.2).;	*1. Agreement and Plan of Merger by and among The Dow Chemical Company, Diamond-Orion Holdco, Inc, Diamond Merger Sub, Inc, Orion Merger Sub, Inc, and E.I. Du Pont de Nemours and Company, dated as of December 11, 2015 ($130 billion).* For purposes of this Agreement, an "Orion Superior Proposal" means any bona fide written proposal (on its most recently amended or modified terms, if amended or modified) made by an Orion Third Party to enter into an Orion Alternative Transaction (with all references to 20% in the definition of Orion Alternative Transaction being treated as references to 50% for these purposes) that (A) did not result from a material breach of Section 5.2(a), (B) is on terms that the Board of Directors of Orion determines in good faith (after consultation with outside counsel and a financial advisor of nationally recognized reputation) to be superior from a financial point of view to Orion's stockholders than the transactions contemplated by this Agreement, taking into account all relevant factors (including any changes to this Agreement that may be proposed by Diamond in response to such proposal to enter into an Orion Alternative Transaction and the identity of the person making such proposal to enter into an Orion Alternative Transaction), and (C) is reasonably likely to be completed, taking into account all financial, regulatory, legal and other aspects of such proposal. In addition, notwithstanding anything in this Agreement to the contrary, at any time prior to the receipt of the Orion Stockholder Approval, if the Board of Directors of Orion determines in good faith (after consultation with outside counsel and a financial advisor of nationally recognized reputation) that the failure to do so would be reasonably likely to be inconsistent with its fiduciary duties under Applicable Law, the Board of Directors of Orion may effect an Orion Recommendation Change in response to any Orion Intervening Event, but only at a time that is after the fourth business day following Diamond's receipt of written notice from Orion advising Diamond of all material information with respect to any such Orion Intervening Event and stating that it intends to make an Orion Recommendation Change and providing its rationale therefor [emphasis in original].

2. Arrangement Agreement between Rogers Communications Inc and Shaw Communications Inc, dated March 13, 2021 ($21.3 billion). "Superior Proposal" means any *bona fide* written Acquisition Proposal made after the date of this Agreement from a Person or group of Persons "acting jointly or in concert" (within the meaning of National Instrument 62-104 – *Take-Over Bids and Issuer Bids*) to acquire not less than all of the outstanding Company Participating Shares or all or substantially all of the assets of the Company on a consolidated basis that: [...] (e) the Company Board determines, in its good faith judgment, after receiving the advice of its outside legal and financial advisors and after taking into account all the terms and conditions of the Acquisition Proposal and other factors deemed relevant by the Company Board (including the Person or group of Persons making such Acquisition Proposal and their affiliates), would, if consummated in accordance with its terms (but without assuming away any risk of non-completion), result in a transaction which is more favourable, from a financial point of view, to each class of the Company Participating Shareholders than the Arrangement (including any amendments to the terms and conditions of the Arrangement proposed by the Purchaser pursuant to Section 5.4(b)).	*2. Agreement and Plan of Merger by and among United Technologies Corporation, Light Merger Sub Corp, and Raytheon Company, dated as of June 9, 2019 ($121 billion).* For purposes of this Agreement, an "UTC Superior Proposal" means any bona fide written proposal (on its most recently amended or modified terms, if amended or modified) made by a UTC Third Party to enter into a UTC Alternative Transaction (with all references to 20% in the definition of UTC Alternative Transaction being treated as references to 50% for these purposes) that (A) did not result from a breach of this Section 5.3(a), (B) is on terms that the Board of Directors of UTC determines in good faith (after consultation with its outside financial advisors and outside legal counsel) to be superior from a financial point of view to UTC's stockholders than the transactions contemplated by this Agreement, taking into account all relevant factors (including any changes to this Agreement that may be proposed by Raytheon in response to such proposal to enter into a UTC Alternative Transaction and the identity of the person making such proposal to enter into a UTC Alternative Transaction) and (C) is reasonably likely to be completed in accordance with its terms, taking into account all financial, regulatory, legal and other aspects of such proposal, and is not subject to a diligence or financing condition [emphasis in original].

3. Arrangement Agreement between Suncor Energy Inc and Petro-Canada, dated March 22, 2009 ($19.5 billion). (1) the third party has first made a written *bona fide* Acquisition Proposal which the board of directors of the Party subject to the Acquisition Proposal determines in good faith: (1) that the funds or other consideration necessary to complete the Acquisition Proposal are or are reasonably likely to be available to fund completion of the Acquisition Proposal at the time and on the basis set out therein; (2) after consultation with its financial advisor(s), would or would be reasonably likely to, if consummated in accordance with its terms, result in a transaction financially superior for shareholders of such Party to the transaction contemplated by this Agreement; (3) after consultation with its financial advisor(s) and outside counsel, is reasonably likely to be consummated at the time and on the terms proposed, taking into account all legal, financial, regulatory and other aspects of such Acquisition Proposal; and (4) after receiving the advice of outside counsel, as reflected in minutes of the board of directors of such Party, that the taking of such action is necessary for the board of directors of the Party subject to the Acquisition Proposal to act in a manner consistent with its fiduciary duties under applicable Laws (a "**Superior Proposal**") [emphasis in original].	*3. Agreement and Plan of Merger Among H.J. Heinz Holding Corporation, Kite Merger Sub Corp., Kite Merger Sub LLC, and Kraft Foods Group, Inc, dated as of March 24, 2015 ($100 billion).* For purposes of this Agreement, the term "Superior Proposal" means any bona fide written Takeover Proposal, which Takeover Proposal did not result in any material respect from a breach of this Section 5.05, made by a third party and which, if consummated, would result in such third party (or in the case of a direct merger between such third party and Kraft, the shareholders of such third party) acquiring, directly or indirectly, more than 50% of the voting power of the Kraft Common Stock or more than 50% of the consolidated assets of Kraft and the Kraft Subsidiaries (based on the fair market value thereof), including in any such case through the acquisition of one or more Kraft Subsidiaries owning such assets, for consideration consisting of cash and/or securities that the Kraft Board or any committee thereof determines in good faith (after consultation with its financial advisor and outside counsel) is more favorable to Kraft's shareholders from a financial point of view than the Transactions, taking into account any changes to the terms of the Transactions irrevocably proposed by Heinz in response to such offer or otherwise and all legal, regulatory, financial and other aspects of such proposal and of this Agreement deemed relevant by the Kraft Board or any such committee in good faith [emphasis in original].

4. Arrangement Agreement among CNOOC Limited, CNOOC Canada Holding Ltd., and Nexen Inc, dated July 23, 2012 ($19.2 billion). "**Superior Proposal**" means any unsolicited *bona fide* written Acquisition Proposal from a Person who is an arm's length third party made after the date of this Agreement [. . .] (vi) in respect of which the Board and any relevant committee thereof determines, in its good faith judgment, after receiving the advice of its outside legal counsel and its financial advisors and after taking into account all the terms and conditions of the Acquisition Proposal, including all legal, financial, regulatory and other aspects of such Acquisition Proposal and the party making such Acquisition Proposal, would, if consummated in accordance with its terms, but without assuming away the risk of non-completion, result in a transaction which is more favourable, from a financial point of view, to Common Shareholders than the Arrangement (including any amendments to the terms and conditions of the Arrangement proposed by the Purchaser pursuant to Section 5.4(2)) [emphasis in original].	*4. Agreement and Plan of Merger dated as of August 1, 2018 by and among LE GP LLC, Energy Transfer Equity, LP, Streamline Merger Sub, LLC, Energy Transfer Partners, LLC, and Energy Transfer Partners, LP ($90 billion).* "ETP Superior Proposal" means a bona fide unsolicited written offer, obtained after the date of this Agreement and not in breach of Section 5.3 (other than an immaterial breach), to acquire, directly or indirectly, 80% or more of the outstanding equity securities of ETP or 80% or more of the assets of ETP and its Subsidiaries on a consolidated basis, made by a third party (other than ETE or any of its Affiliates), which is on terms and conditions which the ETP Managing GP Board determines in its good faith to be (i) reasonably capable of being consummated in accordance with its terms, taking into account legal, regulatory, financial, financing and timing aspects of the proposal, and (ii) if consummated, more favorable to the ETP Unitholders (in their capacity as ETP Unitholders) from a financial point of view than the transactions contemplated hereby, taking into account at the time of determination any changes to the terms of this Agreement that as of that time had been committed to by ETE in writing.

5. Arrangement Agreement between Potash Corporation of Saskatchewan Inc and Agrium Inc, dated September 11, 2016 ($18.7 billion). "Superior Proposal" means a written bona fide Acquisition Proposal to acquire not less than all of the outstanding PCS Shares or Agrium Shares, as applicable, or all or substantially all of the assets of the Party subject to the Acquisition Proposal, which the board of directors of such Party determines, in good faith: [. . .] (b) after consultation with its financial advisor(s), would or would be reasonably likely to, if consummated in accordance with its terms and without assuming away the risk of non-completion, result in a transaction more favourable, from a financial point of view, for shareholders of such Party to the transaction contemplated by this Agreement (including after considering the proposal to adjust the terms and conditions of the Arrangement as contemplated in Section 7.1(c)); [. . .] (e) after receiving the advice of outside counsel, that the failure by the board of directors to take such action would be inconsistent with its fiduciary duties;	*5. Business Combination Agreement by and among Linde Aktiengesellschaft, Praxair, Inc, Zamalight Plc, Zamalight Holdco LLC and Zamalight Subco, Inc, dated as of June 1, 2017 ($86 billion).* "Superior Proposal" means an unsolicited, bona fide written Acquisition Proposal made after the date of this Agreement that would result in a Person or group becoming the beneficial owner of, directly or indirectly, 80% or more of the total voting power of the equity securities of Linde or Praxair, as the case may be, or 80% or more of the consolidated net revenues, net income or total assets (including equity securities of its Subsidiaries), of Linde or Praxair, as the case may be, that each Linde Board or the Praxair Board, as applicable, has determined in good faith, after consultation with outside legal counsel and its financial advisor, taking into account all legal, financial, financing and regulatory aspects of the proposal, the identity of the Person(s) making the proposal and the likelihood of the proposal being consummated in accordance with its terms, that, if consummated, would result in a transaction (A) more favorable to the shareholders of Linde or stockholders of Praxair, as the case may be, from a financial point of view than the transactions contemplated by this Agreement [. . .].

6. Combination Agreement between Phelps Dodge Corporation and Inco Limited, made and entered into as of June 25, 2006 ($17 billion).	*6. Agreement and Plan of Merger among Time Warner Inc, AT&T Inc, and West Merger Sub, Inc, dated as of October 22, 2016 ($85.4 billion).*
"Superior Proposal" means an unsolicited bona fide Acquisition Proposal made by a third party to Italy in writing after the date hereof: [. . .] (vi) in respect of which the Italy board of directors determines in good faith (after receipt of advice from its financial advisors with respect to (y) below and outside legal counsel with respect to (x) below) that (x) failure to recommend such Acquisition Proposal to Italy's shareholders would be inconsistent with its fiduciary duties and (y) such Acquisition Proposal taking into account all of the terms and conditions thereof, if consummated in accordance with its terms (but not assuming away any risk of non-completion), would result in a transaction more favorable to shareholders from a financial point of view than the Arrangement (including any adjustment to the terms and conditions of the Arrangement and this Agreement proposed by Portugal pursuant to Section 5.3(g), and taking into account the long-term value and anticipated synergies anticipated to be realized as a result of the combination of Portugal and Italy).	"Superior Proposal" means an unsolicited bona fide Acquisition Proposal made after the date of this Agreement that would result in a Person or group (or their shareholders) becoming, directly or indirectly, the beneficial owner of, all or substantially all of the Company's consolidated total assets or more than 50% of the total voting power of the equity securities of the Company or the successor Person of the Company, that the Board of Directors of the Company has determined in its good faith judgment is reasonably likely to be consummated in accordance with its terms, taking into account all legal, financial and regulatory aspects of the proposal and the Person or group of Persons making the proposal, and, if consummated, would result in a transaction more favorable to the Company's stockholders from a financial point of view than the transaction contemplated by this Agreement (after taking into account any revisions to the terms of the transaction contemplated by this Agreement pursuant to Section 6.2(f) of this Agreement and the time likely to be required to consummate such Acquisition Proposal).

7. Arrangement Agreement among UnitedHealth Group Incorporated, 1031387 B.C. Unlimited Liability Company, and Catamaran Corporation, made as of March 29, 2015 ($14.4 billion). "Superior Proposal" means, other than the transactions contemplated by this Agreement, a bona fide written Acquisition Proposal (provided that all references therein to "20%" or "80%" shall for purposes of this definition be to "50%") from any Person or group of Persons that the Board determines, in its good faith judgment, after receiving the advice of its outside legal counsel and its financial advisors and after taking into account all the terms and conditions of the Acquisition Proposal, including all legal, financial, regulatory, timing and other aspects of such Acquisition Proposal, including the likelihood of consummation, the financing terms thereof and the Person making such Acquisition Proposal, if consummated, would result in a transaction which is more favorable to Common Shareholders than the transactions contemplated by this Agreement (after giving effect to any amendments or modifications to the terms of the transactions contemplated by this Agreement that the Parent agrees in writing to make pursuant to Section 5.3(1)(c)).	*7. Agreement and Plan of Merger dated as of May 23, 2015 among Time Warner Cable Inc, Charter Communications, Inc, CCH I, LLC, Nina Corporation I, Inc, Nina Company II, LLC, and Nina Company III, LLC ($78.7 billion).* For purposes of this Agreement, "Company Superior Proposal" means a bona fide, unsolicited written Company Acquisition Proposal for at least a majority of the outstanding shares of Company Stock or all or substantially all of the consolidated assets of the Company and its Subsidiaries that the Board of Directors of the Company determines in good faith, after consultation with a financial advisor of nationally recognized reputation and outside legal counsel and taking into account all material financial, legal, regulatory and other aspects of such proposal, including the terms and conditions of the Company Acquisition Proposal, (x) is on terms and conditions more favorable to the Company's stockholders than the transactions contemplated hereby (taking into account any proposal by Parent to amend the terms of this Agreement pursuant to Section 6.03(d)) and (y) is reasonably likely to be consummated and, if a cash transaction (whether in whole or in part), has financing, if any, that is then fully committed or reasonably determined to be available by the Board of Directors of the Company.

8. Arrangement Agreement among Repsol SA, TAPBC Acquisition Inc, and Talisman Energy Inc, dated as of December 15, 2014 ($13.7 billion). "Superior Proposal" means an unsolicited bona fide written Acquisition Proposal made after the date of this Agreement by a third party or group: (i) to acquire not less than all of the outstanding Common Shares or all or substantially all of the Company Assets; [. . .] (vi) in respect of which the Board and/or any relevant committee thereof determines in good faith (after receipt of advice from an independent financial advisor of nationally recognized reputation with respect to (B) below and outside legal counsel with respect to (A) below) that (A) the failure to recommend such Acquisition Proposal to the Common Shareholders would be inconsistent with its fiduciary duties under applicable Laws and (B) such Acquisition Proposal would, if consummated in accordance with its terms, result in a transaction more favourable to the Common Shareholders, from a financial point of view, than the Arrangement, including any adjustment to the terms and conditions of the Arrangement proposed by the Purchaser Parties pursuant to Section 7.2(h) [Non-Solicitation] of this Agreement;	*8. Agreement and Plan of Merger dated as of January 2, 2019 among Bristol-Myers Squibb Company, Burgundy Merger Sub, Inc, and Celgene Corporation ($74 billion).* "Company Superior Proposal" means any bona fide, written Company Acquisition Proposal (other than a Company Acquisition Proposal which has resulted from a violation of this Section 6.02) (with all references to "twenty percent (20%)" in the definition of Company Acquisition Proposal being deemed to be references to "fifty percent (50%)") on terms that the Board of Directors of the Company determines in good faith, after consultation with its financial advisor and outside legal counsel, and taking into account all the terms and conditions of the Company Acquisition Proposal that the Board of Directors of the Company considers to be appropriate (including the identity of the Person making the Company Acquisition Proposal and the expected timing and likelihood of consummation, any governmental or other approval requirements (including divestitures and entry into other commitments and limitations), break-up fees, expense reimbursement provisions, conditions to consummation and the availability of necessary financing (including, if a cash transaction (in whole or in part), the availability of such funds and the nature, terms and conditionality of any committed financing), would result in a transaction (i) that, if consummated, is more favorable to the Company's stockholders from a financial point of view than the Merger (taking into account any proposal by Parent to amend the terms of this Agreement), and (ii) that is reasonably capable of being completed on the terms proposed, taking into account the identity of the Person making the Company Acquisition Proposal, any approval requirements and all other financial, regulatory, legal and other aspects of such Company Acquisition Proposal.

9. Arrangement Agreement and Plan of Merger by and among Burger King Worldwide, Inc, 1011773 B.C. Unlimited Liability Company, New Red Canada Partnership, Blue Merger Sub, Inc, 8997900 Canada Inc, and Tim Hortons Inc, dated August 26, 2014 ($13.4 billion).	*9. Agreement and Plan of Merger, dated as of December 19, 2001, by and among AT&T Corp, AT&T Broadband Corp, Comcast Corporation, AT&T Broadband Acquisition Corp, Comcast Acquisition Corp, and AT&T Comcast Corporation ($72 billion).*
"Company Superior Proposal" means any bona fide, written Company Acquisition Proposal (with references to "20%" in the definition of Company Acquisition Proposal being substituted with references to "50%" for purposes of this definition) made by a third party or third parties acting jointly (other than any Parent Party and any of their respective Affiliates) that the Company Board of Directors (or any committee thereof) determines in good faith and in the proper discharge of its fiduciary duties (after consultation with its financial advisor and outside legal counsel) (i) is reasonably likely to be consummated in accordance with its terms and (ii) is more favorable to the Company Shareholders from a financial point of view than the Arrangement, the Merger and the other transactions contemplated by this Agreement, taken as a whole, in each case taking into account all financial, legal, financing, regulatory and other aspects of such Company Acquisition Proposal (including the identity of the Person or group making the Company Acquisition Proposal) and of this Agreement (including any changes to the terms of this Agreement proposed by Parent).	"AT&T Superior Proposal" means an unsolicited, bona fide AT&T Broadband Acquisition Proposal that AT&T's Board of Directors determines in good faith, after consultation with its financial advisors and outside legal counsel and taking into account all the terms and conditions of the AT&T Broadband Acquisition Proposal, including the likelihood and timing of consummation of the AT&T Broadband Acquisition Proposal (including, without limitation, the likelihood of obtaining financing and receiving necessary regulatory approvals), would be more favorable to the holders of AT&T Common Stock than the transactions provided for in this Agreement.

10. Arrangement Agreement between Loblaw Companies Limited and Shoppers Drug Mart Corporation, July 14, 2013 ($13.1 billion). For the purposes hereof, "Superior Proposal" means a written bona fide Acquisition Proposal made by a third party and in respect of which the board of directors of Shoppers Drug Mart determines in good faith: (1) that the funds or other consideration necessary to complete the Acquisition Proposal are or are reasonably likely to be available to fund completion of the Acquisition Proposal at the time and on the basis set out therein; (2) that is not subject to a due diligence and/or access condition; (3) that, after consultation with its financial advisor(s), would or would be reasonably likely to, if consummated in accordance with its terms, result in a transaction that is more favourable to the Shoppers Drug Mart Shareholders from a financial point of view than the Arrangement; (4) that, after consultation with its financial advisor(s) and outside counsel, is reasonably likely to be consummated at the time and on the terms proposed, taking into account all legal, financial, regulatory and other aspects of such Acquisition Proposal; and (5) after receiving the advice of outside counsel, that failure to recommend such Acquisition Proposal to the Shoppers Drug Mart Shareholders would be inconsistent with its fiduciary duties under applicable Laws;	*10. Agreement and Plan of Merger among Twenty-First Century Fox, Inc, The Walt Disney Company TWC Merger Enterprises 2 Corp, and TWC Merger Enterprises 1, LLC, dated as of December 13, 2017 ($71.3 billion).* "Company Superior Proposal" means an unsolicited bona fide Company Acquisition Proposal made after the date of this Agreement that would result in a Person or group (or their stockholders) becoming, directly or indirectly, the beneficial owner of, 60% or more of the Company's consolidated total assets or more than 50% of the total voting power of the equity securities of the Company or the successor Person of the Company, that the Board of Directors of the Company has determined in its good faith judgment, after consultation with outside counsel and a financial advisor of nationally recognized reputation, would reasonably be expected to be consummated in accordance with its terms, taking into account all legal, financial and regulatory aspects of the proposal and the Person or group of Persons making the proposal, and, if consummated, would result in a transaction more favorable to the Company's stockholders from a financial point of view than the Transactions [. . .]