Jagged Little Pill: The New Frontier for Shareholder Rights Plans and the Fiduciary Duties of Target Boards

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On March 15, 2013 Dalhousie students pursuing their J.D., L.L.M., or J.S.D. were invited to present papers at the Schulich School of Law’s inaugural Think Tank Student Legal Research Conference. Selected students presented a condensed version of their research on a legal topic of interest. Presenters were paired with faculty members who provided feedback after their presentations.

The student with the top presentation, as selected by the Dalhousie Journal of Legal Studies Editorial Board, received a cash prize of $250 and the opportunity to publish his research in Volume 22 of the Journal. This year’s prize recipient was Hunter Parsons, who won for his article “Jagged Little Pill: The New Frontier for Shareholder Rights Plans and the Fiduciary Duties of Target Boards.”
JAGGED LITTLE PILL: THE NEW FRONTIER FOR SHAREHOLDER RIGHTS PLANS AND THE FIDUCIARY DUTIES OF TARGET BOARDS

Hunter Parsons*

A. Introduction

In Oliver Stone’s 1987 drama, *Wall Street*, Gordon Gekko, played by Michael Douglas, declares that the market for corporate control is “a zero sum game—somebody wins, somebody loses. Money itself isn’t lost or made, it’s simply transferred from one perception to another.” In Canada, the provincial securities regulators play an important role in determining the winners and losers in the “zero sum game” of hostile takeover bids through the regulation of defensive tactics.¹ The decision of a target board of directors to take defensive action in the face of a hostile bid by deploying a shareholder rights plan (or “poison pill”) is the frontier where corporate law meets securities regulation.

A poison pill works by making a corporate takeover prohibitively expensive.² The typical poison pill gives the shareholders of the corporation the right to purchase additional shares of the corporation at a price well below market value upon the occurrence of a triggering event. In the event that an acquiror obtains a specified percentage of a class of shares in the target corporation, the right to purchase is triggered. The terms of the poison pill will exclude the acquiror from participating in the exercise of the rights plan. If the poison pill is triggered, then the acquiror faces the prospect of having to buy enough of the newly issued shares to achieve a majority interest in the corporation.

Two recent securities commission decisions have blurred the line between corporate law and securities regulation by venturing into an analysis of the fiduciary

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¹ Takeover Bids – Defensive Tactics, OSC NP 62-202 (4 July 1997) [NP 62-202]; Christopher C Nicholls, Mergers, Acquisitions and Other Changes of Corporate Control, 2d ed (Toronto, Ontario: Irwin Law, 2012) at 196 (when one corporation decides that it wants to acquire control of another corporation against the wishes of the target corporation’s board and management, this is referred to as a “hostile” takeover).

duties of target boards in the context of poison pill regulation. This has increased the tension between corporate law and securities regulation, but has also highlighted the divergent approaches to poison pill regulation amongst three of the largest provincial securities commissions: the Ontario Securities Commission (the “OSC”), the Alberta Securities Commission (the “ASC”), and the British Columbia Securities Commission (the “BCSC”). At corporate law, the directors’ fiduciary duties do not change in the context of a hostile takeover bid: the target board is required to act in good faith and in the best interests of the corporation. Reviewing courts will typically afford deference to the business judgment of the target board in the face of a hostile bid. The business judgment rule provides that the directors of a corporation are not required to make perfect decisions. So long as the directors’ course of action is reasonable, then reviewing courts will apply a deferential approach to their decision. In contrast, securities regulation utilizes an interventionist approach in the context of a hostile bid so as to ensure that shareholders are not denied their right to choose whether to tender to the bid. This raises the distinct possibility of a target board deploying a poison pill in accordance with its fiduciary duty that may be found to be in violation of the corporation’s obligations under securities regulation.

In response to the current tumult in poison pill regulation, the Canadian Securities Administrators (the “CSA”) released Proposed National Instrument 62-105 (the “Proposed Policy”) on March 14, 2013. The Proposed Policy purports to fundamentally change the regulatory approach for poison pills. Under the existing regulatory framework, articulated in National Policy 62-202 (“NP 62-202”), the provincial securities regulators have, for the most part, treated poison pills as a temporary defensive tactic. After a series of conflicting decisions from the ASC, OSC, and BCSC on the utility of poison pills in the context of a hostile takeover bid, the Proposed Policy is an attempt to remove this defensive tactic from the purview of ad hoc regulatory review. The Proposed Policy, if adopted, will allow a target board to completely block a hostile takeover bid through a poison pill so long as it receives shareholder ratification within 90 days of its adoption and annually thereafter.

This paper will consider the merits of the existing regulatory framework, NP 62-202, and the anticipated benefits of the Proposed Policy. The author will analyze a recent line of securities commission decisions that have blurred the distinction between the fiduciary duty analysis under corporate law and the public interest powers to cease trade a poison pill under securities regulation. The prevailing approach in the securities regulation context will be canvassed and compared with the current corporate law concerning the fiduciary duties of target boards in the face of a hostile bid. This paper will detail the ways in which these approaches con-

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3 Neo Material Technologies Inc (Re), 2009 LNONOSC 638 [Re Neo]; Pulse Data Inc (Re), 2007 ABASC 895 [Re Pulse Data].
4 BCE Inc v 1976 Debentureholders, 2008 SCC 69 at para 44 [BCE].
6 NP 62-202, supra note 1, s 1.1(5).
lict and create inconsistent results. Finally, the author will consider this problem in light of the Proposed Policy, and will offer some thoughts concerning the intersection of directors’ obligations under the proposed regulatory framework and their fiduciary duty under corporate law.

The author argues that the Proposed Policy will reduce the current uncertainty in securities law since poison pills will essentially be self-regulating. However, the Proposed Policy does nothing to resolve the conflict between securities and corporate law. The directors’ statutory power and discretion to manage the corporation will be impaired so long as securities commissions continue to regulate poison pills and other defensive tactics. The Proposed Policy indicates this will continue to be the case. Therefore, in the face of a hostile bid, the interests of the shareholders will prevail over the interests of the other stakeholders in the corporation. This is a dramatic departure from the approach endorsed by the Supreme Court of Canada in two recent decisions on directors’ fiduciary duties. The Proposed Policy will fundamentally alter corporate decision-making in boardrooms across the country.

B. The Current Regulatory Framework for Poison Pills

Pursuant to Ontario’s Securities Act (the “OSA”), an “interested person” may bring an application to the commission to cease trade a poison pill. The definition of “interested person” includes an offeror, which captures all hostile bidders who are faced with a target board that has implemented a poison pill. After hearing the application, the commission may make an order “directing the directors […] to comply with or to cease contravening a requirement under […] the regulations related to this part.” The combination of the definition of “regulations” and “rules” in the OSA gives authority to the national policy that provides the framework for poison pill regulation: NP 62-202.

NP 62-202 recognizes that directors of a target corporation may take certain “defensive measures” in an effort to defeat an unsolicited bid. However, the policy states that the primary objective of the takeover bid provisions in securities legislation is to protect the “bona fide interests of the shareholders of a target company.” This policy is aimed at defensive tactics deployed by a target board that have the effect of denying shareholders the ability to decide whether to tender their shares into the bid. NP 62-202 specifically identifies poison pills as “defensive tactics that may come under scrutiny” when used in the face of a hostile bid. The policy cautions that regulators will “take appropriate action if they become aware of defensive

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1 Securities Act, RSO 1990, c S 5, s 104(1) [OSA]. For the purposes of this paper, the Ontario securities legislation, regulations and rules will be used.
2 Ibid, s 103(b) and (c).
3 Ibid, s 104(1)(e).
4 Ibid, s 1(1) "regulations" and "rules."
5 NP 62-202, supra note 1, s 1.1(1).
6 Ibid, s 1.1(2).
7 Ibid, s 1.1(5).
8 Ibid, s 1.1(4)(a).
tactics that will likely result in shareholders being deprived of the ability to respond to the take-over bid.\textsuperscript{16}

Until recently, NP 62-202 and the corresponding body of regulatory decisions were clear that a target board could not use a poison pill to completely block a hostile takeover bid.\textsuperscript{17} According to securities regulators, target boards could only use a poison pill as a temporary defensive tactic in order to generate a more favourable offer for the shareholders of the target corporation.\textsuperscript{18} However, a 2007 decision from the ASC and a 2009 decision from the OSC ended almost twenty years of stability and certainty in poison pill regulation. In \textit{Re Pulse Data}\textsuperscript{19} and \textit{Re Neo}\textsuperscript{20}, the respective commissions held that, in certain circumstances, it is permissible for a poison pill to remain in place indefinitely under NP 62-202. A subsequent case from the BCSC, \textit{Re Lions Gate}\textsuperscript{21} signaled a return to the traditional poison pill analysis. However, in a 2010 case, \textit{Re Baffinland}\textsuperscript{22}, the OSC took the middle ground by confirming the temporary nature of poison pills, but declined to expressly reject the approach utilized by the hearing panel in \textit{Re Neo}. This has left securities regulation and the market for corporate control in a state of flux, with disagreement among the most active provincial securities commissions as to the appropriate approach to poison pill regulation.

\textbf{C. The Intersection of Corporate Law and Securities Regulation: Poison Pills}

The regulation of unsolicited takeover bids involving corporations that are “reporting issuers” under the OSA falls squarely within the public interest jurisdiction of provincial securities commissions.\textsuperscript{23} However, NP 62-202 necessarily involves issues of corporate governance, which is arguably beyond the narrow jurisdiction of securities commissions. Under corporate law, so long as directors act in good faith and in the best interests of the corporation, the target board can use defensive tactics, such as poison pills to, in effect, “just say no” to an unsolicited takeover bid.\textsuperscript{24} However, NP 62-202 exhibits a clear preference for shareholder choice, regardless of whether the unsolicited bid is in the best interests of the corporation.\textsuperscript{25} Therefore, on the same set of facts, securities regulators could order the recession of a poison pill for violating the shareholder choice principle, while the directors, under existing corporate law principles, could be fulfilling their fiduciary duty to the corporation under the \textit{Canadian Business Corporations Act} (CBCA) by using a poison pill to completely block a hostile bid.\textsuperscript{26}

\textsuperscript{16} Ibid, s 1.1(5).
\textsuperscript{17} \textit{Canadian Jorex Ltd (Re)} (1992), 15 OSCB 257 at 263 and 264 [Re Canadian Jorex]; NP 62-202, supra note 1, s 1.1(5).
\textsuperscript{18} \textit{Re Canadian Jorex}, supra note 17 at 263.
\textsuperscript{19} \textit{Re Pulse Data}, supra note 3.
\textsuperscript{20} \textit{Re Neo}, supra note 3.
\textsuperscript{21} \textit{Lions Gate Entertainment Corp (Re)}, 2010 BCSECCOM 432 [Re Lions Gate].
\textsuperscript{22} \textit{Baffinland Iron Mines Corp (Re)}, 2010 LNONOSC 904 [Re Baffinland].
\textsuperscript{23} OSA, supra note 8, s 1(1) “reporting issuer.”
\textsuperscript{24} \textit{Teck Corp Ltd v Millar}, [1972] BCJ No 566, at para 103 (BCSC) [Teck].
\textsuperscript{25} NP 62-202, supra note 1, s 1.1(2).
\textsuperscript{26} \textit{Canadian Business Corporations Act}, RSC 1985, c C-44, ss 102 and 122(1)(a) [CBCA]; NP 62-202, supra note 1.
1. The Early Approach to Poison Pill Regulation: The "When, Not If" Era

Through their interpretation of NP 62-202, the provincial securities commissions have taken the position that it is the target’s shareholders, not its directors, who should ultimately decide whether or not the company will be sold.\(^\text{27}\) Starting with the OSC’s 1992 decision in Re Canadian Jorex, securities commissions have held that poison pills will be permitted to remain in place so long as they continue to have utility in one of two respects: either inducing a competing bid to come forward, or persuading the bidder to make a better offer.\(^\text{28}\) When one of these things happens, or once it becomes apparent that neither will happen, then the poison pill has outlived its usefulness, and the “pill has got to go.”\(^\text{29}\)

In Re Canadian Jorex, the OSC was careful to point out that they were not making a “ruling with respect to the conduct of the Jorex board in adopting the rights plan.”\(^\text{30}\) For the OSC, the central issue was not whether the target board acted in good faith by adopting the poison pill, but whether it was in the public interest for the poison pill to remain in place.\(^\text{31}\) However, the OSC acknowledged that, on the facts of the dispute before the commission, they did not have to decide whether the adoption of the poison pill itself was in the best interests of the corporation.\(^\text{32}\)

Through the obiter in Re Canadian Jorex, the OSC recognized that poison pill hearings highlight the inherent tension between the public interest jurisdiction of securities regulators and corporate law principles. In the OSC’s 1998 decision, Re CW Shareholdings, this tension was explored further. The commission said it was appropriate for them to “look into the question of whether there has been a breach of fiduciary duties” where it is in the public interest to do so in the “particular case.”\(^\text{33}\) The mere fact that the aggrieved party has commenced concurrent claims before the securities commission and the superior court does not mean that the jurisdiction of the commission will be ousted.\(^\text{34}\) The OSC observed that corporate law and securities regulation will often intersect, especially in the context of a hostile takeover bid. So long as the commission considers the issue of fiduciary duties from the perspective of its public interest jurisdiction, this is a permissible exercise of its power.

The tension between the duties of target boards under corporate law and the public interest jurisdiction of securities commissions was central to the OSC’s 1994 decision, Re Lac Minerals.\(^\text{35}\) In this decision, the OSC recognized the inherent conflict between the “board’s duty to manage the corporation honestly and in good faith with a view to the best interests of the corporation” and the shareholders’ right to decide whether to tender their shares to the takeover bid.\(^\text{36}\) The OSC noted

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\(^{28}\) Re Canadian Jorex, supra note 17 at 263.

\(^{29}\) Ibid.

\(^{30}\) Ibid at 262.

\(^{31}\) Ibid.

\(^{32}\) Ibid.

\(^{33}\) CW Shareholdings Inc (Re), 21 OSCB 2910 at para 45 [Re CW Shareholdings].

\(^{34}\) Ibid.

\(^{35}\) Lac Minerals Ltd (Re), 17 OSCB 4963 at para 52 [Re Lac Minerals].

\(^{36}\) Ibid at para 56.
that, where the target board is taking action in a good faith attempt to increase shareholder value, then the commission will interfere with the conduct of the board as little as possible, particularly “when to do so might relieve them of their duties under corporate or fiduciary law.” However, the corollary is that, where the board is not responding to the bid by attempting to increase shareholder value, then the securities commission will exercise its public interest jurisdiction and cease trade the poison pill.

2. Neo and Pulse: The “Just Say No” Era

Following Re Canadian Jorex, securities regulators allowed poison pills to temporarily remain in place so long as they continued to have utility by enhancing shareholder value. After that, it was time for the pill to go. This seemingly certain position was whittled away in 2007 by the ASC in Re Pulse Data. In that case, an unsolicited takeover bid was made for all of the shares of Pulse Data at a small premium above the market price at the time. In response, Pulse Data’s board adopted a poison pill that was ratified at a subsequent shareholder meeting by 98% of the shareholders. Pulse Data stated that it did not plan to seek an alternative bid and sought to use the poison pill to defeat the bid. The ASC declined to cease trade the poison pill since it was reluctant to “interfere with a decision of the Pulse Board that has a fiduciary duty to act in the best interests of Pulse Shareholders, particularly when that decision had very recently been approved by informed Shareholders.”

In Re Pulse Data, the ASC allowed the target board to completely block the unsolicited bid through the use of a poison pill. This runs counter to the historical interpretation of NP 62-202 and the Re Canadian Jorex line of cases. The ASC appears to cede to the business judgment of the Pulse Data board and affords deference to their decision to implement a poison pill in the face of a hostile bid. This is consistent with the corporate law approach toward the use of defensive tactics in the context of a hostile takeover bid, but it represents a departure from the traditional regulatory framework.

In 2009, the OSC had the opportunity to consider Re Pulse Data in Re Neo. In that case, the target board had a shareholder-approved poison pill in place prior to the takeover bid. Pala Investments, which held 20% of the outstanding shares of Neo, structured a takeover bid in such a way that it would not trigger the existing poison pill. In response, the Neo board adopted a second poison pill in order to block Pala Investment’s bid. 81% of Neo’s shareholders (excluding the bidder’s shares) ratified the second poison pill. Neo’s board said that Pala Investment’s bid was attempting to deny the shareholders the benefit of the control premium through the structure of their bid and, after a consideration of alternatives to the bid, it was inappropriate for Neo to initiate an auction or negotiate with Pala In-
vestments. The OSC declined to cease trade the rights plan and commented that, although the primary purpose for adopting a poison pill is typically to allow the target board to pursue alternative transactions, this is not "the only legitimate purpose for a shareholder rights plan." In doing so, the OSC allowed the Neo board to "just say no" to Pala Investment’s takeover bid through the use of the second poison pill.

In Re Neo, the OSC commented on the intersection of the fiduciary duties of target boards and their obligations pursuant to NP 62-202. The OSC recognized that the business judgment rule has applicability in the securities regulation context, and deferred to the business judgment of the Neo board, holding that the target does not have to “permit and facilitate an auction of company shares each and every time an offeror makes a bid.” In this case, the OSC declined to interfere with the decision to adopt the second poison pill because the decision to avoid an auction that was not in the best interests of the corporation was within the business judgment of the board, and there was no reason to suggest that it was made "in any manner other than in furtherance of its fiduciary obligations to the corporation.”

3. Baffinland and Lions Gate: The “Uncertain” Era

Following Re Pulse Data and Re Neo, the provincial securities commissions entered a period of uncertainty with regard to their approach to poison pill regulation. The willingness of the ASC and OSC to use a corporate law-inspired analysis in contested poison pill applications attracted criticism from academics and market participants. The OSC and BCSC responded to Re Pulse Data and Re Neo with decisions that attempted to restore order to poison pill regulation in Canada.

In Re Baffinland, Nunavut Iron made an unsolicited takeover bid for all of the outstanding common shares of Baffinland in September 2010 for a price of $0.80 per share. The Baffinland board already had a poison pill in place that received shareholder approval in March 2009. Following Nunavut Iron’s takeover bid announcement, the Baffinland board entered into a support agreement with another party, ArcelorMittal, who agreed to make a bid for all of the outstanding shares of Baffinland for $1.10 per common share. As part of the support agreement, Baffinland agreed to waive the poison pill immediately prior to the expiration of the ArcelorMittal offer. In essence, the Baffinland board was using the support agreement and the poison pill to "just say no" to Nunavut Iron’s unsolicited bid and allow ArcelorMittal’s bid to go to the shareholders. Nunavut Iron brought an application to the OSC seeking an order to cease trade the poison pill.

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44 Ibid at para 71.
46 Ibid.
48 Ibid at para 114.
49 Ibid at para 2.
50 Ibid at para 8.
51 Ibid at para 9.
52 Ibid at para 12.
The OSC decided to cease trade the poison pill because it had already facilitated an auction, and therefore, it was no longer necessary. Having received an additional offer following Nunavut Iron’s bid, the poison pill achieved its purpose, so it was time for the pill to go.\(^{53}\) The OSC commented that “it will not permit a rights plan to be used for the purpose only of eliminating the timing advantage available to the first bidder.”\(^{54}\) Although Nunavut Iron did not indicate that it planned on increasing the price of its bid, the OSC held that, ultimately, “it is the Baffinland shareholders who should determine the outcome of the two competing bids for their shares.”\(^{55}\)

In *Re Baffinland*, the OSC took the opportunity to comment on *Re Neo*, and in particular, on whether the business judgment rule has any applicability in poison pill regulation.\(^{56}\) The OSC observed that *Re Neo* involved unusual facts, specifically that shareholder approval of the poison pill took place only two weeks before the hearing.\(^{57}\) The OSC commented that “in *Neo*, the Commission concluded that it should defer to the wishes of the shareholders as expressed by the recent shareholder vote.”\(^{58}\) The panel went on to state that “in our view, *Neo* does not stand for the proposition that the Commission will defer to the business judgment of a board of directors in considering whether to cease trade a rights plan, or that a board of directors in the exercise of its fiduciary duties may ‘just say no’ to a takeover bid.”\(^{59}\) Despite this assertion, the commission went on to say that a consideration of whether the target board is acting pursuant to its fiduciary duty is a relevant, but secondary, consideration in deciding whether to cease trade a poison pill.\(^{60}\)

The BCSC had its opportunity to comment on *Re Neo* and *Re Pulse Data* in its 2010 decision, *Re Lions Gate*.\(^{61}\) This case involved an attempted takeover of Lions Gate by noted corporate-raider Carl Ichan through his corporation, Ichan Partners. In March 2010, when Ichan held 18.8% of Lions Gate’s common shares, he made a takeover bid for up to 13 million Lions Gate shares, which would have given him 29.9% of the issued and outstanding shares of the corporation.\(^{62}\) In response, the Lions Gate board adopted a poison pill and scheduled a shareholder meeting to ratify it. After failed negotiations between Ichan and the Lions Gate directors, the target board concluded that a change of control was not in the best interests of the corporation at that time. They took no steps to seek an alternative transaction or commence an auction.\(^{63}\) In response, Ichan brought an application to the BCSC before the shareholder meeting took place.

The BCSC cease traded the Lions Gate poison pill because it denied the shareholders their right to choose whether to tender to the bid.\(^{64}\) In doing so, the

\(^{53}\) *Ibid* at para 32.

\(^{54}\) *Ibid* at para 34.

\(^{55}\) *Ibid* at para 55.

\(^{56}\) *Re Baffinland*, supra note 22 at para 47.

\(^{57}\) *Ibid* at para 48.

\(^{58}\) *Ibid*.

\(^{59}\) *Ibid* at para 51.

\(^{60}\) *Ibid*.

\(^{61}\) *Re Lions Gate*, supra note 21.

\(^{62}\) *Ibid* at para 16.

\(^{63}\) *Ibid* at para 24.

\(^{64}\) *Ibid* at para 29.
commission took the opportunity to comment on the intersection between the fiduciary duty of the target board and NP 62-202. Additionally, the BCSC considered whether the target board could “just say no” to an unsolicited bid through the implementation of a poison pill.

On the fiduciary duty issue, the BCSC commented that “a target company board, faced with a hostile bid, has a fiduciary duty to act in the best interests of the corporation, and the regulators are reluctant to interfere with actions taken by a target company board to discharge that duty.”\(^65\) However, they went on to say that securities commissions will only be reluctant to interfere where the target board is making efforts to maximize shareholder value, and that the target company’s shareholders should ultimately have the opportunity to decide whether to tender to the bid.\(^66\) The BCSC said that whether the target board met its fiduciary duty will not factor into the securities commission’s decision-making.\(^67\) Unless the board behaves improperly—that is, in breach of its fiduciary duty—then compliance with its duties under the CBCA will be a neutral factor.\(^68\)

The BCSC declined to defer to the business judgment of the Lions Gate board. The fact that the target board had a reasonable belief that a change of control was not in the best interests of the corporation was an irrelevant consideration for the commission. Although the directors may have met their fiduciary duty by attempting to block the bid, “the board should not expect Canadian securities regulators to allow a [shareholder rights plan] to interfere with the shareholders’ right to decide whether to tender into the bid.”\(^69\)

In this decision, the BCSC reaffirmed the “when, not if” approach under NP 62-202: where the target board is not taking active steps to increase shareholder value in response to an unsolicited bid, then the poison pill will not be allowed to continue.\(^70\) The BCSC observed that the mere fact that the target shareholders approved the poison pill does not mean that the target can “just say no” to an unsolicited takeover bid. Shareholder approval may be a relevant factor, but it is not determinative.\(^71\) For the BCSC, “the principle that the shareholders must always have the opportunity to decide cannot co-exist with one that would allow target company boards to ‘just say no’ to bids.”\(^72\)

4. The Current Role of Directors’ Fiduciary Duties in Poison Pill Regulation

It is evident that, since Re Pulse Data was released in 2007, the provincial securities commissions have disagreed on the extent that directors’ fiduciary duties are relevant in poison pill regulation. Particularly, there has been disagreement amongst the ASC, OSC, and BCSC as to whether the business judgment rule applies to a target board’s decision to implement a poison pill in the face of a hostile bid. Re Neo and Re Pulse Data reveal that the OSC and ASC are willing, in some

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\(^65\) Ibid at para 50.
\(^66\) Ibid at para 53.
\(^67\) Ibid at para 62.
\(^68\) Ibid.
\(^69\) Ibid at para 66.
\(^70\) Ibid at para 68.
\(^71\) Ibid at para 91.
\(^72\) Ibid at para 84.
circumstances, to apply corporate law principles to the resolution of disputes in the securities regulation forum. These hearing panels were willing to defer to the directors’ business judgment where there was recent and informed shareholder approval of the poison pill. Perhaps the unique factual scenarios that gave rise to each of these decisions emboldened the hearing panels to depart from the separation between corporate law and securities regulation endorsed by Re CW Shareholdings and Re Lac Minerals. Regardless of the impetus for the Re Neo and Re Pulse Data decisions, however, their effects continue to be felt through the uncertainty associated with poison pill regulation today.

In Re Lions Gate and Re Baffinland, the tension between the BCSC and OSC on this issue is readily apparent. In Re Baffinland, the OSC refused to defer to the business judgment of the target board in deciding whether to cease trade a poison pill. In that case, the OSC signalled that it will not hesitate to issue a cease trade order, even if the target board fulfils its fiduciary duty by blocking a bid through the implementation of a poison pill. The hearing panel in Re Baffinland affirmed that the public interest is best served where the target shareholders have the opportunity to decide whether to tender to the bid. In the securities regulation context, the shareholders’ right to choose trumps the directors’ duty under corporate law.

However, these two commissions disagree as to whether the target board’s compliance with its fiduciary duty is relevant to poison pill regulation. In Re Baffinland, the OSC opined that whether the target board of directors acted in the best interests of the corporation and complied with their fiduciary duty is a “relevant, although secondary, consideration for the Commission in deciding whether to cease trade a rights plan.” There is tension between this position and the BCSC’s approach. In Re Lions Gate, the hearing panel commented that, unless a target board fails to discharge its fiduciary duty to the corporation, then compliance will be a “neutral factor.” The BCSC indicated that they will only be reluctant to interfere with the target board’s decision to implement a poison pill when they are seeking an improved or alternative transaction. This is consistent with the approach endorsed by the OSC in Re Lac Minerals.

Some commentators have taken the opportunity to argue that “the prevailing inter-provincial inconsistency in applying National Policy 62-202 to poison pills [is] tailor-made as an argument for a national securities regulator.” However, in 2012, the Supreme Court of Canada held that the proposed federal Securities Act, which attempted to create a national securities regulator, was ultra vires Parliament’s general trade and commerce power under subsection 91(2) of the Constitution Act, 1867. In the wake of this failed attempt to create a national securities regulator, Canada is left with three of its most active provincial securities regulators unable to agree on a coherent analysis under NP 62-202, leaving legal advisors to target boards guessing at which approach will apply in a given case.

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73 Re Baffinland, supra note 22 at para 51.
74 Re Lions Gate, supra note 21 at para 64.
76 Reference Re Securities Act, 2011 SCC 66 [Re Securities Act].
The disjointed approach to poison pill regulation is compounded by the conflicting standards for the use of poison pills under corporate law and pursuant to securities regulation. Under corporate law, so long as the directors respond to the hostile takeover bid in good faith and in the best interests of the corporation, then they will meet their fiduciary duty pursuant to paragraph 122(1)(a) of the CBCA. The director-centric approach under corporate law is diametrically opposed to the shareholder-choice model of securities regulation. To illustrate this point, the following section will articulate the fiduciary duty of a target board in the face of a hostile bid under corporate law.

D. The Corporate Law Approach: Directors' Fiduciary Duties

1. Canada Business Corporations Act

In contrast to the shareholder-choice model utilized by securities regulators through NP 62-202, Canadian courts have adopted a deferential approach to the decisions of target boards in the face of a hostile bid. For a company incorporated under the CBCA, directors are given the broad power to “manage […] the business and affairs of the corporation.” The powers of the shareholders under the CBCA are limited: they have the right to vote at any meeting of the shareholders, and to receive any dividend declared by the corporation, and to receive any remaining property of the company upon dissolution. The directors are charged with managing the affairs of the corporation in accordance with their fiduciary duties. The CBCA imposes a statutory fiduciary duty on the corporation’s directors to “act honestly and in good faith with a view to the best interests of the corporation.” So long as the directors fulfil this requirement, then pursuant to the business judgment rule, they have wide discretion to manage the corporation.

The statutory fiduciary duty contained in the CBCA is owed to the corporation generally, and not to a particular group of shareholders or stakeholders. The CBCA provides limited guidance as to the precise content of the directors’ fiduciary duty. The common law has not been entirely helpful in fleshing out the content of the target board’s fiduciary duty in the context of a hostile takeover bid; however, the case law provides some broad guidelines for target boards in the face of a hostile bid.

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77 Pente Investment Management, supra note 5.
78 CBCA, supra note 26, s 102(1).
79 Ibid, s 24(3)(a).
80 Ibid, s 24(3)(b).
81 Ibid, s 24(3)(c).
82 Ibid, s 122(1)(a).
2. **Directors’ Fiduciary Duties: General Common Law Approach**

(i) BCE and Peoples

In *BCE* and *Peoples*, the Supreme Court of Canada provided the latest articulations of the directors’ fiduciary duty. The court commented that the “fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value.” The fiduciary duty looks to the long-term interests of the corporation and the “content of this duty varies with the situation at hand.” The court went on to recognize that, in considering the best interests of the corporation, the directors may look to the interests of “shareholders, employees, consumers, governments and the environment to inform their decisions.”

The Supreme Court of Canada emphasized that the directors’ fiduciary duty is “to the corporation, and only to the corporation.” Where the interests of the corporation and the various stakeholders of the corporation are in conflict, then the directors owe their duty to the corporation. The court rejected a line of case law coming from the Delaware Supreme Court which holds that the directors’ fiduciary duty changes in the context of a takeover bid. Instead, the court recognized that there is no “fixed rule” for the content of the directors’ fiduciary duty. Even where a corporation is on the verge of bankruptcy, as was the case in *Peoples*, the directors’ duty remains to the corporation as a whole and not to the creditors or any other stakeholders specifically. In this context, the “best interests of the corporation” does not mean the “best interests of the creditors,” but rather, it means the “maximization of the value of the corporation.” Although neither *BCE* nor *Peoples* involved a hostile takeover, these cases seem to suggest the target board’s fiduciary duty does not change even in that context: it remains to the corporation and not to the shareholders specifically.

3. **Directors’ Fiduciary Duties: Takeover Bid Context**

The takeover bid presents a unique challenge to the target board’s fiduciary duty. If the takeover bid is successful, then the target board and management will likely be replaced by the new controlling shareholder. Therefore, the target directors might be motivated to try and defeat the takeover bid for self-interested reasons. The use of defensive tactics such as poison pills therefore places target
boards in an inherent conflict of interest. In the context of a takeover bid, courts have commented that the target board should attempt to minimize this inherent conflict of interest by striking a special committee to consider the merits of the bid and make an independent recommendation to the board as to how to proceed.94

A takeover bid will typically offer the shareholders a significant premium over the current market price for their shares. However, this short-term benefit to the shareholders does not necessarily mean that the bid is in the best interests of the corporation.95 Since there are a number of different motivations from the bidder, including the break-up of the target, corporate law allows the target board to take defensive action to defeat the bid so long as it is in the best interests of the corporation. For this reason, “it is difficult to formulate general rules to govern the behaviour of directors and managers when a bid is made or in anticipation of a bid.”96 For instance, in circumstances where the directors have insider knowledge that leads them to believe that the value of the corporation is higher than the value of the bid, then defensive measures that protect corporate value will be in the best interests of the corporation.97

The Supreme Court of Canada has yet to hear a case specifically involving the directors’ fiduciary duty in the face of a hostile takeover bid. Following BCE and Peoples, it appears that the nature of the directors’ fiduciary duty does not change in the face of a hostile bid. So long as they act in good faith and in the best interests of the corporation, then target boards can take defensive action to block an unsolicited bid. However, the fact that the Supreme Court of Canada has yet to hear a takeover bid case leaves open the possibility that a different standard may apply in the context of a hostile change of control.

No other Canadian courts have developed a coherent analytical framework delineating the content of the directors’ fiduciary duty in the context of a hostile takeover bid either. There are two competing approaches to the question of who should ultimately decide whether the takeover bid is successful: the directors or the shareholders. The shareholder-centric approach argues that, once a takeover bid is made, any defensive action that interferes with the shareholders’ right to decide whether to tender into the bid is impermissible. The competing approach is the director-centric model: directors are in the best position to determine whether a takeover bid is in the best interests of the corporation. So long as the directors act in accordance with their fiduciary duty, then they are permitted to take action to block the bid. Although the law is far from settled, it appears as though the director-centric approach, which was adopted by the British Columbia Supreme Court in Teck, most closely articulates the current Canadian position.98

(i) The Director-Centric Approach: Teck

Teck arose from a battle for the control of a corporation, Afton, that owned an undeveloped copper mine near Kamloops, British Columbia. Teck Corp. was the largest shareholder of Afton and they sought to gain a majority so that they could

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94 Pente Investment Management, supra note 5 at para 38.
95 VanDuzer, supra note 83 at 365.
96 Ibid.
97 Ibid.
98 Teck, supra note 24.
enter into an agreement with Afton to bring the mine into production. The directors of Afton opposed Teck Corp.’s desire to bring the mine into production as they had misgivings about Teck Corp.’s reputation, technical capacity and experience in developing similarly-situated mines. The directors wanted to see Afton’s principal asset, the copper property, “developed efficiently and profitably.” In the directors’ opinion, Teck Corp. was not the best company to do this, so they issued a large number of shares to a third party, Placer, thereby diluting Teck Corp.’s voting power. Afton proceeded to enter into a development agreement with Placer and Teck Corp. responded by bringing an action against Afton’s directors for breach of fiduciary duty.

In *Teck*, the court held that the Afton directors did not violate their fiduciary duty to the corporation through the dilutive share issuance since they held a reasonable belief that it was in the best interests of the corporation for Placer to develop the mine. In arriving at this holding, Berger J. wrestled with the central problem of directors’ fiduciary duties in the context of a hostile change of control transaction:

If the directors have the right to consider the consequences of a takeover, and to exercise their powers to meet it, if they do so bona fide in the interests of the company, how is the court to determine their purpose? In every case the directors will insist their whole purpose was to serve the company’s interest. And no doubt in most cases it will not be difficult for the directors to persuade themselves that it is in the company’s best interests that they should remain in office. Something more than a mere assertion of good faith is required.

In response to this evidentiary problem, Berger J. formulated the following test for determining whether the directors of a target corporation have met their fiduciary duty: first, the directors must act in good faith, and second, where the directors believe that a change of control will result in “substantial damage to the company’s interests” then there must be reasonable grounds for this belief. If there are no reasonable grounds, this will justify a finding that the directors were “actuated by an improper purpose.” In other words, where the target directors do not hold a reasonable belief that a substantial threat to the corporation exists, and their sole purpose for the dilutive share issuance is to “freeze out” a group of shareholders, then their fiduciary duty to the corporation will not be met.

The approach in *Teck* has been followed or cited with approval by many courts across Canada, including the Ontario Court of Appeal. In *Peoples*, the Supreme Court of Canada cited *Teck* for the narrow proposition that, in considering whether the directors are acting in the best interests of the corporation, the board may

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99 Ibid at para 151.
100 Ibid.
101 Ibid at para 151.
102 Ibid at para 101.
103 Ibid at para 103.
104 Ibid.
105 Ibid at para 106.
106 Pente Investment Management, supra note 5 at para 34.
consider the interests of shareholders and other stakeholders of the corporation.\textsuperscript{107} Despite this relatively widespread acceptance, at least two cases have attempted to derogate from the director-centric rule in \textit{Teck} in favour of an approach that focuses on shareholder choice in the context of a hostile takeover bid.

\textbf{(ii) The Shareholder Choice Approaches: Producers Pipeline and Exco}

A 1987 case from the Nova Scotia Supreme Court, \textit{Exco},\textsuperscript{108} and a 1991 case from the Saskatchewan Court of Appeal, \textit{Producers Pipelines},\textsuperscript{109} attempted to formulate an approach focused on shareholder choice in the context of a hostile takeover bid. Both cases reject \textit{Teck} and hold that the shareholders should have the right "to decide to whom and at what price they will sell their shares."\textsuperscript{110} Ultimately, "defensive tactics that result in shareholders being deprived of the ability to respond to a takeover bid or to a competing bid are unacceptable."\textsuperscript{111}

In \textit{Producers Pipelines}, the court formulated a new test for directors who deploy defensive tactics in response to an unsolicited takeover bid. The court held that, where the target board implements a poison pill, the directors must be able to establish: that (1) they had a good faith belief that the bid posed a threat to the corporation; (2) they acted after proper investigation; and (3) the defensive measures were reasonable in relation to the threat posed.\textsuperscript{112} Where the target board responds to the bid by using a defensive tactic such as a poison pill, the court will impose a rebuttable presumption that the directors' motivations were improper.\textsuperscript{113}

Similar to the \textit{Producers Pipelines'} test, the court in \textit{Exco} held that the burden should rest upon the directors to prove that they were acting in the best interests of the corporation.\textsuperscript{114} If the target directors use their power to issue share capital in the face of a hostile bid, then the directors "must be able to show that the considerations upon which the decision to issue was based are consistent only with the best interests of the company and inconsistent with any other interests."\textsuperscript{115} Thus, \textit{Exco} imposed a more stringent standard upon the target board than \textit{Producers Pipelines} and stands for the proposition that, when faced with a hostile takeover bid, the directors of the target corporation should get out of the way and let the shareholders decide the fate of the bid.

\textbf{(iii) The Rejection of the Shareholder Choice Approach}

Subsequent superior court and appellate court decisions have rejected the shareholder-choice approaches endorsed by \textit{Producers Pipelines} and \textit{Exco}. In \textit{Harold E. Ballard}, the Ontario Superior Court of Justice (General Division) rejected \textit{Exco} and provided some highly critical commentary on the test set forth by the Nova Scotia Supreme Court.\textsuperscript{116} This decision was penned by Farley J., who was the

\textsuperscript{107} BCE, supra note 4 at para 42.
\textsuperscript{108} Exco Corp v Nova Scotia Savings & Loan Co (1987), 78 NSR (2d) 91 (NSSC) [Exco].
\textsuperscript{109} 347883 Alberta Ltd v Producers Pipelines Inc (1991), 80 DLR (4th) 359 (SKCA) [Producers Pipelines].
\textsuperscript{110} Ibid at para 36.
\textsuperscript{111} Ibid at para 39.
\textsuperscript{112} Ibid at para 38.
\textsuperscript{113} Ibid at para 40.
\textsuperscript{114} Exco, supra note 108 at para 341.
\textsuperscript{115} Ibid.
\textsuperscript{116} 820099 Ontario Inc v Harold E Ballard Ltd, [1991] OJ No 266 (ONGD) [Harold E Ballard].
supervising judge of the Commercial List in Toronto at the time and a highly re-
spected corporate law expert.\textsuperscript{117} Farley J. observed that the Exco test is “unduly harsh in that it might inhibit reasonable business decisions,”\textsuperscript{118} and that instead of a reverse onus standard, the real question should be what “the directors had upper-
most in their minds after a reasonable analysis of the situation.”\textsuperscript{119} So long as the target board acts in the best interests of the corporation and in good faith, they will fulfill their fiduciary duty in the face of a hostile bid.\textsuperscript{120}

	extit{Producers Pipelines} was rejected by the Ontario Court of Appeal in \textit{Pente Investment Management}. In this case, the court commented that, in the context of a hostile takeover bid, the “court must be satisfied that the directors have acted rea-
sonably and fairly.”\textsuperscript{121} The Ontario Court of Appeal emphasized that directors will meet their fiduciary duty to the corporation so long as they make a “reasonable decision not a perfect decision,”\textsuperscript{122} and that the target board will receive the benefit of the business judgment rule during a hostile takeover bid so long as “the directors have selected from one of several reasonable alternatives.”\textsuperscript{123} For the court in \textit{Pente Investment Management}, the rationale for shifting the burden of proof to the target board did not exist if the directors had successfully minimized their conflict of inter-
est through the implementation of a properly-constituted special committee.\textsuperscript{124}

\textbf{4. Summary of the Current Corporate Law Approach}

Although the Supreme Court of Canada has not heard a case involving the directors’ fiduciary duty in the face of a hostile takeover bid, the foregoing jurisprudence reveals the current position under Canadian corporate law is set out in the lower courts: where the target board takes steps to minimize its inherent conflict of interest, then the business judgment rule applies in the context of a hos-
tile takeover bid. Reviewing courts will be deferential to the target board’s decision to implement a poison pill and block the hostile bid so long as the directors act in good faith and have a reasonable basis to believe that the bid represents a threat to the corporation. As part of the directors’ discretionary power to manage the corpo-
ration, corporate law recognizes that it is permissible for the target board to “just say no” to a hostile bid in circumstances where it is in the corporation’s best inter-
ests. The directors may properly consider the interests of all of the constituent stakeholders of the corporation in arriving at their decision. Under corporate law, the shareholders will only have the opportunity to tender to the bid where the di-
rectors believe it is in the best interests of the corporation.

\textsuperscript{118} Harold E Ballard, \textit{supra} note 116.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
\textsuperscript{121} Ibid. \textit{supra} note 5 at para 36.
\textsuperscript{122} Ibid.
\textsuperscript{123} Ibid.
\textsuperscript{124} Ibid at para 38.

1. Background

In March 2012, Maureen Jensen, the OSC’s executive director, made remarks to the Institute of Corporate Directors on the strategic direction of the OSC.\(^{125}\) Ms. Jensen commented on the direction that the OSC plans to take on shareholder democracy issues, and in particular, poison pills. She noted that, although shareholder democracy is a corporate governance issue that has traditionally been dealt with under corporate law, “securities regulators have been willing to regulate in such matters to further our mandate of investor protection and fostering efficient markets.”\(^{126}\) Ms. Jensen commented that, although poison pills are not directly related to shareholder democracy, it is nonetheless an issue that “goes to the heart of how decision-making authority is allocated between the board and its shareholders.”\(^{127}\)

In Ms. Jensen’s address, she observed that the traditional approach to poison pill regulation under NP 62-202 “needs to be revisited in light of the significant market, governance and regulatory developments that have occurred since the policy was adopted in 1986.”\(^{128}\) The Canadian Securities Administrators (the “CSA”) subsequently commenced a rule review aimed at “creating a transparent framework for rights plans that allow target boards more latitude in responding to hostile bids if shareholder approval of the rights plan has been obtained.”\(^{129}\) Ms. Jensen indicated that the decision on how to respond to a hostile bid should be left to the target’s board and shareholders, rather than through regulatory hearings on an \emph{ad hoc} basis.\(^{130}\)

2. Concerns with the Approach under NP 62-202

In March 2013, the CSA released Proposed National Instrument 62-105 (the “Proposed Policy”), which identifies and addresses a number of concerns with the current regulatory approach towards poison pills. The CSA notes that “some market participants believe that the current Canadian approach generally favours bidders rather than targets and their shareholders.”\(^{131}\) Some commentators have suggested that securities regulators should revoke NP 62-202 and “stop regulating poison pills in any respect.”\(^{132}\) These market participants argue that poison pills should be dealt with by the courts as a matter of fiduciary law under the oppression remedy contained in corporate legislation.\(^{133}\) In the Proposed Policy, the CSA rejects this proposition and notes that “securities regulators have a legitimate role in


\(^{126}\) Ibid.

\(^{127}\) Ibid.

\(^{128}\) Ibid.

\(^{129}\) Ibid.

\(^{129}\) Ibid.

\(^{131}\) Proposed Policy, supra note 7 at 2647.

\(^{132}\) Ibid.

\(^{133}\) Ibid.
regulating take-over bids” and to ensure that defensive tactics do not undermine the shareholders’ right to respond to a bid.134

In the Proposed Policy, the CSA recognizes the risk of inconsistent regulatory decisions under the current *ad hoc* approach to poison pill regulation. They admit that the “event-driven nature of decision-making” through contested hearings pursuant to NP 62-202 creates a “risk of inconsistent and unpredictable decisions” by securities regulators.135 For the CSA, this has resulted from “different perspectives on underlying principles, such as [...] the relevance of the board’s fiduciary duty obligations when responding to hostile takeover bids.”136

Finally, the CSA notes that some commentators have suggested that NP 62-202 and poison pill regulation in general “inappropriately fetters the discretion of target boards to apply their fiduciary duty to act in the best interests of the corporation in a manner consistent with *BCE*.”137 The commentary accompanying the Proposed Policy acknowledges this conflict, but the CSA is of the view that the final decision regarding the adoption of a poison pill should remain with the shareholders and not with the target board, the regulators, or the courts.138

3. **Key Features of the Proposed Policy**

The Proposed Policy will establish a regulatory framework for poison pills in all CSA jurisdictions.139 Under this new approach, poison pills will be allowed to remain in place so long as a simple majority of the shareholders of the target corporation approve the rights plan within a specified period of time.140

The commentary accompanying the Proposed Policy notes that the purpose of takeover regulation continues to be the fair treatment of target shareholders.141 In contrast to NP 62-202, where the commissions decide whether to cease trade a poison pill on an *ad hoc* basis, the Proposed Policy will leave the ultimate choice to shareholders and, for the most part, takes the decision out of the hands of the provincial securities commissions.142 Securities regulators do not anticipate intervening to cease trade a rights plan that was adopted in compliance with the Proposed Policy unless “the target issuer engages in conduct that undermines the principles underlying the Proposed Policy or there is a public interest rationale for intervention.”143

The Proposed Policy will allow a poison pill to remain in place indefinitely so long as it receives shareholder approval “within 90 days from the date of adoption,” or if the poison pill is adopted after the takeover bid has been made, then “within 90 days from the date the take-over bid was commenced.”144 The poison pill only needs ratification from a simple majority of shareholders, and the shareholders

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135 *Ibid* at 2648.
139 *Ibid* at 2643.
141 *Ibid* at 2649.
142 *Ibid* at 2650.
144 *Ibid* at 2649.
may terminate the poison pill at any time by a majority vote. The bidder’s shares are excluded for both of these votes. Finally, the poison pill cannot be used to discriminate between takeover bids: if it is "waived or modified with respect to one take-over bid it must be waived or modified with respect to any other take-over bid." 

F. Will the Proposed Policy Remedy the Uncertainty Surrounding Poison Pills?

It appears as though the Proposed Policy will provide a degree of certainty to poison pill regulation since securities commissions will not hear as many applications for cease trade orders as they do under the existing approach. NP 62-202 relies upon “active regulatory intervention” on an ad hoc basis to determine whether a poison pill should be cease-traded. Since cease trade orders are made on a case-by-case basis, and hearing panel decisions do not have any precedential value, this has led to inconsistent and unpredictable decisions regarding poison pills between the provincial securities regulators, and within the same regulator at different times. In contrast, under the Proposed Policy, the decision of whether a target board should adopt or retain a poison pill is left in the hands of the shareholders, and securities regulators will only intervene in limited circumstances. The possibility for conflicting decisions on poison pills remains under the Proposed Policy, but the frequency of those decisions should be drastically reduced.

The Proposed Policy represents an effort to have target boards self-regulate the use of poison pills, and in the process, it takes the opportunity away from the respective provincial commissions to apply (or not apply, as the case may be) a corporate law-inspired fiduciary duty analysis. The Proposed Policy is a positive development for securities regulation and market participants since it provides a set of black and white rules delineating when a poison pill is permissible and when it is not. So long as the target board complies with the requirements of the Proposed Policy, it will not attract regulatory scrutiny. The Proposed Policy clarifies the securities regulators’ position that the business judgment rule and the directors’ fiduciary duty are irrelevant considerations in the context of poison pill regulation. Further, it reaffirms the CSA’s clear preference for shareholder choice in the face of a hostile takeover bid.

G. Will the Proposed Policy Remedy the Conflict Between Securities Regulation and Corporate Law?

Although the Proposed Policy will decrease the opportunity for uncertain results within the securities regulation context, it will not remedy the conflict between securities regulation and corporate law. The regulation of poison pills in

145 Ibid.
146 Ibid.
147 Ibid.
148 Ibid at 2646.
149 Ibid at 2648.
the face of a hostile takeover bid will continue to be inconsistent with the approach set forth by the Supreme Court of Canada in *BCE* and *Peoples*. The directors’ fiduciary duty is to the corporation, yet the Proposed Policy requires the target board to shift its duty to the consideration of shareholder interests in the context of a hostile takeover bid. The result is that Canadian directors will continue to be pulled in two different directions when faced with a hostile takeover bid.

The Proposed Policy gives target boards greater flexibility in determining whether to adopt and maintain a poison pill in the face of a hostile takeover bid as it allows the target board to completely block an unsolicited bid where it is not in the best interests of the corporation, provided the shareholders agree. In comparison to NP 62-202, the Proposed Policy gives the directors more range to respond to bids that are not in the best interests of the corporation. However, in comparison to the scope of directors’ power under the *CBCA*, the latitude that a target board will have in responding to an unsolicited bid is significantly circumscribed under the Proposed Policy. In the commentary accompanying the Proposed Policy, the CSA adheres to the view that “the ultimate decision about the adoption or maintenance of a Rights Plan should remain with the shareholders and not with the board of directors, regulators or courts.”

This is in direct conflict with the limited rights of shareholders under the *CBCA*.

Given that poison pill regulation requires the fiduciary duty of the target board to shift from the corporation to the shareholders in the context of a hostile takeover bid, the theoretical underpinnings of the Proposed Policy closely align with the widely-rejected *Producers Pipelines* standard. The Proposed Policy supports the notion from *Producers Pipelines* that defensive action in the face of a bid must interfere with shareholder choice as little as possible. Further, both provide that any defensive action taken in response to the bid should be put to the shareholders for prior or subsequent approval. This shareholder-choice model of corporate governance was rejected by Farley J. in *Harold E. Ballard* and by the Ontario Court of Appeal in *Pente Investment Management*.

The decision to promote shareholders rights over and above the interests and rights of the other stakeholders of the corporation also directly conflicts with the approach set forth by the Supreme Court of Canada in *BCE* and *Peoples*. First, corporate law is clear that directors, acting in the best interests of the corporation, have a fiduciary duty to protect, and attempt to maximize, corporate value. However, the Proposed Policy imposes an obligation on the target board to maximize shareholder choice in the face of a bid. This is not a problem when the bid will maximize both corporate and shareholder value. However, maximization of corporate and shareholder value may often be in conflict since, as *BCE* articulates, the directors’ fiduciary duty is “not confined to short-term profit or share value.”

Shareholder value in the face of a bid is necessarily short-term: if the shareholders do not have the opportunity to tender to the bid, then it will eventually expire and the takeover premium will evaporate.

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150 Proposed Policy, supra note 7 at 2648.
151 *Producers Pipelines*, supra note 109.
152 *Harold E Ballard*, supra note 116; *Pente Investment Management*, supra note 5.
153 *Peoples*, supra note 84 at para 42.
154 *BCE*, supra note 4 at para 38.
As opposed to the short-term focus of the shareholder-choice model, the long-term interests of a corporation involve a wider set of considerations. The decision to promote shareholder-choice over other stakeholder interests in the corporation in the Proposed Policy is problematic from a corporate law perspective. BCE is clear that “in considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decision.” Where directors give appropriate attention to the “ancillary interests” of the corporation, courts will apply a deferential approach to the resulting decisions of the directors in accordance with the business judgment rule. However, the Proposed Policy takes away this flexibility and deference in the context of a hostile takeover bid. It shifts the directors’ fiduciary duty away from the corporation as an aggregate entity, and moves it to a single group within the corporation: the shareholders.

Under the current corporate law approach for directors faced with a hostile bid, the target board is required to act in good faith and in the best interests of the corporation. If so, then the directors are not required to get shareholder approval for the implementation of a poison pill and the target board can unilaterally “just say no” to the unsolicited bid. In the commentary accompanying the Proposed Policy, the CSA notes that one of the alternatives to NP 62-202 is to leave “decisions as to defensive tactics completely to the courts as a matter of fiduciary duty law.” The CSA concluded that the Proposed Rule is preferable since “the purpose of take-over bid regulation is to ensure fair treatment of target shareholders and that all market participants know what rules apply.” It appears as though the Proposed Policy will accomplish this, but it will be done at the expense of directors’ power to manage the corporation under corporate law.

**H. Conclusion**

During one of the most memorable scenes in *Wall Street*, Gordon Gekko speaks at the annual general meeting of a fictional company called Teldar Paper. Although the film does not make it explicit, Gekko appears to be involved in a proxy battle, and he tells the shareholders that “you own the company. That’s right, you, the stockholder.” He claims that, as a corporate raider and the largest single shareholder of Teldar, he is “not a destroyer of companies [rather, he is] a liberator of them.” What Gekko does not tell the Teldar shareholders is that he is self-interested in short-term profits and he wants to elect a board of directors that will maximize the immediate value of the corporation so that he can realise a quick return on his investment. Gekko is not concerned with the long-term health of the corporation, nor is he concerned with the panoply of constituent stakeholders that

155 *BCE*, *supra* note 4 at para 40.
156 *Ibid*.
157 *CBCA*, *supra* note 26, s 122(1)(a).
158 *Teck*, *supra* note 24 at para 101.
159 Proposed Policy, *supra* note 7 at 2655.
160 *Ibid* at 2649.
make up the modern corporation. None of this matters to the indomitable Gekko, since "greed, for lack of a better word, is good."

Through the CBCA and the two most recent Supreme Court of Canada decisions on the fiduciary duties of corporate directors, Canadian corporate law has exhibited a preference for the director-centric approach in the context of a hostile takeover bid.163 However, the poison pill regulatory framework has staked an opposite position in the battlefield for corporate control. This is problematic since, as Gekko demonstrates, shareholders do not owe a duty to the corporation to act in its best interests. NP 62-202 and the Proposed Policy ignore the fact that the corporation is a dynamic entity with diverse stakeholder interests, and quite often, the target is in a vulnerable position during the course of a hostile takeover bid. For regulators, in the context of an unsolicited bid, the shareholders’ right to choose is paramount. This strips the directors of much of their statutory discretionary power to manage the corporation, and as a result, the long-term interests of stakeholders and the corporation as a whole will be undermined going forward.

If the Proposed Policy is adopted by the provincial securities regulators, the way that target boards respond to hostile bids will change significantly. The poison pill will only have utility for target boards in circumstances where it is clear that a majority of the shareholders will ratify it. In situations where the directors believe that the bid is not in the best interests of the corporation, but shareholder support for the poison pill is unclear, target boards might be reluctant to employ this defensive tactic. After all, a shareholder vote against the poison pill is essentially a vote in favour of the hostile bid. Despite the reduced effectiveness of the poison pill, the fiduciary duty will still require the directors to take affirmative steps to resist the bid in certain circumstances. Therefore, it is conceivable that directors and their legal counsel will be forced to get creative and develop new defensive tactics that will allow target corporations to block hostile bids.

Since all Canadian corporations that raise public capital will be subject to poison pill regulations, it appears as though the securities regulators will continue to pick winners and losers in the market for corporate control. Whether this is done through NP 62-202 or the Proposed Policy, one thing is clear: for better or worse, shareholder empowerment is alive and well in Canadian corporations.

163 BCE, supra note 4; CBCA, supra note 25, s 122(1)(a); Peoples, supra note 83.