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LA RECONFIGURATION DU DEVOIR DE LOYAUTÉ DES ADMINISTRATEURS DE SOCIÉTÉS PAR ACTIONS : DE CHARYBDE EN SCYLLA?

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LA RECONFIGURATION DU DEVOIR DE LOYAUTÉ DES ADMINISTRATEURS DE SOCIÉTÉS PAR ACTIONS: DE CHARYBDE EN SCYLLA?

Stéphane Rousseau*

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INTRODUCTION

Depuis le début des années 80, le conseil d'administration des sociétés par actions fait l'objet de nombreuses propositions de réforme par des commentateurs insatisfaits de la contribution des administrateurs à la gestion des affaires des sociétés[1]. Ces commentateurs recommandent diverses modifications à la structure, à la composition et au fonctionnement du conseil d'administration afin d'en augmenter l'efficacité et l'imputabilité. Ces propositions, destinées à améliorer le rendement des sociétés par actions dans l'intérêt des actionnaires, exercent une influence tangible sur la régie d'entreprises. En effet, nombre d'entre elles ont été intégrées dans des instruments périjuridiques, tels que les énoncés de politique de la Bourse de Toronto et de l'Organisation pour la coopération économique et le développement (OCDE), qui contribuent à modifier les normes de gouvernance des sociétés par actions en exposant les pratiques souhaitables en cette matière[2]. Parallèlement, le mouvement favorisant une plus grande responsabilité sociale pour la société par actions a pris de la vélocité durant la même période. Mû par les critiques soulignant les abus que provoque la maximisation des profits dans l'intérêt des actionnaires, le mouvement de la responsabilité sociale réclame une meilleure prise en compte des intérêts de l'ensemble des constituantes de la société par actions par le conseil d'administration.

Les pressions générées par ces deux mouvements de réforme placent les administrateurs dans une situation difficile

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1 Ronald J. DANIELS et Edward J. WAITZER, "Challenges to the Citadel: A Brief Overview of Recent Trends in Canadian Corporate Governance", (1994) 23 *Can. Bus. L.J.* 23; "Symposium on Corporate Governance", (1993) 48 *Bus. Law.* 1267; Daniel D. PRENTICE et P.R.J. HOLLAND, (dir.), *Contemporary Issues in Corporate Governance*, Oxford, Clarendon Press, 1993; André TUNC, « Le gouvernement des sociétés anonymes - Le mouvement de réforme aux États-Unis et au Royaume-Uni », (1994) 1 *R.I.D.C.* 59.

2 AD HOC TASK FORCE ON CORPORATE GOVERNANCE, *OECD Principles of Corporate Governance*, OECD, Directorate for Financial, Fiscal and Enterprise Affairs, SG/CG(99)5, Paris, 1999; Toronto Stock Exchange, *Where Were the Directors?*, Report of the Toronto Stock Exchange Committee on Corporate Governance in Canada, Toronto, 1994. Voir, en général, Melvin A. EISENBERG, "Corporate Law and Social Norms", (1999) 99 *Col. L. Rev.* 1253.

au regard de leur devoir de loyauté. Doivent-ils gérer les affaires de la société dans l'intérêt des actionnaires et prendre des décisions qui maximisent les profits? Ou doivent-ils plutôt administrer la société dans l'intérêt de toutes les parties intéressées par les activités corporatives?

Jusqu'à présent, ces questions, débattues par les commentateurs, étaient demeurées sans véritable impact sur le devoir de loyauté des administrateurs. Ce dernier continuait d'être interprété généralement en référence à l'intérêt des actionnaires qui justifie la maximisation des profits de la société. La décision de la Cour supérieure dans l'affaire de la faillite du Magasin à rayons Peoples inc.[3] marque toutefois une rupture avec cette tendance jurisprudentielle. Cette décision rendue par le juge Greenberg offre une nouvelle interprétation du devoir de loyauté des administrateurs qui vise à faire une place aux intérêts des autres constituantes de la société par actions, en l'occurrence les créanciers. Bien qu'elle soit importante, l'opinion de la Cour sur cette question n'en demeure pas moins schématique, ce qui est susceptible de soulever des difficultés certaines en pratique. Aussi, l'objectif du présent commentaire est d'explorer plus en détail la reconfiguration du devoir de loyauté des administrateurs amorcée par le juge Greenberg.

1. LA DÉCISION

L'entreprise Les magasins Wise est une société par actions publique qui fait affaires dans le secteur du commerce au détail et dont les principaux actionnaires et administrateurs sont les frères Lionel, Ralph et Harold Wise. En 1992, Les magasins Wise a fait l'acquisition de la chaîne Peoples pour un montant de 27 M$. Les magasins Wise comptait alors une cinquantaine de succursales concentrées au Québec en milieu urbain qui totalisaient des ventes annuelles de 100 M$. La chaîne Peoples était pour sa part une division non incorporée de Marks & Spencer Canada Inc. Cette division comptait

3 *Peoples Department Stores Inc./Magasin à rayons Peoples inc.* (Faillite de), [1999] R.R.A. 178 (C.S.) (résumé). Curieusement, malgré son importance, la décision de la Cour supérieure n'a pas été publiée en version intégrale. Nous référerons donc dans le présent texte aux paragraphes de la décision qui apparaissent dans l'extrait publié en annexe et désigné ci-après *Peoples*.

plus de 80 succursales, pour la plupart situées en milieu rural à l'extérieur du Québec, et générait des ventes annuelles de 160 M$. L'acquisition de la chaîne Peoples s'avérait intéressante pour Les magasins Wise en ce qu'elle permettait à l'entreprise d'étendre ses activités sur le plan géographique, en plus de promettre des gains de synergie sous la forme d'économies d'échelle.

Les magasins Wise effectua l'acquisition de Peoples Department Stores inc., société par actions constituée aux fins de la transaction, par le biais d'une filiale à part entière, 2798832 Canada Inc, en utilisant l'effet levier[4]. Ainsi, elle versa 5 M$ au moment de la signature du contrat au moyen d'un emprunt consenti par la Banque Toronto-Dominion. Le solde de 22 M$, qui devait être payé dans un délai de huit ans à Marks & Spencer, était financé par un acte de fiducie accompagné d'une charge flottante en faveur de la venderesse. Parmi les conditions de l'acte de fiducie, Les magasins Wise s'engageait à maintenir des ratios financiers stricts. En outre, Peoples ne devait fournir aucune aide financière aux Magasins Wise.

Quelques mois après la transaction, Les magasins Wise procéda à une réorganisation corporative aux termes de laquelle Peoples Department Stores Inc. et 2798832 Canada Inc. furent fusionnées pour former le nouveau Peoples Department Stores (Peoples). Cette nouvelle société devenait par conséquent une filiale directe entièrement contrôlée par Les magasins Wise. À la même époque, les dirigeants de Wise entreprirent d'intégrer les activités de Peoples et de Wise afin de réaliser les gains de synergie ayant motivé l'acquisition. Ainsi, Wise étendit son système informatique de comptabilité et de gestion des opérations à Peoples. Plus important encore, les frères Wise, administrateurs de Peoples Department Stores, adoptèrent une nouvelle politique d'approvisionnement

4 La technique d'acquisition retenue par Les magasins Wise, qui exploite l'effet levier de l'endettement, est désignée par l'expression *leveraged-buyout* (LBO). Elle consiste à financer l'acquisition de la société cible en empruntant l'argent nécessaire à une institution financière et en offrant en garantie l'actif de la société cible. Voir William A. KLEIN et John C. COFFEE, *Business Organization and Finance*, 6th ed., Westbury, Foundation Press, 1996, p. 181.

destinée à simplifier la gestion et à générer des économies d'échelle[5].

Selon la nouvelle politique d'approvisionnement, les inventaires de Peoples et de Wise étaient fusionnés et conservés dans le même entrepôt. De plus, les deux sociétés allaient désormais se partager les responsabilités en matière d'approvisionnement. Peoples devenait responsable d'effectuer les achats au Canada pour son compte et celui des Magasins Wise. Les marchandises commandées par cette dernière lui seraient transférées et elle rembourserait Peoples par la suite. Selon la même formule, Les magasins Wise s'occuperait de l'approvisionnement auprès des fournisseurs étrangers.

Dans les faits, Les magasins Wise ne fit aucun paiement en échange des marchandises qui lui étaient transférées en raison des difficultés financières qu'elle éprouvait alors. Étant donné l'importance des achats faits au Canada, la politique d'approvisionnement causa un tort sérieux à Peoples qui vit ses besoins de liquidités croître considérablement. La situation financière de Peoples et de Wise périclita à un point tel qu'en septembre 1994, la Banque Toronto-Dominion les avisa qu'elle allait cesser de leur faire crédit à compter du début de 1995. Malgré des tentatives de sauvetage, les deux entreprises durent faire cession de leurs biens au début de décembre 1994.

Le syndic de faillite poursuivit les frères Wise, qui sont les principaux actionnaires et administrateurs des Magasins Wise et les administrateurs de Peoples. Se fondant sur l'article 122 de la *Loi canadienne sur les sociétés par actions*[6] (L.C.S.A.) et l'article 100 de la *Loi sur la faillite et l'insolvabilité*[7] (L.F.I.), le syndic réclama des frères Wise les sommes dues à Peoples par Les magasins Wise pour le transfert de marchandises effectué conformément à la politique d'approvisionnement dans les 12 mois précédant la faillite.

5 Bien qu'elle ait été mise en vigueur, la politique d'approvisionnement ne fut jamais constatée par écrit et les conditions de remboursement ne furent jamais précisées. En outre, aucune résolution du conseil d'administration de Peoples n'approuva la mise en vigueur de la politique d'approvisionnement, malgré son importance. Voir *Peoples*, paragr. 48.

6 *Loi sur les sociétés par actions*, L.R.C., c. C-44 [ci-après L.C.S.A.].

7 *Loi sur la faillite et l'insolvabilité*, L.R.C., c. B-3 [ci-après L.F.I.].

La Cour retient la responsabilité des administrateurs de Peoples sous l'article 122 L.C.S.A. Selon la Cour, les frères Wise, à titre d'administrateurs, ont transgressé leur devoir de prudence et de diligence lors de l'adoption de la politique d'approvisionnement[8]. En procédant à l'implantation de la politique, les administrateurs ont omis de considérer son impact à l'égard de Peoples qui se retrouvait avec un compte à recevoir auprès d'une société éprouvant des difficultés financières. De plus, les administrateurs ont négligé de surveiller les effets de la politique sur la situation financière de Peoples. En conséquence, bien qu'elle reconnaisse la doctrine du jugement d'affaires qui commande une certaine déférence à l'égard des décisions d'affaires des administrateurs et dirigeants, la Cour refuse de faire preuve d'une telle retenue en l'espèce. À juste titre, la Cour souligne que la doctrine du jugement d'affaires ne peut s'appliquer lorsque les administrateurs ne se sont pas acquittés de leur devoir de prudence et diligence. Autrement dit, la doctrine n'offre une protection qu'aux décisions qui ont été prises dans le cadre d'un processus conforme aux devoirs des administrateurs, mais qui ne mènent pas aux résultats escomptés.

Le juge Greenberg retient également la responsabilité des administrateurs de Peoples pour le motif qu'ils ont manqué à leur devoir de loyauté en favorisant les intérêts des Magasins Wise au détriment de Peoples[9]. En outre, dans un développement novateur en droit québécois, la Cour ajoute que les administrateurs de Peoples ont transgressé leur devoir de loyauté en négligeant les intérêts des créanciers de Peoples. Nous analyserons les motifs de la Cour à cet égard dans le texte qui suit.

Par ailleurs, la Cour reconnaît la responsabilité des administrateurs en vertu de l'article 100 L.F.I.[10]. Selon la Cour, les transferts de marchandises effectués conformément à la politique d'approvisionnement constituent des transactions révisables au sens de la *Loi sur la faillite et l'insolvabilité* étant donné le lien de dépendance qui unit Les magasins Wise

8 *Peoples*, paragr. 55, 56, 62, 99-122.
9 *Id.*, paragr. 123 et suiv.
10 La partie de la décision traitant de l'article 100 L.F.I. n'a pas été reproduite en annexe étant donné qu'elle excède le présent commentaire.

et Peoples[11]. Puisque Peoples n'a reçu aucune contrepartie en échange des transferts de biens aux Magasins Wise, le juge Greenberg tient les administrateurs de Peoples responsables du montant représentant la juste valeur des biens transférés en raison de leur intérêt dans ces transactions[12].

2. L'INFLUENCE DE LA DÉCISION SUR LE DEVOIR DE LOYAUTÉ DES ADMINISTRATEURS

Le rôle du conseil d'administration est de gérer les affaires tant commerciales qu'internes de la société par actions[13]. Bien qu'ils soient étendus, les pouvoirs de gestion du conseil d'administration ne sont pas illimités. Dans l'exercice de leurs fonctions, les administrateurs doivent agir avec prudence, diligence et compétence dans le meilleur intérêt de la société par actions[14]. En outre, ils doivent « respecter les obligations que la loi, l'acte constitutif et les règlements [leur] imposent et agir dans les limites des pouvoirs qui [leur] sont conférés »[15].

Parmi les devoirs des administrateurs, le devoir de loyauté, qui commande d'agir dans le meilleur intérêt de la société, soulève des difficultés particulières en raison de l'incertitude entourant la notion de l'intérêt de la société par actions. Deux théories coexistent pour définir cette notion[16]. D'une part, la théorie contractuelle avance que l'intérêt de la société coïncide avec l'intérêt des actionnaires, véritables bénéficiaires des activités de celle-ci, qui désirent la maximisation des profits résultant de l'exploitation de l'entreprise. D'autre part, la théorie institutionnelle souligne que la société par actions est une personne morale ayant une existence autonome et une finalité spécifique qui ne correspond pas nécessairement à l'intérêt des actionnaires.

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11 Art. 3, 4 L.F.I.
12 Art. 100(2) L.F.I.
13 Art. 102 L.C.S.A.
14 Art. 122 L.C.S.A.
15 Art. 321 C.c.Q.
16 Pour une présentation des théories, voir Marcel LIZÉE, « Le principe du meilleur intérêt de la société commerciale en droit anglais et comparé », (1989) 33 *R.D. McGill* 653.

En droit canadien, la théorie contractuelle s'est imposée tant en jurisprudence qu'en doctrine comme principal cadre analytique du devoir de loyauté des administrateurs[17]. Sans aucun doute, la simplification de l'analyse des rapports entre les administrateurs, la société et les actionnaires qu'elle permet d'opérer y est pour quelque chose. En revanche, la théorie contractuelle ne permet pas de rendre compte adéquatement du faisceau d'intérêts qui se rencontrent dans le patrimoine de la société par actions. Dans son acception classique[18], elle empêche la considération des intérêts des divers intervenants dont le sort est étroitement lié à la société, tels que les créanciers, les employés, les collectivités où l'entreprise est exploitée, etc. Témoins des lacunes de la théorie contractuelle, un nombre croissant de législations légitiment la théorie institutionnelle en permettant au conseil d'administration de tenir compte des intérêts de ces intervenants[19].

La décision de la Cour supérieure dans l'affaire *Peoples* marque une volonté de rompre avec la théorie contractuelle et de faire place à une conception élargie de l'intérêt de la société par actions. Précurseur, le juge Greenberg adhère à la théorie institutionnelle pour interpréter le devoir de loyauté des administrateurs de Peoples. Sans manquer de nous rappeler le champ d'application étendu du devoir de loyauté (B), le juge Greenberg s'inspire de la théorie institutionnelle pour réitérer le devoir d'indépendance des administrateurs d'une filiale à l'égard de la société mère (A). Plus important encore, l'adhésion de la Cour à cette théorie mène au développement d'un devoir de loyauté des administrateurs à l'égard des créanciers de la société (C).

2.1 Le devoir de loyauté des administrateurs d'un réseau de sociétés par actions

Les regroupements d'entreprises présentent des défis particuliers pour le législateur. Du point de vue du droit des

17 *Infra* les notes 83-86 et le texte correspondant.

18 Voir, pour une interprétation renouvelée de la théorie contractuelle, Richard A. BOOTH, "Stockholders, Stakeholders, and Bagholders (or How Investor Diversification Affects Fiduciary Duty)", (1998) 53 *Bus. Law*, 429.

19 Pour une présentation des lois américaines, voir Lawrence E. MITCHELL, "A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes", (1992) 70 *Texas L. Rev.* 579.

sociétés, les problèmes procèdent de l'intégration des activités des filiales du groupe qui place les administrateurs dans des situations de conflits d'intérêts délicates[20]. Il convient de rappeler que dans les regroupements de sociétés à forte intégration horizontale ou verticale, les dirigeants de la société mère, qui détient le contrôle total ou presque total des filiales, exercent une emprise considérable sur l'administration des affaires de ces dernières. Concrètement, cette emprise se manifeste par la nécessité pour les administrateurs des filiales d'obtenir l'approbation de la direction de la société mère pour réaliser certains investissements ou transactions. Les administrateurs peuvent également être contraints d'établir un prix de transfert pour les transactions entre les membres du groupe, de manière à maximiser le profit qui résulte de la transaction. Enfin, la direction de la société mère peut obliger les filiales à faire des prêts sans intérêt ou à faible taux d'intérêt à d'autres membres du conglomérat. L'ensemble de ces pratiques est réalisé afin de maximiser la valeur du regroupement, sans égard à leurs effets pour les filiales prises isolément.

En atténuant le principe de la personnalité juridique distincte de la société par actions, l'intégration des activités des filiales du conglomérat soulève des risques d'abus. Par exemple, la société mère peut se servir de son pouvoir de contrôle pour réaliser des opérations dans son intérêt, mais au détriment de l'intérêt des filiales prises individuellement[21]. De plus, ces pratiques posent des risques d'abus des créanciers en rendant la solvabilité des filiales du groupe très volatile et leurs actifs très mobiles.

Deux doctrines sont mises de l'avant pour appréhender cette problématique. D'une part, la doctrine de l'entité juridique distincte, selon laquelle les sociétés faisant partie d'un conglomérat demeurent des personnes morales distinctes, est

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20 Voir Tom HADDEN, Robert E. FORBES et Ralph L. SIMMONDS, *Canadian Business Organizations Law*, Toronto, Butterworths, 1984, p. 620; Jonathan M. LANDERS, "A Unified Approach to Parent, Subsidiary & Affiliate Questions in Bankruptcy", (1975) 42 *U. Chi. L. Rev.* 589, 603-604.

21 CANADA, *Rapport de la Commission royale sur les groupements de sociétés*, Ottawa, Approvisionnement et services, 1978, p. 345-349; Tom HADDEN, Robert E. FORBES, Ralph L. SIMMONDS, *Canadian Business Organisations Law*, Toronto, Buttersworths, 1984, pp. 620-624.

présentée pour imposer un devoir d'indépendance aux administrateurs de filiales à l'égard de la société mère[22]. D'autre part, la théorie de l'entité économique est mise de l'avant pour attribuer la personnalité juridique à des entités économiques non incorporées, en se fondant sur son existence effective dans les faits[23]. La théorie de l'entité économique permet d'apprécier le devoir de loyauté des administrateurs au regard de l'intérêt du groupe d'entreprises, plutôt que de la filiale prise isolément.

Les deux doctrines sont présentées par les parties au litige dans l'affaire *Peoples* où la Cour doit déterminer si les administrateurs de la filiale Peoples, qui agissent dans l'intérêt des Magasins Wise, ont transgressé leur devoir de loyauté. Les procureurs des frères Wise, administrateurs de Peoples, s'appuient sur la doctrine de l'entité économique pour faire valoir que leurs clients n'ont pas contrevenu à leur devoir de loyauté en mettant en place la politique d'approvisionnement. Selon les procureurs des administrateurs, "the Individual Respondents were entitled to ignore the interest of Peoples as such and make decisions concerning the latter by taking into account only the best interests of Wise Stores"[24].

Il convient de noter que cette position est fondée sur une version tronquée de la théorie de l'entité économique. Dans la mesure où elle mène à l'attribution de la personnalité juridique à des groupements non incorporés, la théorie devrait avoir pour effet d'entraîner la mise au rancart du principe de la responsabilité limitée entre les filiales et la société mère. C'est d'ailleurs l'opinion du professeur Jonathan Landers qui propose une version modifiée de la théorie de l'entité économique.

> Under the test a parent will be held for the debt of its subsidiary when (1) it impairs the viability of the subsidiary as a separate business entity either at its inception or in its administration or fails to observe the procedural formalities that

22 Art. 301, 302, 309 C.c.Q.; *Salomon* c. *A. Salomon and Company Limited*, [1897] A.C. 22.

23 Adolf A. BERLE, "The Theory of Enterprise Entity", (1947) 47 *Col. L. Rev.* 343; William L. CARY et Melvin A. EISENBERG, *Corporations – Cases and Materials*, 7th ed., Westbury, The Foundation Press, 1995, p. 174-175.

24 *Peoples*, paragr. 146.

> would identify the subsidiary as a separate corporation; except (2) a creditor who was in a position to inquire cannot reach the parent's assets when a reasonable investigation of the financial status of the subsidiary and its relation to its parent would have indicated the shallowness of the subsidiary's resources.[25]

Autrement dit, la théorie de l'entité économique mise de l'avant par les frères Wise devrait conduire à une consolidation des droits et des obligations de chacune des unités du groupe. En corollaire, cela signifie qu'il est possible de soulever le voile corporatif pour rechercher la responsabilité de la société mère concernant les obligations de ses filiales. De fait, une revue de la jurisprudence américaine, britannique et canadienne indique que la théorie de l'entité économique est invoquée comme motif de soulèvement du voile corporatif[26]. En l'espèce, nous devons toutefois reconnaître que la levée du voile corporatif entre Peoples et Wise aurait peu d'intérêt pour les créanciers de la filiale étant donné l'état d'insolvabilité de la société mère. C'est sans doute pour cette raison que le tribunal n'explore pas la possibilité de pousser la logique de la théorie de l'entité économique jusqu'au soulèvement du voile corporatif.

Le syndic de Peoples, pour sa part, soutient que c'est plutôt la doctrine de l'entité juridique distincte qui doit s'appliquer[27]. Selon le syndic, les administrateurs d'une filiale ne peuvent faire passer les intérêts de la société mère ou du groupe avant les intérêts de la société dont ils sont les mandataires. Cette règle est non seulement nécessaire pour respecter le principe de l'arrêt *Salomon*[28]. maintenant codifié à l'article 309 C.c.Q., mais également pour assurer la protection des actionnaires minoritaires de la filiale en cause.

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25 Jonathan M. LANDERS, "A Unified Approach to Parent, Sudsidiary and Affiliate Questions in Bankruptcy" (1975) 42 *U. Chi. L. Rev.*, 589, 625-626.

26 Voir la jurisprudence citée par Phillip I. BLUMBERG, *The Multinational Challenge to Corporation Law*, New York, Oxford University Press, 1993; Tom HADDEN, Robert E. FORBES, Ralph L. SIMMONDS, *Canadien Business Organizations Law*, Toronto, Buttersworth, 1984, pp. 639-641; Neil C. SARGENT, "Corporate Groups and the Corporate Veil in Canada: A Penetrating Look at Parent-Subsidiary Relations in the Modern Corporate Enterprise", (1987) 17 *Man. L.J.* 156, 158 n. 10.

27 *Peoples*, paragr. 130-143.

28 *Salomon* c. *A. Salomon and company limited*, [1897] A.C. 22.

La Cour se range derrière l'opinion du syndic. Elle reconnaît, tout d'abord, l'existence d'un devoir d'indépendance pour les administrateurs de filiales à l'égard de la société mère ou des autres sociétés du conglomérat, en faisant sienne les observations des auteurs Hadden, Forbes et Simmonds: "It follows from the general principle that each company within a group is a separate legal entity that the directors of a subsidiary are both entitled and obliged to assert the interests of their own company as opposed to those of the group or of any other company within it"[29]. Ce devoir d'indépendance des administrateurs découle de leur devoir de loyauté à l'égard de la compagnie qui exige qu'ils n'agissent que dans l'intérêt de celle-ci[30]. Un des corollaires de ce devoir d'indépendance exige que les administrateurs conservent, dans l'exercice de leurs fonctions, une attitude d'esprit libre qui leur permette d'exercer sans entraves la discrétion qui leur a été accordée[31]. Les administrateurs peuvent consulter les actionnaires qui les ont désignés au sujet de la conduite des affaires de la compagnie[32]. Cependant, ils ne doivent pas promouvoir ou défendre les seuls intérêts des actionnaires qui les ont désignés, sans égard à l'intérêt de la compagnie[33]. Appliquant ces principes à l'espèce, la Cour statue que:

> ...the directors of a wholly-owned subsidiary may consider the best interests of the parent and, where those and the best interests of the subsidiary overlap or coincide, they may act accordingly. Where those respective interests are not congruent, they must attempt to conciliate the two. Hence, where there is mutuality of interests, there is no problem. However, where the best interests of the subsidiary are in

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29 Tom HADDEN, Robert E. FORBES, Ralph L. SIMMONDS, *Canadien Business Organizations Law*, Toronto, Buttersworth, 1984, p. 633.

30 Marc GIGUÈRE, «L'indépendance des administrateurs de compagnies», (1966) 26 *R. du B.* 160.

31 *Id.*, 166. Voir aussi art. 324 *C.c.Q.*

32 *820099 Ontario inc.* c. *Harold E. Ballard Ltd.*, (1992) 3 B.L.R. (2d) 113, 171 (Ont.Div.Ct.).

33 *Bergeron* c. *Ringuet*, [1958] B.R. 222; confirmé par [1960] R.C.S. 672; *820099 Ontario inc.* c. *Harold E. Ballard Ltd.*, (1992) 3 B.L.R. (2d) 113, 171 (Ont. Div. Ct.); *Deluce Holdings Inc.* c. *Air Canada*, (1993) 8 B.L.R. (2d) 294, 306-312 (Ont. Gen.Div.).

direct conflict with those of the parent, the former must prevail in regard to the actions of the directors of the subsidiary.[34]

En d'autres termes, les administrateurs ne peuvent sacrifier l'intérêt général de la filiale à l'intérêt du regroupement ou de la société mère comme l'ont fait les intimés en l'espèce en adoptant la politique d'approvisionnement[35].

Certains critiqueront la décision de la Cour d'utiliser la théorie de l'entité juridique distincte dans l'appréciation du devoir de loyauté en faisant valoir les difficultés que cette position posera en pratique pour les administrateurs de filiales. Ces critiques doivent toutefois être mises en perspective, au regard du rendement financier plutôt mitigé des regroupements d'entreprises mis en évidence par les chercheurs en économie financière[36]. Dans ce contexte, nous pouvons nous interroger sur l'opportunité pour la réglementation de favoriser la formation de conglomérats. Des données plus précises sur la contribution économique positive des regroupements d'entreprises méritent d'être fournies.

Plus problématique, il nous semble, s'avère la confusion qu'opère le juge Greenberg entre le devoir de loyauté des administrateurs édicté par l'article 122 L.C.S.A. et les devoirs indirects issus du recours pour oppression, lorsqu'il s'inspire des décisions rendues à l'égard de ce recours pour établir le contenu du devoir de loyauté[37]. Certes, il existe un chevauchement important entre ces deux catégories de devoirs[38]. Cependant, le recours pour oppression repose fondamentalement sur l'équité, notion beaucoup plus vaste que la loyauté

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34 *Peoples*, paragr. 149. Voir aussi *Charterbridge Corporation Ltd* c. *Lloyds Bank*, [1970] Ch 62.

35 Marc GIGUÈRE, « L'indépendance des administrateurs de compagnies », (1966) 26 *R. du B.* 160, 164.

36 Voir, par exemple, David A. STANGELAND et al., « À plein régime: une étude de cas du groupe Hees-Edper », dans Ronald J. DANIELS et Randall MORCK, (dir.), *La prise de décision dans les entreprises au Canada*, Calgary, Calgary University Press, 1995, p. 263, p. 264-266.

37 *Peoples*, paragr. 135-174.

38 Jacob S. ZIEGEL, Ronald J. DANIELS, David L. JOHNSTON, Jeffrey G. MACINTOSH, *Partnerships and Business Corporations*, 3e éd., vol. 2, Toronto, Carswell, 1994, p. 1190-1192.

exigée par le devoir imposé par l'article 122 L.C.S.A.[39]. Aussi, tout en reconnaissant que la transgression du devoir de loyauté par les administrateurs mène fréquemment les tribunaux à conclure à l'oppression[40], nous devons constater que l'inverse n'est pas nécessairement vrai.

En outre, nous devons souligner le risque d'une incompatibilité dans certaines circonstances entre le devoir de loyauté et les devoirs indirects imposés par l'article 241 L.S.C.A. Rappelons que le devoir de loyauté exige que les administrateurs agissent dans l'intérêt de la société par actions. En revanche, le recours pour oppression ne traite pas de l'intérêt de la société par actions, personne juridique distincte, mais plutôt de l'intérêt des diverses constituantes de cette dernière telles que les actionnaires, les créanciers, les administrateurs ou les dirigeants. Or, l'obligation d'agir dans l'intérêt de la société peut exiger parfois que les administrateurs fassent passer les intérêts de ces constituantes au second plan. Procéder à une intégration des devoirs sous les articles 122 et 241 L.S.C.A. pourrait par conséquent placer les administrateurs devant un conflit insoluble, comme le soulignait la Cour d'appel de l'Ontario dans l'affaire *KeepRite*:

> Acting in the best interests of the corporation could, in some circumstances, require that a director or officer act other than in the best interests of one of the groups protected under s. 234 [241]. To impose upon directors and officers a fiduciary duty to the corporation as well as to individual groups of shareholders of the corporation could place directors in a position of irreconcilable conflict, particularly in situations where the corporation is faced with adverse economic conditions.[41]

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39 *Id.* Voir *Cogeco Cable Inc.* c. *CFCF Inc.*, [1996] R.J.Q. 1360, 1377 (C.S.); *First Edmonton Place Limited* c. *315888 Alberta Ltd.*, (1989) 40 B.L.R. 28, 50-60 (Alta.Q.B.). Voir en général Mary CONDON, "Pandora's Box or Trojan Horse? Recent Developments in the Use of the Oppression Remedy under the CBCA", dans Conférences commémoratives Meredith, 1994/95, *Les sociétés par actions à la croisée des chemins*, Montréal, Faculté de droit, Université McGill, pp. 466 et suiv.

40 Voir, par exemple, *Calmont Leasing Ltd.* c. *Kredl*, [1993] 7 W.W.R. 428 (Alta. Q.B.); conf. [1995] 8 W.W.R. 179 (Alta. C.A.)

41 *Brant Investments Inc.* c. *KeepRite Inc.*, (1991) 3 O.R. (3d) 289, 301 (C.A.).

L'opinion du juge Greenberg sur cette question doit donc être abordée avec beaucoup de circonspection. Permettre aux tribunaux de recourir à la notion d'équité pour interpréter le devoir de loyauté est susceptible de miner les balises qui ont été établies par la jurisprudence pour circonscrire le contenu de ce devoir et de générer une confusion inutile[42].

2.2 Le devoir de loyauté des administrateurs d'une filiale lors de l'octroi d'aide financière à la société mère

Subsidiairement, les administrateurs de Peoples font valoir qu'ils n'ont pas transgressé leur devoir de loyauté à l'égard de Peoples en accordant une aide financière aux Magasins Wise par le biais de la politique d'approvisionnement, puisqu'une telle aide financière est permise par le sous-paragraphe 44(2)c) L.C.S.A.[43]. Rappelons que le paragraphe 44(1) L.C.S.A. restreint l'octroi de prêts, de cautions et d'autres formes d'aide financière par la société à diverses personnes qui entretiennent des liens avec celle-ci, ainsi qu'à tout acheteur d'actions de la société ou d'une société de son groupe[44]. Plus particulièrement, le paragraphe interdit l'attribution d'aide financière dans ces deux cas lorsque les administrateurs ont des motifs raisonnables de croire que la société est ou deviendrait insolvable, ou que son actif est ou serait inférieur au total de son passif et de son capital déclaré. Le paragraphe 44(2) L.C.S.A. édicte certaines exceptions à cette règle en permettant l'aide financière nonobstant le fait que la société ne rencontre pas le test de solvabilité ou le test comptable énoncé au paragraphe 44(1) L.C.S.A. Selon le sous-paragraphe 44(2)c) L.C.S.A., la société peut accorder une aide

42 Dans l'affaire *Brant Investments Inc. C. KeepRite Inc.*, (1991) 3 O.R. (3d) 289, la Cour note: "It must be recalled that in dealing with s. 234 [maintenant 241], the results of the impugned acts, the protected groups, and the powers of the court to grant remedies are all extremely broad. To import the concept of breach of fiduciary duty into that statutory provision would not only complicate its interpretation and application, but could be inimical to the statutory fudiciary duty imposed upon directors".

43 *Peoples*, paragr. 145-146.

44 Pour une étude approfondie de la réglementation de l'aide financière, voir ALBERTA, Institute of Law Research and Reform, *Financial Assistance by a Corporation: Section 42, The Business Corporations Act (Alberta)*, Report for Discussion No. 5, Edmonton, 1987.

financière, notamment sous forme de prêt ou de caution à sa société mère si elle lui appartient en toute propriété.

La Cour rejette la prétention des intimés en affirmant que le fait de respecter les exigences législatives en matière d'octroi d'aide financière n'exonère pas les administrateurs de leur devoir général de loyauté: "compliance by directors with Section 44(2)c), or more correctly acting as permitted therein, does not necessarily mean that they have complied with all their duties"[45]. L'auteur Martel s'inquiète de la position de la Cour en soulignant qu'elle risque de mener à une remise en cause des opérations de financement et de garanties intersociétés dont la légalité est reconnue par le sous-paragraphe 44(2)c) L.C.S.A.

> Cette déclaration a de quoi faire sursauter ceux qui participent à des financements comportant des cautionnements "filiale-mère". Ces cautionnements risquent, en vertu de ce principe, d'entraîner la responsabilité personnelle des administrateurs de filiales [...] Les aides financières "upstream" ne sont pas, semble-t-il, autant hors de portée qu'on pourrait le croire...[46]

Il est vrai que le sous-paragraphe 44(2)c) L.C.S.A. a été édicté dans le but de légitimer les ententes d'aide financière en amont (*upstream*) qui sont couramment conclues en pratique lors d'acquisition par voie d'effet levier. Ce type d'aide financière permet « à une société qui achète toutes les actions d'une autre société d'obtenir alors une aide financière de cette filiale qui lui appartient en toute propriété, y compris une aide financière pour tous emprunts contractés pour acheter la filiale »[47]. Toutefois, dans la mesure où l'objectif de l'article 44 L.C.S.A. est de protéger les créanciers d'une société contre une réduction importante de son capital ou son insolvabilité, nous devons reconnaître que l'exception prévue au sous-paragraphe 44(2)c) L.C.S.A. est étonnante en ce qu'elle a pour effet d'enlever toute protection aux créanciers lors de telles opérations. En ce sens, la prise de position du juge Greenberg

45 *Peoples*, paragr. 148.
46 Paul MARTEL, « Une véritable bombe à retardement », (1999) *La presse juridique*, vol. 7, n° 1, p. 3.
47 INDUSTRIE CANADA, *Aide financière et dispositions connexes*, Ottawa, Document de consultation, 1996, p. 10.

semble procéder d'une volonté de maintenir un certain niveau de protection pour les créanciers lors d'acquisition par voie d'effet levier. De fait, il est possible de soutenir que, à l'instar d'Industrie Canada, le juge Greenberg conçoit l'article 44 L.C.S.A. comme une manifestation particulière du devoir de loyauté des administrateurs.

> Le principal défi a toujours été de procurer une protection raisonnable tout en octroyant à la société la souplesse nécessaire à ses opérations financières et d'affaires.
>
>> Bien que les principales règles du droit des sociétés qui régissent les conflits d'intérêts soient les devoirs fiduciaires, il existe nombre d'autres règles de la sorte [...] Chacune de ces règles, y compris l'article 44, fait partie de l'arsenal de la LCSA qui permet de contrôler les initiés qui abusent de leur position d'autorité dans la société.[48]

C'est donc dire que les administrateurs qui respectent l'article 44 L.C.S.A. lors de l'attribution d'aide financière ne sont pas libérés pour autant de leur devoir général de loyauté.

À cet égard, l'opinion de la Cour ne s'écarte pas véritablement des principes fondamentaux du droit des sociétés par actions. Il est depuis longtemps reconnu que le devoir de loyauté s'applique à l'exercice de tout pouvoir par les administrateurs, notamment sous la forme de la théorie de la finalité des pouvoirs[49]. Selon cette théorie, le devoir de loyauté exige que les administrateurs évitent de se servir des pouvoirs qui leur ont été conférés dans un but impropre qui ne participe pas de l'intérêt de la société. S'autorisant de cette théorie, les tribunaux ont sanctionné l'utilisation du pouvoir d'émettre des actions lorsque celui-ci était utilisé par les administrateurs « dans le simple but de se perpétuer dans l'exercice de

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48 *Id.*, paragr. 34.

49 Sur la théorie de l'abus de pouvoir, voir généralement *Re 347883 Alberta Ltd.* c. *Producers Pipeline Inc.*, (1991) 80 D.L.R. (4d) 359 (C.A. Sask.); *Teck Corp.* c. *Millar*, (1973) 33 D.L.R. (3d) 288 (C.S.C.-B.); Bruce WELLING, *Corporate Law in Canada – The Governing Principles*, Toronto, Butterworths, 1991, p. 336-356; Edmund M.A. KWAW, *The Law of Corporate Finance in Canada*, Toronto, Butterworths, 1997, p. 33-45.

leur pouvoir en maintenant leur contrôle ou celui de leurs amis au sein de l'assemblée générale »[50]. De même, la Cour d'appel statuait récemment que le caractère discrétionnaire de la déclaration de dividendes n'exonérait pas les administrateurs de leur devoir d'agir de bonne foi dans l'intérêt de la société[51].

Enfin, il ne faut pas exagérer les risques que pose la reconnaissance d'un devoir de loyauté pour la légalité de telles transactions. Il convient de rappeler que le devoir de loyauté s'adresse à la société. L'application de ce devoir – notamment sous la forme de la théorie de la finalité des pouvoirs – doit donc tenir compte de l'intérêt de l'ensemble des constituantes et non seulement de l'intérêt des créanciers[52]. En outre, la sanction du devoir de loyauté des administrateurs par un créancier de la société passe nécessairement par l'utilisation de l'action dérivée qui fournit deux mesures de contrôle restreignant les risques d'opportunisme des créanciers[53].

Tout d'abord, les créanciers ne sont pas reconnus automatiquement comme plaignants dans le cadre de l'action dérivée. Le paragraphe 238d) L.C.S.A. attribue aux tribunaux la discrétion d'attribuer à une personne le statut de plaignant ayant qualité pour intenter une action dérivée[54]. Selon la jurisprudence, le statut de plaignant ne devrait être accordé à un créancier que lorsque ce dernier démontre que, dans les circonstances, la justice et l'équité exigent qu'il puisse intenter le recours[55]. Deuxièmement, au stade de la réception du recours, le plaignant doit rencontrer une série de critères destinés à restreindre « les possibilités d'abus que représentent les poursuites de harassement intentées comme moyen d'extorquer à l'administration une transaction coûteuse aux frais

50 *Beauchamp* c. *Les contenants sanitaires C.S. inc.*, [1979] C.S. 414, 418.

51 *Bergeron* c. *Bergeron-Faucher*, R.E.J.B. 98-06831 (C.A.) p. 6. Voir aussi *Forget* c. *Société financière Desjardins-Laurentienne inc.*, R.E.J.B. 99-10474 (C.S.) paragr. 92-104 (Adoption d'une politique d'indemnisation des cadres).

52 *Infra* les notes 83-87 et le texte correspondant.

53 Art. 239 L.C.S.A.

54 Pour une analyse détaillée de la notion de plaignant, voir J.Anthony VAN DUZER, "Who May Claim Relief from Oppression: The Complainant in Canadian Corporate Law", (1993) 25 *Ottawa L. Rev.* 463.

55 *First Edmonton Place Ltd.* c. *315888 Alberta Ltd.*,(1989) 40 B.L.R. 28, 62-69 (Alta Q.B.); *Royal Trust Corporation of Canada* c. *Hordo*, (1994) 10 B.L.R. (2d) 86 (Ont. Gen. Div.).

de la corporation »[56]. Parmi ces critères, notons que le plaignant doit agir de bonne foi et démontrer qu'il semble être dans l'intérêt de la société que l'ordonnance soit rendue[57]. Ainsi, les tribunaux refusent de faire droit aux recours qui paraissent frivoles, vexatoires ou voués à l'échec[58].

2.3 La reconnaissance d'un devoir de loyauté des administrateurs à l'égard des créanciers de la société

Tel que nous l'avons mentionné précédemment, les administrateurs ont le devoir d'agir dans le meilleur intérêt de la société par actions. S'appuyant sur la théorie contractuelle, la doctrine et la jurisprudence dominantes s'entendent pour interpréter ce devoir comme signifiant que les administrateurs doivent agir dans l'intérêt des actionnaires, véritables bénéficiaires des activités de la société par actions. Les administrateurs n'ont pas à considérer les intérêts des divers intervenants de la société, mis à part les intérêts des actionnaires. En ce sens, les intérêts des créanciers demeurent étrangers à l'intérêt de la société, même lorsque la contribution financière excède celle des actionnaires[59].

Depuis une vingtaine d'années, la logique de la théorie contractuelle est toutefois érodée par une jurisprudence issue des pays du Commonwealth qui propose une interprétation alternative du devoir de loyauté des administrateurs fondée sur la théorie institutionnelle. Selon cette jurisprudence, les intérêts des créanciers méritent d'être considérés par les administrateurs puisqu'ils participent, dans certaines

56 Robert DICKERSON, *Propositions pour un nouveau droit des corporations commerciales canadiennes*, Ottawa, Information Canada, 1971. vol. 1, paragr. 482.

57 *First Edmonton Place Ltd.* c. *315888 Alberta Ltd.*, (1989) 40 B.L.R. 28, 70-75, (Alta Q.B.).

58 *Re Marc-Jay Investments Inc. and Levy*, (1974) 50 D.L.R. (3d) 45, 47 (Ont. H.C.); *Royal Trust Corporation of Canada* c. *Hordo*, (1994) 10 B.L.R. (2d) 86 (Ont. Gen. Div.)

59 Voir, par exemple, Paul MARTEL, « L'insolvabilité de la compagnie et la responsabilité des administrateurs: l'émergence d'un «insolvent trading» judiciaire? », dans Service de la formation permanente, Barreau du Québec, *Développements récents en droit commercial*, Cowansville, Éditions Yvon Blais, 1998, p. 61; Maurice MARTEL et Paul MARTEL, *La compagnie au Québec – les aspects juridiques*, Montréal, Wilson & Lafleur Martel ltée, 1998, p. 23-48 à 23-50.

circonstances, de l'intérêt de la société. Ignorée jusqu'à présent par les autorités québécoises, cette interprétation du devoir de loyauté est explorée pour la première fois par le juge Greenberg dans l'affaire *Peoples*. Aussi, il est nécessaire de s'arrêter aux développements consacrés par la Cour à cette question.

L'imposition d'un devoir de loyauté aux administrateurs à l'égard des créanciers de la société peut être envisagée sous deux angles différents. D'une part, nous pouvons envisager l'imposition d'un devoir de loyauté direct en ayant recours aux règles générales de la responsabilité civile contractuelle et extracontractuelle. D'autre part, une interprétation renouvelée des règles du droit des sociétés peut permettre de reconnaître un devoir de loyauté indirect aux administrateurs à l'endroit des créanciers. Ces deux approches sont abordées par la Cour dans l'affaire *Peoples*. Bien qu'ils soient importants, les développements que consacre la Cour à cette question n'en demeurent pas moins schématiques. Dans cette section, nous tenterons d'examiner plus en détail le fondement légal ainsi que l'étendue du devoir de loyauté des administrateurs à l'égard des créanciers.

2.3.1 L'EXISTENCE D'UN DEVOIR DIRECT À L'ÉGARD DES CRÉANCIERS

La possibilité d'imposer un devoir de loyauté direct aux administrateurs à l'égard des créanciers prend sa source dans la décision de la House of Lords dans l'affaire *Winkworth* où Lord Templeman affirma : “A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors”[60]. Cette décision, fortement critiquée en

60 *Winkworth* c. *Edward Baron Development Co. Ltd.*, [1986] 1 W.L.R. 1512, 1515 (H.L.).

Grande-Bretagne[61], a été rendue conformément aux principes de la *common law*. Aussi, il est étonnant de voir la Cour dans l'affaire *Peoples* y référer comme si le principe énoncé pouvait être transposé en droit civil sans autre justification. Pourtant, le rôle supplétif du droit civil en droit des sociétés est désormais reconnu explicitement par l'article 300 du *Code civil du Québec*[62]. En l'occurrence, quelle règle de droit civil pourrait permettre l'intégration du principe énoncé par Lord Templeman en droit québécois?

La première avenue consiste à rechercher la responsabilité des administrateurs pour l'inexécution des obligations contractuelles assumées par la société à l'égard des tiers. Cette approche se heurte toutefois au principe de l'immunité du mandataire en matière contractuelle, codifié à l'article 2157 C.c.Q., dont bénéficient les administrateurs[63]. Selon ce principe, l'exécution du mandat n'emporte pas la création de relation contractuelle entre le mandataire et le tiers. Le mandataire n'est qu'un intermédiaire qui représente le mandant pour l'accomplissement d'actes juridiques liant ce dernier à l'égard des tiers. Ainsi, le mandataire n'est pas tenu responsable des obligations qu'il contracte pour le compte du mandant lorsqu'il agit dans le cadre de ses fonctions. S'il respecte les limites de son mandat, « le mandataire n'assume à l'égard des tiers aucune responsabilité pour des dommages découlant

61 Voir Daniel D. PRENTICE, "Creditor's Interest and Director's Duties", (1990) 10 *Oxford J. Leg. St.* 265, 275-276; L.S. SEALY, "Personal Liability of Directors and Officers for Debts of Insolvent Corporations: A Jurisdictional Perspective (England)", dans Jacob S. ZIEGEL, (dir.), *Current Developments in International and Comparative Corporate Insolvency Law*, Oxford, Clarendon Press, 1994 p. 485 à la p. 487 où le professeur Sealy remarque à propos de la décision dans *Winkworth*: "It is probably right to dismiss remarks such as these as little more than so much hot air".

62 Sur le rôle supplétif du Code civil à l'égard de la *Loi canadienne sur les sociétés par actions*, voir *Nadeau* c. *Nadeau*, [1988] R.J.Q. 2058 (C.A.); Caroline PRATTE, « Essai sur le rapport entre la société par actions et ses dirigeants dans le cadre du *Code civil du Québec* », (1994) 39 *R.D. McGill* 1.

63 Selon l'art. 321 C.c.Q., les administrateurs sont considérés comme les mandataires de la société par actions.

d'une faute contractuelle, laquelle incombe, corrélativement, au mandant »[64].

Il en va toutefois autrement lorsque le mandataire excède les limites de son mandat. Dans ce cas, le mandataire pourra être tenu responsable envers les tiers de la faute contractuelle que la société a commise par son intermédiaire[65]. Pour déterminer si les administrateurs agissent à l'intérieur des limites de leur mandat, il s'agit alors de déterminer s'ils se sont conduits de bonne foi dans le meilleur intérêt de la société en menant celle-ci à manquer à ses obligations contractuelles. Si tel est le cas, les administrateurs pourront être exonérés puisque leurs actes s'inscrivent dans le cadre de leurs fonctions et sont conformes à leur devoir de mandataire. À titre d'exemple, dans *Groupe Cèdrico Inc.* c. *Gagnon*[66], le défendeur, administrateur et dirigeant de Bois Bolduc et Dupuy Limitée, vendit du bois acheté de la demanderesse pour le compte de sa société à un prix inférieur au prix coûtant. La Cour retint la responsabilité extracontractuelle du défendeur en soulignant que sa conduite s'avérait une machination frauduleuse destinée à l'avantager au détriment de sa société. N'agissant plus dans le cadre de son mandat, le défendeur ne pouvait donc invoquer l'immunité du mandataire en matière contractuelle[67].

Dans le contexte de l'affaire *Peoples*, le principe de l'immunité des mandataires vient limiter les possibilités de rechercher la responsabilité contractuelle des administrateurs pour l'inexécution des obligations de la société à l'égard de ses créanciers[68]. Certes, il aurait été possible de soutenir que les administrateurs ont commis une faute contractuelle à l'égard de Marks & Spencer en mettant en place la nouvelle politique

64 L. Hélène RICHARD, « Le devoir d'indemnisation de la compagnie québécoise: réflexions sur la responsabilité personnelle du mandataire », (1988) 48 *R. du B.* 785. Voir Claude FABIEN, « Les règles du mandat », *R.D.- Mandat - Doctrine - Document 1*, 1986, n°. 245, 250, p. 224, 228. Voir, par exemple, *Métaux Richard Angers Ltée* c. *Compagnie d'assurance canadienne générale*, JE 97-2239 (C.S.); *Immeubles G.L.M.C. Inc.* c. *Tremblay*, J.E. 95-522 (C.Q.)

65 Art. 2158 C.c.Q.

66 *Groupe Cèdrico Inc.* c. *Gagnon*, [1995] A.Q. N°. 1842 (C.S.).

67 Pour une solution similaire en *common law*, voir, *Kepic* c. *Tecumseh Road Builder*, (1985) 29 B.L.R. 85 (C.S. Ont.).

68 Voir *Dorion, Jolin et Associés* c. *Plante*, J.E. 82-577 (C.S.)

d'approvisionnement. En effet, cette dernière constituait une forme d'aide financière interdite par le contrat. Cependant, il est raisonnable d'affirmer que la décision des administrateurs était directement rattachée à l'exécution de leur mission qui consiste en l'administration des affaires de la société, en ce qu'ils tentaient par leur décision de réaliser les économies d'échelle ayant motivé l'acquisition de Peoples[69]. À cet égard, la Cour note que les frères Wise n'ont pas agi de manière malhonnête ou frauduleuse en prenant cette décision et n'ont pas cherché à en dériver des bénéfices personnels[70]. Par conséquent, les actions des administrateurs devraient être imputées à la société par l'effet du principe de l'article 2157 C.c.Q.

En second lieu, nous pouvons envisager le devoir des administrateurs à l'égard des créanciers sous l'angle extracontractuel. L'article 1457 C.c.Q. impose à toute personne douée de raison une obligation générale de prudence et de diligence envers autrui. S'appuyant sur cette règle, la doctrine et la jurisprudence dominantes soutiennent que le mandataire demeure responsable de la transgression des obligations légales envers les tiers, peu importe qu'il agisse ou non dans le cadre de ses fonctions[71]. Ainsi, lorsqu'il commet une faute extracontractuelle, « [l]e mandataire ne peut se cacher derrière son mandat pour échapper à sa responsabilité »[72].

S'il est certes possible que le cocontractant du mandant puisse rechercher la responsabilité extracontractuelle du mandataire, le cocontractant doit être en mesure de démontrer que la faute du mandataire ne résulte pas uniquement de la transgression d'une obligation contractuelle, mais bien de celle d'une obligation légale[73]. À titre d'exemple, dans *Immeubles G.L.M.C. Inc.* c. *Tremblay*[74], la Cour rejeta le

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69 Art. 102 L.C.S.A.; art. 311, 2158 C.c.Q.

70 *Peoples*, paragr. 139, 153.

71 *Cafo Limited.* c. *Harper*, [1968] C.S. 235; *Proulx* c. *Entreprises de radiodiffusion de la Capitale inc.* [1996] R.R.A. 714 (C.S.); *Groupe Cèdrico Inc.* c. *Gagnon*, [1995] A.Q. n° 1842 (C.S.); Claude MASSE, « La responsabilité civile », dans *La réforme du Code civil*, t. 2, Sainte-Foy, P.U.L., 1993, p.241, aux pages 263-264.

72 Claude FABIEN, « Les règles du mandat », *R.D. - Mandat - Doctrine - Document 1*, 1986, n°. 244, p. 223.

73 *Houle* c. *Banque Nationale du Canada*, [1990] 3 R.C.S. 122, 165-167.

74 *Immeubles G.L.M. Inc.* c. *Tremblay*, J.E. 95-522 (C.Q.).

recours en responsabilité extracontractuelle contre les administrateurs d'une société pour le défaut de paiement d'une commission. La Cour souligna que, puisqu'ils avaient commis leurs fautes dans l'exercice de leurs fonctions lors de l'exécution du contrat intervenu entre leur société et le tiers, les administrateurs bénéficiaient de l'immunité du mandataire en matière de responsabilité contractuelle. Pour pouvoir rechercher la responsabilité extracontractuelle des administrateurs, il aurait fallu que la demanderesse établisse que les fautes alléguées résultaient de la transgression d'une obligation légale indépendante de la relation contractuelle en cause[75].

En revanche, de nombreuses décisions reconnaissent la responsabilité personnelle des administrateurs pour la transmission d'information fausse ou trompeuse lors de la négociation d'un contrat avec un tiers pour le compte de la société[76]. À titre d'exemple, dans *Cafo Ltd.* c. *Harper*[77], la Cour reconnut la responsabilité du défendeur qui avait fait de fausses représentations sur l'existence d'un contrat d'assurance lors de la négociation d'un contrat de prêt pour le compte de sa société. De telles décisions reconnaissent que le dol précontractuel permet de fonder un recours en responsabilité extracontractuelle puisqu'il consiste en la transgression d'une obligation légale[78]. Par conséquent, le mandataire ne peut invoquer l'immunité de l'article 2157 C.c.Q.

Appliqués à l'affaire *Peoples*, ces principes exigent que les créanciers soient en mesure d'établir une faute extracontractuelle des administrateurs qui résulte de la transgression d'un devoir légal prenant sa source à l'article 1457 C.c.Q. La

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75 Voir aussi *Société d'entraide économique du Témiscamingue* c. *Valiquette*, J.E. 86-547 (C.S.) (les administrateurs sont exonérés de toute responsabilité délictuelle quant à la violation d'une clause du contrat hypothécaire).

76 *Attilasoy* c. *Crown Trust Company*, [1974] C.A. 442; *Banque d'épargne* c. *Geddes*, (1890) 6 M.L.R. 243, 245; *Cloutier* c. *Dion*, [1954] B.R. 595; *Fromages Claude Inc.* c. *Deshaies*, J.E. 95-742 (C.Q.); *Les métaux Richard Angers Ltée* c. *Compagnie d'assurance canadienne générale*, J.E. 97-2239 (C.S.); *Mondo Rubber (Canada) Ltée* c. *Mignault*, [1981] C.S. 1048; *Banque canadienne impériale de commerce* c. *Lavallée*, J.E. 94-1864 (C.S.); *Tremblay* c. *Demers*, R.E.J.B. 98-09962 (C.S.).

77 *Cafo Limited* c. *Harper*, [1968] C.S. 235.

78 Adrian POPOVICI, *La couleur du mandat*, Montréal, Les Éditions Thémis, 1993, p. 363-365

faute doit être indépendante des contrats entre les créanciers et la société et doit pouvoir exister même en l'absence de ceux-ci. En l'espèce, ce critère semble difficile à rencontrer. Les faits pouvant être reprochés aux administrateurs de Peoples consistent à ne pas avoir protégé les intérêts des créanciers de la société dans l'administration des affaires, particulièrement en implantant la nouvelle politique d'approvisionnement. Or, l'obligation de protéger les intérêts des créanciers ne peut s'apprécier qu'au regard des contrats qui lient ces derniers à la société. Ce sont les termes particuliers de chacun des contrats qui permettent de définir l'intérêt des créanciers et d'énoncer les règles de conduite qui devraient s'imposer aux administrateurs. Dans ce contexte, il paraît difficile de conclure que la faute reprochée est de nature extracontractuelle.

En terminant, nous devons signaler que le recours pour oppression édicté par l'article 241 L.C.S.A. peut permettre d'imposer un devoir direct aux administrateurs à l'égard des créanciers de la société par actions. Une jurisprudence de plus en plus abondante semble reconnaître que les administrateurs ne peuvent exercer leurs pouvoirs de manière à ce que la société abuse des droits des créanciers ou porte atteinte injustement à leurs intérêts[79]. L'analyse de l'impact de l'article 241 L.C.S.A. dépasse toutefois le cadre du présent commentaire et doit par conséquent être remise à une autre occasion.

2.3.2 L'EXISTENCE D'UN DEVOIR INDIRECT À L'ÉGARD DES CRÉANCIERS

Bien qu'elle fasse référence avec approbation à l'affaire *Winkworth*, la Cour, dans l'affaire *Peoples*, laisse transparaître son ambivalence à l'endroit de cette position en citant également les autorités qui favorisent la création d'un devoir indirect de loyauté à l'égard des créanciers. Ainsi, le juge Greenberg réfère à la jurisprudence australienne, néozélandaise

79 Voir la jurisprudence citée et analysée par Paul MARTEL, « L'insolvabilité de la compagnie et la responsabilité des administrateurs: l'émergence d'un «insolvent trading» judiciaire? », dans Service de la formation permanente, Barreau du Québec, *Développements récents en droit commercial*, Cowansville, Éditions Yvon Blais, 1998, p. 67-82; Jacob S. ZIEGEL, "Creditors as Corporate Stakeholders: The Quiet Revolution - An Anglo-Canadian Perspective", (1993) 43 *U.T.L.J.* 511, 526-529.

et britannique qui présente le devoir de loyauté des administrateurs comme s'adressant à la société, mais exigeant, dans certaines circonstances, la prise en compte de l'intérêt des créanciers[80]. L'opinion du juge Mason de la Haute Cour d'Australie, dans *Walker* c. *Wimborne*, citée par le juge Greenberg, synthétise cette seconde façon de concevoir le devoir des administrateurs à l'égard des créanciers:

> It should be emphasized that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them.[81]

Il est aisé de percevoir l'influence de la conception institutionnelle de l'intérêt de la société à la lecture de cette opinion de la Haute Cour d'Australie. Rappelons que la conception institutionnelle s'appuie sur le principe que la société par actions est une entité juridique distincte de ses membres. De ce principe, la conception institutionnelle infère le corollaire que la société par actions poursuit des objectifs spécifiques ne correspondant pas nécessairement à ceux des actionnaires[82]. Dans cette perspective, le devoir de loyauté des administrateurs consiste à permettre à la société de réaliser sa finalité.

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80 Pour une revue des principales décisions, voir Francis DAWSON, "Acting in the Best Interests of the Company – For Whom Are Directors Trustees?", (1984) 11 *N.Z.U.L.Rev.* 68; John H. FARRAR, "The Responsibility of Directors and Shareholders for a Company's Debts under New Zealand Law", dans Jacob S. ZIEGEL, (dir.), *Current Developments in International and Comparative Corporate Insolvency Law*, Oxford, Clarendon Press, 1994, p. 521; Ross GRANTHAM, "The Judicial Extension of Directors' Duties to Creditors", [1991] *J.B.L.* 1; Jacob S. ZIEGEL, *Id.*

81 *Walker* c. *Wimborne* (1976) 137 C.L.R. 1, 6-7. *Voir aussi Nicholson* c. *Permakraft (NZ) Ltd.* [1985] 1 N.Z.L.R. 242, 249-250 (C.A.): "The duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider inter alia the interests of creditors." *Kinsela* c. *Russel Kinsela PTY Ltd.*, [1986] 4 N.S.W.L.R. 722,732;*Yukong Line Ltd.* c. *Rendsburg Investments Corporation (No 2)*, [1998] 1 W.L.R. 294.

82 *Allen* c. *Gold Reefs of West Africa*, [1900] 1 Ch. 656, 671 : "[i]t must be exercised, not only in the manner required by law, but also *bona fide for the benefit of the company as a whole*, and it must not be exceeded." Voir aussi *Bergeron* c. *Ringuet*, [1958] B.R. 222, 236; [1960] R.C.S. 672, 683.

Traditionnellement, la conception institutionnelle de l'intérêt de la société a eu peu d'effet sur les devoirs des administrateurs en raison de l'acception étroite donnée à la finalité de la société. Ainsi, la doctrine et la jurisprudence majoritaires, dans le sillage de l'affaire *Arderne Cinemas*, considèrent que la finalité de la société consiste en la maximisation des profits[83]. Cette interprétation a pour effet de vider la finalité de la société de son sens en la faisant coïncider avec l'intérêt des actionnaires, comme le favorise la conception contractuelle de l'intérêt de la société.

L'interprétation étroite de la finalité de la société fait toutefois l'objet de nombreuses remises en question depuis plusieurs années par des commentateurs qui critiquent l'objectif de maximisation des profits et favorisent une plus grande responsabilité sociale de la société par actions[84]. Les tenants de ce mouvement de responsabilité sociale militent en faveur d'une prise en compte des intérêts des individus et des institutions qui sont affectés par les activités corporatives tels que les employés, les clients, les fournisseurs, la communauté dans laquelle œuvre l'entreprise, les gouvernements, etc.

Malgré la vitalité de ce mouvement de réforme, les tribunaux canadiens sont demeurés relativement conservateurs

83 *Greenhalgh* c. *Arderne Cinemas*, [1951] Ch. 286, 291 (C.A.): "the phrase 'the company as a whole', does not [...] mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body." Voir Yves LAUZON, « La perception judiciaire des devoirs des administrateurs de personnes morales: quel progrès? », dans Service de la formation permanente du Barreau du Québec, *Développements récents en droit commercial*, Cowansville, Éditions Yvon Blais, 1998, p. 151 à la p. 180; Maurice MARTEL et Paul MARTEL, *La Compagnie au Québec - les aspects juridiques*,Montréal, Wilson & Lafleur Martel Ltée, 1998, p. 23-49, 23-50; E.E. PALMER, "Directors' Powers and Duties", dans Jacob S. ZIEGEL, *Études sur le droit canadien des compagnies*, vol. 1, Toronto, Butterworths, 1967, p. 371.

84 Canada, *Rapport de la Commission royale d'enquête sur les groupements de sociétés*, Ottawa, Approvisionnements et service, 1978, p.419-441; Janis SARRA, "Corporate Governance Reform: Recognition of Workers' Equitable Investments in the Firm", (1999) 32 *Can. Bus. L.J.* 383; Symposium: "Corporate Stakeholder Conference", (1993) 43 *U.T.L.J.* 297; Symposium: "Corporate Malaise - Stakeholder Statutes: Cause or Cure?", (1991) 21 *Stetson L. Rev.* 1; Symposium: "Defining the Corporate Constituency", (1990) 59 *U. Cin. L. Rev.* 385.

en continuant de privilégier les intérêts des actionnaires des sociétés lors de l'interprétation du devoir de loyauté des administrateurs[85]. Ils ont ainsi pour la plupart ignoré l'opinion du juge Berger dans l'affaire *Teck Corporation* c. *Millar* qui soulignait dès 1973 la nécessité d'élargir la notion de l'intérêt de la société.

> 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.
> [...]
> A classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting *bona fide* in the interests of the company itself.[86]

Dans cette perspective, la position du juge Greenberg dans l'affaire *Peoples*, qui favorise une interprétation progressiste de l'intérêt de la société, se démarque de la jurisprudence traditionnelle[87]. Appuyée par le courant doctrinal de la responsabilité sociale, elle mènera sans aucun doute les tribunaux à repenser la notion de l'intérêt de la société afin de rendre compte des préoccupations des diverses constituantes des entreprises.

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85 *Palmer* c. *Carling O'Keefe Breweries of Canada Ltd.*, (1989) 67 O.R. (2d) 161 (Gen. Div.). Voir aussi concernant plus spécifiquement les créanciers *Bank of Toronto* c. *Cobourg, Peterborough & Marmora Railway Co.*, (1886) 10 O.R. 376, 378 (pas de devoirs fiduciaires); *Royal Bank of Canada* c. *First Pioneer Investments Ltd.*, (1980) 27 O.R. (2d) 352 (*id.*).

86 *Teck Corp.* C. *Millar*, (1973) 33 D.L.R. (3d) 288, 313.

87 Certaines décisions laissent cependant entrevoir la reconnaissance d'obligation des administrateurs à l'égard des créanciers: *Re Trizec Corp.*, (1994) 10 W.W.R. 127 (Alta.Q.B.); *Re London, New York & Paris Association of Fashions Ltd.*, (1982) 40 C.B.R. (n.s.) 127 (Nfld. T.D.). Voir aussi l'appui de la doctrine suivante: Jacob S. ZIEGEL, "Creditors as Corporate stakeholders : The Quiet Revolution - An Anglo-Canadian Perspective", (1993) 43 *U.T.L.J.* 511; Caroll HANSELL et James GILLIES, "Nearing the Brink: Financial Crisis and Issues for Unrelated Directors", dans Lazar SARNA, (dir.), *Corporate Structure, Finance and Operations*, vol. 9, Toronto, Carswell, p. 161; Yves LAUZON, « La perception judiciaire des devoirs des administrateurs de personnes morales: quel progrès? », dans Service de la formation permanente du Barreau du Québec, *Développements récents en droit commercial*, Cowansville, Éditions Yvon Blais, 1998, p. 187-188.

Considérant l'importance de son opinion à cet égard, il est déplorable que la Cour n'ait pas profité de l'occasion pour clarifier la nature du devoir qu'elle entend imposer aux administrateurs lorsqu'elle cite la jurisprudence du Commonwealth qui exige que les administrateurs tiennent compte des intérêts des créanciers. Bien qu'il puisse paraître simple, le devoir de considérer les intérêts des créanciers soulève des questions complexes qui n'ont pas été abordées par les tribunaux jusqu'à maintenant[88].

Tout d'abord, les conditions d'ouverture du devoir auraient mérité d'être précisées. Plusieurs décisions du Commonwealth citées par le juge Greenberg établissent que le devoir ne prend naissance que lorsque la compagnie est insolvable. Ainsi, dans l'affaire *Kinsela*, la Cour d'appel de New South Wales notait:

> In a solvent company, the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise [...]. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency,or the imposition of some alternative administration.[89]

Cependant, les tribunaux omettent d'offrir une définition précise de l'insolvabilité. Certaines décisions interprètent la notion d'insolvabilité en faisant référence au bilan de l'entreprise, constatant l'insolvabilité lorsque l'actif de l'entreprise est inférieur à son passif[90]. D'autres décisions conçoivent

88 Francis DAWSON, " Acting in the Best Interests of the Company - For Whom Are Directors Trustees?", (1984) 11 *N.Z.U.L. Rev.*, 71; C.A. RILEY, "Directors' Duties and the Interests of Creditors", (1990) 10:5 *Co. Law.* 87.

89 *Kinsela* c. *Russell Kinsela PTY Ltd.*, [1986] 4 N.S.W.L.R. 722. Voir aussi: *Liquidator of West Mercia Safetywear Ltd.* vs. *Dodd & Anor,* (1988) 4 B.C.L.C. 30, 33.

90 Pour une revue des décisions, voir C.A. RILEY, "Directors Duties and the Interests of Creditors" (1990) 10.5 Co. Law, 88-89; Daniel D. PRENTICE, "Creditor's Interest and Director's Duties", (1990) *Oxford Leg. St.*, 265, 276.

l'insolvabilité comme incluant également l'incapacité de l'entreprise de payer ses dettes à leur échéance[91]. Dans la mesure où l'objectif de la création du devoir est de protéger les créanciers, cette interprétation plus libérale de la notion d'insolvabilité semble souhaitable[92]. Dans chacune de ces situations, les créances sont mises en péril alors qu'au mieux les dettes seront remboursées en retard et qu'au pire, elles ne seront tout simplement pas acquittées. La Cour, dans l'affaire *Peoples*, s'abstient de prendre position à cet égard puisqu'elle choisit d'étendre le devoir des administrateurs au-delà de la notion d'insolvabilité pour inclure les situations où la société est solvable, mais où elle envisage d'effectuer une action qui pourrait compromettre sa situation financière[93]. En l'espèce, de l'avis du juge Greenberg, les administrateurs avaient donc un devoir à l'égard des créanciers à partir du moment où ils prirent la décision de mettre en place la nouvelle politique d'approvisionnement.

La position de la Cour est susceptible de soulever des difficultés sérieuses en pratique. Toute décision d'affaires comporte des risques d'échec qui peuvent venir influer sur la situation financière de l'entreprise. Interprétée libéralement, la position du juge Greenberg pourrait donc enrayer le processus décisionnel des entreprises en contraignant les administrateurs à minimiser les risques plutôt qu'à s'intéresser à la maximisation de la valeur de la société[94]. En plus de scléroser la gestion des entreprises, cette approche risque de mener à des conflits irréconciliables entre les administrateurs et les actionnaires qui confient leurs capitaux aux entreprises afin qu'ils soient utilisés pour financer des projets d'investissement offrant des rendements élevés.

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91 Voir, par exemple, *Nicholson* c. *Permakraft (NZ) Ltd*, [1985] 1 N.Z.L.R. 242 (C.A.).

92 Voir art. 2(1) L.F.I. qui définit la « personne insolvable » en ayant recours à ces deux conceptions.

93 *Peoples*, paragr. 158. Voir en ce sens, *Walker* c. *Wimborne*, précité, note 81.

94 Brian CHEFFINS, *Company Law – Theory, Structure and Operation*, Oxford, Clarendon Press, 1997, p. 541. Nous utilisons la notion de valeur plutôt que de profits en ce qu'elle permet la considération d'autres intérêts que ceux des actionnaires. Voir Jeffrey G. MacINTOSH, "Designing an Efficient Fiduciary Law", (1993) 43 *U.T.L.J.* 425.

Deuxièmement, les tribunaux du Commonwealth offrent peu d'indications sur les moyens que doivent prendre les administrateurs pour s'acquitter de leur devoir de considérer les intérêts des créanciers. Une revue de la jurisprudence canadienne sur le devoir de loyauté des administrateurs nous offre toutefois des indications utiles à cet égard. Selon la jurisprudence, les administrateurs ont l'obligation d'effectuer une analyse raisonnable de la situation lorsqu'ils établissent l'intérêt de la société. Ils ne peuvent donc satisfaire les exigences de leur devoir de loyauté par la simple affirmation *a posteriori* qu'ils croyaient agir dans l'intérêt de la société.

> Under s. 122 of the CBCA directors have a duty, amongst other things, (a) to act honestly and in good faith with a view to the best interests of the corporation, and (b) to comply with any unanimous shareholder agreement. In considering whether or not the directors have complied with these obligations in a given situation more is required that a mere assertion of good faith on the part of the directors [...] Where an issue arises, hindsight and after-the-fact rationalization all too naturally make it easy for the directors to believe they were, indeed acting for the benefit of the corporation.
> [...]
> [...] when assessing the directors' conduct in relation to the s. 122 duty to act "in good faith with a view to the best interests of the corporation", "the question is, what was it the directors had uppermost in their minds *after a reasonable analysis of the situation*".[95]

95 *Deluce Holdings* c. *Air Canada*, (1993) 8 B.L.R. (2d) 294, 310. Voir *CW Shareholdings Inc.* c. *WIC Western International Communications Ltd.*, (1998) 38 B.L.R. (2d) 196 (Ont. Gen. Div.): "In the end, they must make a decision and exercise their judgment in a informed and independent fashion, after a reasonable analysis of the situation and acting on a rational basis with reasonable grounds for believing that their actions will promote and maximize shareholder value." Voir aussi *820099 Ontario Inc.* c. *Harold E. Ballard Ltd.*, (1992) 3 B.L.R. (2d) 113, 171-172-176 (Ont. Div:Ct.); *Benson* v. *Third Canadian General Investment Trust Ltd.*, (1993) 14 O.R. (3d) 493; *Olympia & York Enterprises Ltd.* v. *Hiram Walker Resources Ltd.*, (1987), 59 O.R. (2d) 254, 270-73 (Div. Ct.); *Maple Leafs Foods Inc.* c. *Schneider Corporation*, (1999) 42 O.R. (4d) 177 (Gen. Div.); C.A. RILEY, "Directors Duties and the Interests of Creditors", (1990) 10:5 *Co. Law*, 87, 90; Yves LAUZON, « La perception judiciaire des devoirs des administrateurs de personnes morales : quel progrès? » dans Service de la formation permanente du Barreau du Québec, *Développements récents en droit commercial*, Cowansville, Éditions Yvon Blais, 1998, p. 181; remarque qu'il appartient au tribunal « de décider si l'administrateur s'est servi de son pouvoir de déterminer ponctuellement le meilleur intérêt de la personne morale de façon quasi-judiciaire ».

Prenant appui sur ce principe, nous pouvons soutenir que pour respecter leur devoir de loyauté, les administrateurs devraient réaliser une analyse raisonnable des différentes composantes de l'intérêt de la société, incluant l'intérêt des créanciers, avant de prendre une décision. À titre d'exemple, dans l'affaire *Peoples*, il aurait été difficile pour les administrateurs de soutenir qu'ils se sont souciés de l'intérêt des créanciers. En effet, les faits indiquent que les administrateurs ont fait preuve de négligence en ne s'informant tout simplement pas des conséquences financières qu'engendrerait l'adoption de la politique d'approvisionnement[96].

La troisième question qui aurait mérité l'attention de la Cour concerne le processus d'arbitrage que doit effectuer le conseil d'administration contraint de tenir compte des intérêts des constituantes de la société[97]. Comment les administrateurs peuvent-ils s'acquitter de leur devoir de considérer les intérêts des constituantes lorsque ces intérêts sont antagonistes? Doivent-ils accorder préséance à l'une des constituantes?

D'emblée, nous devons souligner qu'il est souhaitable que les tribunaux fassent preuve de déférence à l'égard de la décision du conseil d'administration lorsqu'une procédure appropriée a été suivie pour considérer les intérêts des diverses constituantes[98]. Le conseil d'administration doit constamment effectuer un arbitrage entre les intérêts des diverses constituantes d'une société par actions. Il s'agit d'une opération complexe à l'égard de laquelle les tribunaux devraient avoir une grande retenue. De fait, le contrôle judiciaire des décisions du conseil d'administration recèle de nombreuses difficultés qui ont toujours amené les tribunaux

96 *Peoples*, paragr. 55-56, 62.

97 Voir Adolf BERLE, "For Whom Corporate Managers Are Trustees: A Note", (1932) 45 *Harv. L. Rev.* 1365, 1367.

98 Yves LAUZON, « La perception judiciaire des devoirs des administrateurs de personnes morales : quel progrès? » dans Service de la formation permanente du Barreau du Québec, *Développements récents en droit commercial*, Cowansville, Éditions Yvon Blais, 1998, p. 151 à la p. 181.

à être très prudents avant de substituer leur jugement *ex post facto* à celui des administrateurs dans le feu de l'action[99].

Cependant, le conseil d'administration n'a pas toujours la même discrétion dans son appréciation de l'intérêt de la société. La jurisprudence indique que le conseil d'administration peut être contraint d'accorder la préséance aux intérêts de la constituante qui est la plus touchée par l'opération en cause. À titre d'exemple, la jurisprudence américaine et canadienne en matière d'offre publique d'achat exige que les administrateurs accordent priorité aux intérêts des actionnaires lorsque la société est sur le point de faire l'objet d'un changement de contrôle[100]. Aussi, l'insolvabilité ou la quasi-insolvabilité pourrait être perçue comme un événement qui infléchit la discrétion des administrateurs en les contraignant à placer les intérêts des créanciers au premier plan[101]. C'est ce que suggère l'opinion de la Cour d'appel anglaise dans l'affaire *West Mercia Safetywear Ltd.*:

> But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation,

99 Voir, par exemple, *Re Smith & Fawcett Ltd.*, [1942] Ch. 304, 306 (C.A.): "directors are required to act "*bona fide* in what they consider – not what a court may consider – is in the interest of the company."; *Brant Investments Inc.* c. *KeepRite Inc.*, (1991) 3 O.R. (3d) 289, Les Éditions Yvon Blais, 1998, p. 151 à la p. 319; *Forget* c. *Société financière Desjardins-Laurentienne inc*, REJB 99-010474 (C.S.), paragr. 100. Voir aussi R. DICKERSON, *Propositions pour un nouveau droit des corporations commerciales canadiennes*, Ottawa, Information Canada, paragr. 241.

100 En droit canadien, voir *CW Shareholdings Inc.* c. *WIC Western International Communications Ltd.*, (1998) 38 B.L.R. (2d) 196 (Ont. Gen. Div.); *Maple Leafs Foods Inc.* c. *Schneider Corporation*, (1999) 42 O.R. (4d) 177 (Gen. Div.); *Armstrong World Industries Inc.* c. *Arcand*, (1998) 36 B.L.R. (2d) 171 (Ont. Gen. Div.). En droit américain, voir *Revlon Inc.* c. *MacAndrews & Forbes Holdings Inc.*, (1986) 506 A.2d 173; *Paramount Communications Inc.* c. *Time Inc*, 571 A.2d 1140 (Del. Ch. 1989); *Paramount Communications Inc.* c. *QVC Network Inc.*, 637 A.2d 34 (Del. 1993)

101 Paul L. DAVIES, *Gower's Principles of Modern Company Law*, 6th Ed., London, Sweet & Maxwell, p. 603.

return to solvency,or the imposition of some alternative administration.[102]

Bien qu'elle ait le mérite de clarifier le devoir des administrateurs, la règle énoncée dans cette affaire recèle néanmoins ses propres difficultés[103]. L'utilisation du terme « créancier » est particulièrement problématique en ce qu'il désigne un groupe hétérogène constitué de divers types de créanciers garantis et de créanciers chirographaires dont les intérêts ne sont pas identiques. À titre d'exemple, les administrateurs d'une société qui éprouve des difficultés financières agiraient-ils dans l'intérêt des créanciers s'ils mettaient fin aux activités de la société alors que son actif permet de rembourser seulement les créanciers garantis? Qu'en serait-il de la décision des administrateurs de continuer d'exploiter l'entreprise dans l'espoir de générer suffisamment de revenus pour permettre le remboursement d'une partie des créances chirographaires? Comme nous pouvons le constater, des précisions méritent d'être apportées sur le rôle du conseil d'administration dans l'arbitrage des intérêts des diverses constituantes de la société par actions[104].

En terminant, il convient de rappeler que le devoir de loyauté des administrateurs continue de s'adresser à la société, même lorsqu'il exige que soit accordée la préséance aux intérêts des créanciers. C'est donc la société qui est créancière du devoir de loyauté et qui peut intenter un recours pour en faire sanctionner la transgression. Le créancier qui désire

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102 *Liquidator of West Mercia Safetywear Ltd.* c. *Dodd & Anor*, (1988) 4 B.C.L. c. 30. Voir aussi *Re Trizec* Corp. (1994) 10 W.W.R. 127 (Alta Q.B.); Caroll HANSELL et James GILLIES, "Nearing the Brink : Financial Crisis and Issues for Unrelated Directors", dans Lazar SARNA, (dir.), Corporate Structure, Finance and Operations, vol. 9, Toronto, Carswell, p. 161, à la p. 201; Ross GRANTHAM, "The Judicial Extension of Directors' Duties to Creditors", [1991] J.B.L. 1, 14-16. En droit américain, voir *Credit Lyonnais Bank Nederland, N.V.* c. *Pathe Communications Corp.*, 1991 Del. Ch. LEXIS 215 C.A.

103 C.A. RILEY, "Directors' Duties and the Interests of Creditors", (1990) 10 :5 *Co. Law* 87.

104 Nous devons déplorer le peu d'attention accordée par Industrie Canada à la redéfinition du devoir de loyauté des administrateurs dans ses travaux visant la réforme de la *Loi canadienne sur les sociétés par actions*. Voir INDUSTRIE CANADA, *Responsabilité des administrateurs*, Document de consultation, Ottawa, 1995.

invoquer la contravention du devoir de loyauté à son égard devra procéder par action oblique sous l'article 240 L.C.S.A., ce qui maintiendra un certain contrôle judiciaire de l'utilisation de ce recours[105].

CONCLUSION

L'affaire *Peoples* marque une rupture avec la conception traditionnelle du devoir de loyauté des administrateurs de sociétés par actions. Cette rupture engendre une grande incertitude quant au rôle du devoir de loyauté dans la protection des intérêts des diverses constituantes des sociétés par actions. L'incertitude générée est exacerbée par le peu d'indications données par la décision quant au contenu du devoir de loyauté. C'est sans doute en ayant à l'esprit cette incertitude qu'un commentateur a qualifié la décision de « véritable bombe à retardement »[106].

Tout en reconnaissant la légitimité des préoccupations soulevées par la décision du juge Greenberg, le présent commentaire a fait valoir la pertinence de la reconfiguration du devoir de loyauté des administrateurs de sociétés par actions. À un moment où la privatisation des services publics confère une emprise croissante à ce type d'entreprise sur le bien-être collectif, il semble nécessaire de repenser la finalité de la société par actions afin de faire une place aux intérêts de ses diverses constituantes. Dans cette perspective, le commentaire a tenté d'atténuer les incertitudes qu'entraîne la décision en s'attardant sur le contenu du devoir de loyauté plutôt que sur l'opportunité d'utiliser ce dernier pour recentrer la finalité de la société par actions.

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105 *Supra* les notes 53-58 et le texte correspondant.
106 Paul Martel, « Une véritable bombe à retardement », (1999) *La presse juridique*, vol. 7, no. 1, p. 3.

ANNEXE: Extraits de la décision *Peoples Department Stores Inc./Magasin à rayons Peoples inc.* (Faillite de), J.E. 99-318 (C.S.).

1. The Court is seized with a "Second Re-Amended Petition to Recover Funds in Reviewable Transactions and Recover Property/Claims of the Bankrupt". At the time it was declared bankrupt, as of December 9,1994, and at all relevant times prior thereto, Peoples was a wholly-owned subsidiary of Wise Stores Inc., (hereinabove and hereinafter "Wise Stores"). Wise Stores was also declared bankrupt as of that same date. Each of the Wise Brothers was a Director of Peoples (there were no other Directors of that company) and of Wise Stores at all times relevant to these proceedings.

2. The Petitioner's proceeding herein is bicephalus, being based upon both the provisions of Section 122 of the Canada Business Corporations Act (hereinafter "the C.B.C.A.") and Section 100 of the Bankruptcy and Insolvency Act (hereinafter "the B.I.A.")...

[...]

CHAPTER 3 - HISTORICAL

3. The business of Wise Stores was founded in 1930 by Mr. Alex Wise, the father of the Individual Respondents. It started with a single retail clothing store on St-Hubert Street, in Montreal, with an area of 1,500 square feet.

4. In 1952, Lionel Wise, the eldest of the three brothers, came into the business. Then, by order of their age, Ralph Wise entered in 1957 and Harold Wise in 1964. When the youngest brother came into the business in 1964, the chain consisted of 4 stores, which by then had taken on the configuration of "junior department stores" selling a mix of hard goods and soft goods and producing annual sales of approximately $4,000,000. Additional stores were opened during the 1960's and 1970's. By 1980, the chain counted 10 stores with annual sales of approximately $10,000,000.

5. In 1980, one of their competitors, the Scott-Lasalle Group, went into bankruptcy and Wise Stores took over the leases for 15 Scott-Lasalle stores. This brought the Wise chain to 25 stores and by 1986, their annual sales figure was up to $50,000,000. It was in 1986 that Wise Stores went public and was listed on the Montreal Stock Exchange.

6. That public treasury issue yielded $6,000,000 and, after fees and expenses, netted the Company $5,000,000, which was applied thereafter to expansion and acquisitions. In 1988, Continental Stores went bankrupt. The Wise chain purchased five of their stores prior to that bankruptcy and 15 more after the bankruptcy. Continuing to open new stores, by the early 1990's the Wise chain had grown to 50 stores, with annual sales of approximately $100,000,000.

7. By 1992, the principal competitors of Wise Stores in Eastern Canada were Zellers, Woolco, M-Stores, Greenberg, K-Mart, Metropolitan Stores, Hart, Rossy, Canadian Tire and Peoples. In 1992, M-Stores declared bankruptcy. By 1994, Wal-Mart, the largest American retailer, entered the Canadian market by buying out the Canadian chain of Woolco stores, K-Mart was acquired by Zellers and Greenberg and Metropolitan Stores went into bankruptcy.

8. In 1992, Peoples had been in business for 78 years and was then an unincorporated division of Marks & Spencer Canada Inc. (hereinabove and hereinafter "M.& S."). The British parent of M. & S., Marks & Spencer plc (hereinabove and hereinafter "M. & S. plc") was then and still is a pre-eminent retailer in the United Kingdom. It employs 57,000 people worldwide and its annual sales worldwide are the equivalent of Can. $20,000,000,000. Peoples then had 81 stores doing annual sales of approximately $160,000,000. Its stores were mainly located in rural areas from Ontario to Newfoundland, whereas Wise Stores' operations were mainly located in Quebec and in urban areas. The two chains thus appeared to be a good commercial fit.

9. Peoples' merchandise mix was 60% hard goods and 40% soft goods, whereas Wise Stores was approximately 50%-50%, except that during the Christmas season each year the proportion of hard goods would rise to 60%. Since soft goods yield a higher profit margin than hard goods, in the early 1990's Peoples' gross profit margin was about 33-1/3% whereas at Wise Stores, it was approximately 40%

CHAPTER 4 - WISE STORES' ACQUISITION OF PEOPLES

10. Wise Stores had become interested in acquiring the Peoples chain in 1988, but Mr. Lionel Wise's inquiries and approaches at that time were rebuffed.

11. Then in late 1991, Lionel Wise heard at a lunch with a business associate that M. & S. was ready to sell off its Peoples Division. Mr. Colvill explained that prior to the transaction with Wise Stores, M. & S. plc traded in Canada in three groups, M. & S. itself, Dallairds and Peoples. These were three divisions of one company, M. & S.

12. He added that towards the end of 1991, M. & S. plc. decided to look for purchasers for their Canadian properties. When it made that decision, each of the three divisions of M. & S. was set up as a separate corporation, the Peoples Division becoming Peoples Department Stores Inc.

13. In the context of its decision to sell off its Canadian operations, Peoples was addressed first by M. & S. plc since it was atypical vis-à-vis the "Marks & Spencer Concept".

14. Negotiations between representatives of Wise Stores and M. & S. plc began in January-February 1992. After Mr. Colvill's 8 visits to Montreal and meetings totalling some three weeks, a deal was reached by May. The purchase price agreed to was targeted at $25,930,000 [see clause 3.1 of the Share Purchase Agreement (hereinafter "the SPA."), Exhibits P-16, I-3 and I-96, dated June 5,1992], subject to an adjustment according to agreed upon formulae pursuant to the audited May 23, 1992 balance

sheet of Peoples (it is Exhibit I-103), with a Closing Date fixed for July 16, 1992 (see clause 4.1 of the S.P.A.).

15. It is noted that three Amendments to the S.P.A. were executed on the same date that the S.P.A. itself was signed, June 5,1992, and a fourth Amendment was signed on July 21, 1992, i.e. prior to the Closing Date. Those Amendments are Exhibits I-97, I-98,I-99, I-100 and P-17.

16. Moreover, even beyond the question of price, the lease obligations for the Peoples Stores were in fact the primary concern and objective of M. & S. and M & S. plc. Since Peoples had until just prior to the acquisition operated as an unincorporated division of M. & S., all of its leases were in the name of M. & S. with, in numerous cases, solidary guarantees by M. & S. plc. The contingent liabilities of M. & S. and its British parent in respect of those leases was between $100,000,000 and $200,000,000.

17. In order to limit and put a term to those contingent liabilities, M. & S. retained the services of Burns Fry Limitée (see Exhibit I-104). M. & S. succeeded in reaching agreement with the vast majority of their lessors to release M. & S. and, where applicable, its parent company, in return for Bank Letters of Credit being opened upon which a lessor could draw in the event of a default by Peoples, limited however to the period of 3 years after M. & S. divested itself of Peoples. Mr. Lionel Wise assisted M. & S. in obtaining agreement from the lessors, since he clearly understood that the issue of the contingent liabilities under the leases was a potential "deal breaker".

18. There was a principal Letter of Credit upon which lessors generally could draw (see Exhibit I-105), and also specific Letters of Credit exacted by some lessors (see as well Exhibit I-105).

19. The net assets of Peoples at that time being approximately $45,000,000 after extracting the inter-company amounts relative to the M. & S. Group, that amount was

about equivalent to the inventory at cost plus approximately $11,000,000 as the depreciated book value of tenant's fittings.

20. M. & S. agreed to sell all the issued and outstanding shares of Peoples for a final price of $27,000,000 (see Exhibit I-92-H, second page), granting a net discount of 30% against the inventory at cost. That discount was intended to inject equity into Peoples via the realisation of the discount on the sale of the inventory and thereby create profits. The result in fact was the creation of artificially inflated profits for the first stub fiscal period of Peoples ending January 30, 1993. As we may glean from Exhibit P-1, at page 5, net earnings for 8 months were $18,613,972.

21. By comparison, at that same date, page 5 of Exhibit P-7 reveals that Wise Stores showed a net loss of $1,495,598 for a full year.

22. The inflated nature of those profits earned by Peoples is clear when compared to a full year's net profits of $4,348,124 for the fiscal period ended January 29, 1994 (see Exhibit P-1, page 5) and a loss of $7,104,000 shown on Exhibit P-15, the draft financials for the first three quarters of fiscal January 30, 1995, terminated on October 29, 1994.

23. It is also pertinent to note that prior to its acquisition by Wise Stores, Peoples had been loss-making to the extent of approximately $10,000,000 per year. Those artificially inflated profits of more than $18,000,000 for the 8 months ending January 30, 1993 explains why, at the beginning of the next fiscal period, Peoples had no bank indebtedness and moreover was holding $10,625,032 in cash (see at pages 3 and 4 of Exhibit P-1).

24. For the purpose of that S.P.A., Wise Stores incorporated 2798832 Canada Inc. as its wholly-owned subsidiary in order to have it purchase all the issued and outstanding shares of Peoples. Hence, Peoples became the wholly-owned subsidiary of a wholly-owned subsidiary of Wise

Stores. Wise Stores was required to solidarily guarantee in favour of M. & S. all of the purchaser's obligations under the S.P.A. That guarantee is Exhibit I-1.

25. The sum of $5,000,000 was paid at closing with funds borrowed from the Toronto Dominion Bank (hereinabove and hereinafter "the T.D."). It was therefore what the financial milieu would call a "fully leveraged buy-out".

26. In order to secure its balance of price of $22,000,000, M. & S. put in place in the S.P.A. various rather stringent security measures and draconian restrictive covenants. They were clearly intended to push Wise Stores into a refinancing of Peoples in order to pay out M. & S. sooner than the 8 year deferred payment schedule set out in the S.P.A.

27. Over and above the usual first floating charge over all of Peoples' assets via a Trust Deed, Supplementary Trust Deed and Bonds issued thereunder (subject to a priority in favour of the T.D. in an amount which was varied from time to time), the purchaser and Wise Stores obligated themselves under Clause 9.5 of the S.P.A. to maintain tight financial ratios. Moreover, under Clause 11.14(c) of the Schedule to Amendment No. 4 dated July 21, 1992 and produced as Exhibit P17, the purchaser and Wise Stores agreed that Peoples would not furnish any "financial assistance" to Wise Stores.

28. As Mr. Colvill put it during his testimony, "we ring-fenced the assets of Peoples", that is, made sure that the integrity of the assets of Peoples would be maintained.

29. After approximately 7 months of operating both companies under Wise management, on January 31, 1993, right after the end of the 1993 fiscal period, Wise Stores caused the purchaser, 2798832 Canada Inc., to be amalgamated with its wholly-owned subsidiary, Peoples, the former wholly-owned subsidiary of M. & S., to form the new Peoples, the eventual Bankrupt herein (see Exhibit I-2). Consequently, the new Peoples became directly the wholly-owned subsidiary of Wise Stores.

30. That corporate reorganisation, together with the original incorporation of the Peoples Division of M. & S. and the purchase of all of its issued and outstanding shares by 2798832 Canada Inc., then a wholly-owned subsidiary of Wise Stores, permitted the newly amalgamated Peoples to conserve the tax losses of approximately $22,000,000 of the former Peoples Division of M. & S.

CHAPTER 5 - THE NEW DOMESTIC INVENTORY PROCUREMENT POLICY

31. At the time of the acquisition of Peoples by Wise Stores in June-July 1992, whereas computerisation at Peoples was non-existent (all computer functions had been provided to it by M. & S.), Wise Stores had two sophisticated and advanced computer systems.

32. One was an accounting system, the software of which had been designed and programmed by Richter & Associates, the management consulting arm of its accountants, R.U.V. That system was consequently and appropriately given the name "RICHTER". There was also a retail inventory system, the software of which had been designed and programmed by N.C.R. Its name was "ARMS".

33. After the acquisition, the Wise Stores' dual computer systems were extended to Peoples' operations. However, each company had its own file in each of the two computer systems. Moreover, the merging of the two companies on an operational level produced certain synergies. For example, prior to the acquisition Peoples' warehouse was located on Cousens street in Ville St-Laurent. Wise Stores operated a warehouse on Deslauriers street in Ville St-Laurent and also had warehouse space leased at a rental of $200,000 per year in a building on the Trans-Canada, which was given up in the Spring of 1993.

34. The Deslauriers warehouse was maintained temporarily for imports and bulky "S.K.U."'s (style-keeping units) and was assigned the code number 98 in the computer system, and the Cousens warehouse the code number 995.

While Deslauriers continued to be occupied, it was also employed to warehouse the inventory for the liquidation discount centres, the 5 Wizmart stores opened by Wise Stores during fiscal 1994. However, between February 1, 1994 and the closure of the Deslauriers warehouse in April 1994, the merchandise at Deslauriers was treated in the computer system as though it was at Cousens and belonged to Peoples.

35. The Wise Stores' lease for the Deslauriers premises was to terminate in April 1994. Thus, by giving up that space at that time and merging Wise Stores' warehouse into the same building as the Peoples' warehouse, a further substantial saving would be realised. The Peoples' warehouse was the natural choice, since it had 28 feet high ceilings and yet had no racking. It had thus been seriously underutilised. As Mr. Lionel Wise described it: "It was like a big field".

36. Another telling example of the synergies realised via the acquisition was in respect to the buyers of both companies. Before the acquisition, Wise Stores had 21 buyers and Peoples had 25. After the acquisition, the best of both groups were retained and a termination package offered to the others. Thus, soon after the acquisition, the total number of buyers stood at 24, 3 held over from Peoples and 21 from Wise Stores, and they looked after the purchasing for both companies.

37. Thus, for his/her department and range of merchandise, each buyer would look after both Wise Stores' and Peoples' requirements. However, because each company was operated in a separate computer file, all the work was doubled. Purchase orders, delivery records, invoices, etc., all had to be done separately for each company, even though most of the suppliers were common to both of them.

38. This led to many administrative and logistical problems. Often, the computer systems would show no stock of a given item, whereas in the warehouse there was stock. Conversely, often when the computer systems showed stock of a given item, in the warehouse there was none (See Exhibit I-116).

39. This is perhaps not surprising when one recalls that the Cousens warehouse received and shipped 30,000 cartons each business day, through 20 loading docks, was operated on two shifts totalling 18 hours per day and employed about 150 people.

40. This situation grew worse as the January 1994 fiscal period progressed. In October 1993, Mr. Lionel Wise asked David Clement to devise a solution. The new domestic inventory procurement policy was David Clément's brainchild, recommended by him as the solution to those problems.

41. From the time of the acquisition of Peoples, Wise Stores had effected all Letter of Credit imports for both companies, and then would bill Peoples for the imported merchandise transferred to Peoples Stores. This procedure was followed since Wise Stores had the banking facilities to open and transact Letters of Credits (See Exhibit I-109), as well as the experience and the contacts overseas. Peoples, on the other hand, except for perhaps 1% of its total purchases, had not imported directly via Letters of Credit prior to the acquisition.

42. After some study and reflection, what Mr. Clement proposed was to physically merge both warehouse systems into one, entering it all in the computer in the 995 designation of Peoples. Peoples would make all domestic purchases (defined as merchandise sourced within Canada and the United States) for both companies and transfer and charge out to Wise Stores all domestic merchandise shipped to its stores.

43. Wise Stores would continue to open and pay for all the Letters of Credit for the overseas merchandise, which would be transferred "en bloc" and charged by Wise Stores to Peoples and immediately entered into Peoples warehouse records as it was received there.

44. Peoples would then charge Wise Stores for all transfers to the latter's stores of imported merchandise, in the same manner as the domestic merchandise. Hence, aside from the imported goods, the buyers would deal

with one set of purchase orders and there would be one set of shipping documents, one set of invoices from domestic suppliers, etc. As a result, it would also eliminate the confusion and administrative problems at the Cousens warehouse.

45. According to Mr. Lionel Wise, another important benefit to be gained from the new domestic inventory procurement policy would be enhanced volume rebates from suppliers. However, the testimony heard from Messrs. Feldman, Richman, Sala, Ferston, Drouin and Laberge belied that assertion. A cursory examination of the sample invoices, Exhibits I-30 to I-63, reveals that both before and after January 29, 1994, most domestic suppliers simply invoiced both companies indiscriminately as: "Wise Peoples", "Wise/Peoples", "Peoples/Wise", "Peoples-Wise", "Wise Stores/Peoples Stores", "Wise Peoples Stores", "Wise Peoples Inc.", Wise Bros/Peoples Ltd.", "Magasins Wise Inc., Peoples Inc.", Magasins Wise/Peoples", etc.

46. Except for Mattel, each of those suppliers had dealt with Peoples even before its acquisition by Wise. After the acquisition and even before the new domestic purchasing policy went into effect on February 1, 1994, all 6 suppliers heard from here granted volume rebates calculated on the cumulated total purchases made by Peoples and Wise Stores, even though the purchase orders, shipping documents, invoices, etc., were separate. Therefore, the new domestic purchasing system had no impact at all on those rebates.

47. Moreover, Exhibit I-119, a combined Christmas catalogue for Wise Stores and Peoples, was offered by Mr. Harold Wise to prove the further printing, distribution and advertising savings resulting from the new domestic purchasing system. However, inasmuch as the merchandise integration of both companies had already occurred prior to January 29, 1994, Mr. Harold Wise could not answer the Court's question as to why those same savings could not have been reaped even prior to the implementation of the new domestic purchasing system.

48. Mr. Clément's proposed solution was accepted by the three Individual Respondents after rather cursory consideration. It was done informally by brief consultations among the three brothers, with no formal resolution enacted by the Board of Directors. Hence, the Peoples Minute Book is silent with respect to this whole concept.

49. During his testimony, Mr. Clement opined that this whole matter was in the ordinary course of business and accordingly did not require any formal resolution of the Board of Directors. It would appear to the Court that the three Individual Respondents were of the same opinion, erroneously we would suggest. The new domestic inventory procurement policy was a major and drastic departure from the prior policy, with potentially disastrous financial consequences for Peoples.

50. It is of some interest to observe from Exhibit P-1, page 4 and Exhibit P-7, page 4, that as at January 29, 1994, Peoples had retained earnings of $22,962,096, whereas Wise Stores showed a deficit of $1,224,106. Wise Stores was fully extended at the T.D. By instituting the new domestic inventory procurement policy, they used Peoples to subsidize and support Wise Stores. This was accentuated after the M. & S. priority amount was increased from $5,000,000 to $12,000,000 and then $15,000,000 (as reviewed in Chapter 6 below).

51. Mr. Lionel Wise testified that he discussed the proposal with Mr. Lichtsztral prior to putting the new system into operation. The latter's testimony on this point was to the contrary. During his examination-in-chief, he stated that Mr. Lionel Wise suggested to him that the warehouse problems would be overcome by running one warehouse system, and that this in fact occurred at the end of 1993 or the beginning of 1994.

52. That response by Mr. Lichtsztral was not clear as to whether that conversation took place prior or subsequent to the new system going into operation. However, he was quite clear when he responded during his cross-examination that he only became aware of the new system during the first quarter of fiscal 1995, i.e. at the

Audit Committee meeting of April 27, 1994, after it was already in effect.

53. Mr. Michael Frankel, who did not testify, would have also learned about the new system at that same meeting. He suggested to the Individual Respondents that a formal contract be prepared and signed by both companies, setting out the modalities, terms and conditions of the functioning of that system, including how and when Wise Stores would pay Peoples for the merchandise received by the former s stores from time to time, etc. However, his advice fell on deaf ears.

54. If Mr. Lionel Wise revealed the new domestic inventory procurement policy to Messrs. Litchtsztral and Frankel at that Audit Committee meeting, then necessarily Mr. Stevenson would have learned about it then as well. This belies his assertion that he heard about it for the first time near the end of June 1994, when Mr. Colvill communicated with him concerning Exhibit P-8 and the huge interco.

55. In fact, the 3 Individual Respondents, when consulting with each other and considering the new domestic inventory procurement policy proposed by Mr. Clement, at no time directed their minds to the creditworthiness or lack thereof of Wise Stores, or what the financial consequences would be for Peoples. There was also no real, effective consultation with their professional advisors.

56. Clearly, a reasonably prudent and diligent person would have realised that the new process would strip hard assets (inventory) away from Peoples and it would receive in return an account receivable from Wise Stores which likely would not be collected and would be uncollectible, seeing Wise Stores' cash flow problems as alleged in paragraphs 67 and 68[1] of the Plea of the

(1) "67. The massive intrusion of Wal-Mart into the Eastern Canadian market by acquiring over one hundred Woolworth of Canada (Woolco) stores and, more particularly, the enormous liquidation by Wal-Mart of Woolco inventory during the first six months of 1994, forced other department store competitors such as Zellers, WISE/PEOPLES and others to reduce prices, profit margins and inventory values. 68. Consequently both PEOPLES and WISE's cash-flows were negatively affected."

Individual Respondents and as well the fact that Wise Stores was seriously under-capitalized.

57. In all, after weighing and evaluating all of the evidence, the Court finds that the allegations of paragraph ii and all of its sub-paragraphs, with the exception of sub-paragraphs (i) and (j), of the Second Re-Amended Petition, were proved beyond a balance of probabilities. That is, and here we cite from the Second Re-Amended Petition:

"**11. RESPONDENT DIRECTORS made a decision** in January, 1994 (exact date unknown) to significantly alter the business of **PEOPLES** such that:

(a) commencing February, 1994, PEOPLES would purchase all of the domestic and imported merchandise for WISE (except for merchandise imported directly from the Orient with Letter of Credit);
(b) PEOPLES would assume sole responsibility to pay the suppliers for such WISE merchandise;
(c) PEOPLES would transfer such WISE merchandise to WISE as and when requested by WISE to do so;
(d) there was no written agreement between PEOPLES and WISE evidencing any of the foregoing;
(e) there were no terms or conditions for WISE to repay PEOPLES for such WISE merchandise;
(f) there was no security requested or taken by PEOPLES for WISE for the foregoing;
(g) there was no fee payable by WISE to PEOPLES for the foregoing;
(h) there was no one designated to monitor or control the indebtedness of WISE to PEOPLES resulting from the foregoing;
(i) there were no normal, commercial invoices issued by PEOPLES to WISE for any of the foregoing, and
(j) there was no fixed price which WISE was required to pay for PEOPLES for such WISE merchandise."

[...]

58. To conclude on this issue, it is clear that, in instituting the new domestic inventory procurement policy, the Wise Brothers preferred the interests of Wise Stores over those of Peoples. There was a reckless disregard by them of the negative financial implications to Peoples resulting from that new policy.

59. Mr. Friedman established the amount of the interco as at the time of the Bankruptcy of Peoples at $16,210,661 (see page 5 and Schedule C of Exhibit P-32, his first report dated March 7,1996, at page 12). The companies' books and records, at one time, showed that amount to be $15,186,486 (see the November 26, 1994 statement found in Exhibit P-48).

60. After that date, when Mr. Di Palma, at the request of the Trustee-Petitioner, effected a reconciliation as at January 31, 1995, that amount was shown by him as $13,398,128 (see ex. "1" of Exhibit P-32 at page 14). The latter amount is arrived at by crediting Wise Stores with a payment of $58,500 made by Wise Stores to Peoples in January 1995, while Wise Stores was still operating prior to its Bankruptcy being declared at the end of January 1995 with legal effect back to December 9, 1994 (see Schedule "A" at page 9 of Mr. Friedman's first report, Exhibit P-32)

61. On the basis of all the evidence, we find that it was that interco, almost totally the result of the new domestic inventory procurement policy, which caused the demise of Peoples.
We agree with the assertion by Mr. Colvill that Peoples acting not as an agent but rather as principal - purchasing, obliging itself and paying for merchandise destined for Wise Stores - constituted "financial assistance" from the former to the latter, in breach of the covenant in the SPA. which prohibited same. Mr. Lionel Wise erroneously considered that "financial assistance" meant only money transfers directly and not transfers of merchandise.

[...]

62. To conclude this Chapter 5 and anticipating Chapter 7 (A) below, it is clear to this Court that the evidence has established beyond a preponderance that in instituting and continuing the new domestic inventory procurement policy and in failing to monitor or have monitored the burgeoning interco thereafter, the three Wise Brothers failed to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, thereby violating the obligations incumbent upon them in virtue of Section 122(1) C.B.C.A.

CHAPTER 6 - PEOPLES' SLIDE INTO BANKRUPTCY - FEBRUARY 1, 1994 TO DECEMBER 9, 1994

[...]

63. As already mentioned above, Peoples commenced its 1995 fiscal year with no bank debt and $10,625,000 in cash. The S.P.A. provided in Clause 1.1.59 that, provided a specified ratio of inventory to bank debt was maintained, bank financing by the T.D. up to specified amounts would be secured in their favour in priority to the security held by M. & S. Those limits were then amended by Clause 6 of Amendment No. 4 of July 21, 1992 as follows (see Exhibit P-17):

a) $9,000,00, for the period ending on or about January 31, 1993;
b) $8,000,000 during the year ending on or about January 31, 1994;
c) $5,010,000, during the year ending on or about January 31, 1995, and
d) no more than **$500,000 in excess** of the Bank Financing forecasted in the Purchaser's *Pro Formas* attached to the S.P.A. as Schedules 1.1.73 and 1.1.74, in the subsequent year ending on or about January 31, 1996.

64. With Peoples' additional cash flow requirements resulting from the new domestic inventory procurement policy, that limit on the priority amount was too restrictive. Hence, at the end of January 1994, I Mr. Lionel Wise realised that there would be a major credit crunch in a

month or two. Consequently, he telephoned Mr. Colvill and advised him that Peoples could not live within its $5,000,000 line of bank credit. He requested that Mr Colvill agree to have M. & S. increase the bank priority amount to $15,000,000. At the same time, he requested of the T.D. a $5.000,000 to $6,000,000 balloon credit for three months.

65. By early March 1994, Mr. Colvill agreed to increase the bank priority amount to $12,000,000, in consideration of a substantial shortening of the term for payment of the balance of the purchase price due under the S.P.A. That amendment provided that the further payments would commence in July 1994 and be completed by August 1996, rather than the original completion date of June 2000, as stipulated at Clause 3.4 of the original S.P.A. Exhibit I-126, signed later but indicated to be effective as of March 9,1994, reflected that new understanding.

66. Notwithstanding the foregoing, as Peoples' cash flow requirements continued to increase because of the new domestic inventory procurement policy, Mr. Ralph Wise (he had taken over those functions from Mr. Lionel Wise, who was then temporarily incapacitated because of his then recent heart attack) soon realised that even that increased priority amount of $12,000,000 would not suffice. Over and above the increased cash flow requirements resulting from the new inventory procurement policy, there was looming the first capital payment of $300,000 falling due on July 21, 1994, together with one year's interest at 4% on the then total capital balance of $12,761,000, being $510,440.

67. In that regard, on May 31, 1994, a meeting was held at the offices of R.U.V., attended by the three Wise Brothers representing Peoples, Mr. Colvill and Ms. Munro on behalf of M. & S. and, as advisors, Messrs. Clément, Lichtsztral, Stevenson and Swidler (see Exhibit I-127). It was agreed at that meeting to defer the schedule of the remaining capital payments by one year, from the scheduled starting date of July 1994 to a new August 1997 instead of in 1996. There was no change

with regard to the interest payment of $510,440 due on July 21, 1994.

68. However, as July 1994 approached, that interest payment again became the subject of negotiations, together with a further request on the part of Peoples to increase the bank priority amount from $12,000,000 to $17,000,000.

69. See the letter Exhibit I-85, dated July 26, 1994, where Mr. Colvill agreed to increase the priority amount to $15,000,000, provided that the Wise family execute personal guarantees in favour of M & S. in the amount of $2,000,000. By the letter Exhibit I-86, also dated July 26, 1994, Mr. Ralph Wise countered, requesting:

   a) that the priority amount be increased to $15,500,000:
   b) that the Wise family guarantee be for the sum of $1,500,000;
   c) that the interest payment due on July 21, 1994 be paid in six equal (presumably monthly) instalments, commencing July 1994; and
   d) that the capital payment schedule, already deferred so as to commence in July 1995 and terminate in August 1997, be further extended to 60 equal monthly payments, still to commence in July 1995, but to conclude in June 2000, bringing the termination date back to the original date set out in the S.P.A.

70. In his letter of July 27, 1994, Mr. Colvill advised Mr. Ralph Wise that M. & S. would not go beyond a further $3,000,000 for a new total of $15,000,000 on the bank priority amount; that they would not further defer the capital payment schedule; was pleased to note that the Wise family were prepared to increase their personal guarantees from the earlier amount offered of $1,000,000 to $1,500,000, but still insisted that the required amount was $2,000,000 (see Exhibit I-87).

71. Thereafter, by his further letter dated July 29, 1994 (Exhibit I-88), Mr. Colvill accepted that the personal guarantees be in the amount of $500,000 by each of the 3 Wise Brothers, and moreover agreed to stretch out the capital repayment schedule, still to commence on

July 21, 1995, but to be made by way of 37 monthly payments. terminating on July 21, 1998. He persisted in his refusal to defer the July 21, 1994 interest payment of $510,440.

72. He moreover made that new arrangement conditional on the co-operation by Wise Stores and Peoples to agree to procedures satisfactory to M. & S. by August 31, 1994 for inventory control so as to remove the interco or reduce it to a level acceptable to M. & S.

73. There was also the question of setting up special board subcommittees of Wise Stores, charged with the search, recruitment and appointment of a new chief executive officer, as well as with the refinancing of the Wise Group. Mr. Stevenson had been pressing the concept of a refinancing and a new C.E.O. for several months, and in fact, it was the half-hearted efforts of the Wise Brothers to proceed along those lines which culminated in Mr. Stevenson's resignation from the Board of Directors of Wise Stores on September 19, 1994 (see Exhibit P-47).

74. That new deal was documented and signed on September 27, 1994, effective as of July 21, 1994. It is Exhibit I-107.

75. The personal guarantees by the three Wise Brothers were also executed on September 27, 1994. They are found as part of Exhibit I-90. It is of no small interest to note that M. & S. never collected on those personal guarantees. One may note as part of Exhibit I-90 the document releasing them from those guarantees, and that release is dated January 13, 1995. It is not co-incidental that that date is when the undersigned granted a Petition brought by M. & S. pursuant to Section 50.4(11) of the B.I.A., seeking the early termination of the period within which Peoples was to file its Proposal.

76. That Petition had been contested by Peoples up to that point, but on January 13, 1995 counsel for Peoples announced to the Court that Peoples was no longer contesting but in fact consented to the granting of that

Petition, the consequence of which was the immediate declaration by the Court of the Bankruptcy of Peoples, with effect retroactive to December 9, 1994.

77. It is most reasonable to conclude that there was a direct connection between the withdrawal of the contestation (and the consequent declaration of Bankruptcy) and the release of those personal guarantees. Mr Colvill testified that the consideration for granting those releases was so that the 3 Wise Brothers would not obstruct the Bankruptcy process. M. & S. moreover felt that there would be no collection on those guarantees in any event.

78. Insofar as the long-standing pressure from M. & S. upon Wise Stores-Peoples to refinance and increase their capitalization, in fact, in February 1993 there had been a public secondary offering of shares of the capital stock of Wise Stores by the Wise Brothers with respect to shares held by them and/or their personal holding companies. That offering realised $15,000,000, $5,000,000 to each of the Wise Brothers. None of those funds, however, found their way into the treasury of Wise Stores and did absolutely nothing to enhance its capitalization.

79. With respect to the sums owing by Peoples to M. & S. at the time of the Bankruptcy of the former, Mr. Colvill confirmed that because of the security held by M. & S., it succeeded in recovering all amounts due to it on the sale of Peoples, excepting perhaps a relatively small sum of $300,000 pertaining to claims under the Letters of Credit with respect to the Peoples leases.

[...]

80. As regards the deteriorating financial position of Peoples throughout 1994, we have evidence in that regard from Mr. Singer and from Mr. Veilleux.

81. BNY/CAFCO Financial Corporation operated as a factor and guaranteed some of the accounts payable by Peoples and Wise Stores to the trade. While Mr. Singer was on a routine visit to the offices of Wise Stores-Peoples on or about June 20, 1994, in order to evaluate

credit for the coming period, Messrs. Clément and Ralph Wise furnished him with a copy of each of Exhibits P-8 and P-9, that is the balance sheet and statement of operations as at April 30, 1994 of each of Peoples and Wise Stores.

82. At that time, BNY/CAFCO had credit lines in place for Wise Stores and Peoples in the amount of $2,000,000. Those two companies then owed the clients of BNY/CAFCO $1,800,000. BNY/CAFCO had established a separate line of credit for each of Wise Stores and Peoples. In that situation, they tracked the changes in the financial position of each of those two companies from year to year.

83. From Exhibit P-8, Mr. Singer gleaned some significant changes with respect to Peoples compared to the end of the first quarter of the prior year. The balance sheet indicated that, firstly, there was the sum of $18,664,000 owing to Peoples by its parent company, Wise Stores, whereas in the prior year there was no such amount. Peoples' inventory had increased from $44,977,000 to $47,759,000. Peoples' accounts payable had increased from $18,426,000 to $29,025,000 and whereas in the prior year it had no bank debt, now it was indebted to the T.D. in the amount of $10,136,000. Moreover, the profit and loss statement showed that its sales had dropped by $3,000,000 against the same quarter of the previous year.

84. Mr. Singer questioned those changes and was informed about the new domestic inventory procurement policy. He was however not told that in any respect that $18,664,000 interco was the result of an accounting error.

85. Questioned about his reaction, Mr. Singer indicated quite clearly that it worried him and that he did not like it. To use his words: "It was clear that Peoples was being loaded with debt to the benefit of Wise".

86. He accordingly decided to exit the credit. As he put it: "I felt it smelled". He was moreover concerned as to how

M. & S. would react to that interco; he was sure they would not like it.

87. Because it would take some time to extricate his company from the Peoples-Wise Stores Group, the following week he asked Mr. Ralph Wise for a letter of guarantee from the T.D. in the amount of $500,000. Mr. Ralph Wise agreed and Mr. Singer decided to limit his company's exposure with respect to the Wise Stores-Peoples Group within the amount of that Letter of Guarantee. It is dated July 6, 1994 and is Exhibit P-30.

88. By the time that both Wise Stores and Peoples filed their respective Notices of Intention on December 9,1994, BNY/CAFCO had reduced their credit in respect of those two companies to below the levels of that Letter of Guarantee and they accordingly had no resulting loss; they were paid in full by the T.D.

89. As for Mr. Veilleux, testifying on behalf of the T.D., he explained that the T.D. has set up categories of credit risk running from 1 to 9. A No. 1 is the best credit rating.

90. He reported that in February 1994 Wise Stores was a number 4, which meant "high risk". The rating changed as follows:

May 1994 - 5 - "higher risk"
June 1994 - 6 - "watch"
August 1994 - 7 - "unsatisfactory"
October 1994 - 7 E - "unsatisfactory - EXIT"

91. "Exit", he explained, means that the account is requested to find financing with another banking institution.

92. The audit committee meeting of April 27, 1994 was continued to May 13, 1994 because the audit committee could not recommend to the Board the approval of the financial statements for the year ended January 29, 1994. The reason for this was that Peoples was in default both to the T.D. and to M. & S. with respect to ratios, etc., although effectively no payment had at that

time been missed. The T.D. waived the defaults by virtue of its letter found in Exhibit I-79, and M. & S. waived in its turn, thereby permitting those year-end financials to be finalized and made public.

93. Exhibits I-80 to I-84 inclusive are a series of proposals made by the T.D. to Peoples and Wise in respect of the renewal of their lines of credit, none of which was accepted. That series of documents continues by way of Exhibit I-92D, being a further offer of credit facilities dated September 28, 1994. What is significant in that letter is that Messrs. Veilleux and Herrity confirmed for the T.D. that, as previously advised verbally, the T.D. was not prepared to continue to finance Peoples and Wise Stores after December 31, 1994, calling upon them to replace the T.D. with another financial institution.

94. This was a shock for the three Wise Brothers. Mr. Lionel Wise, who knew Mr. Boulanger from earlier contacts while, as he put it, "we were both growing up within the bank", communicated with him in Toronto and arranged for a meeting with him which would be attended as well by Mr. Swidler in order to assist the Wise Stores-Peoples representatives. The results of that meeting are reflected in Exhibit I-124, a letter dated October 6,1994, from Messrs. Herrity and Veilleux addressed to Peoples, to the attention of Messrs. Lionel and Ralph Wise, confirming that based upon Mr. Swidler's representations, they would be prepared to extend credit facilities beyond December 31, 1994 to a mutually acceptable date in 1995, provided however that in no event would they extend credit facilities beyond July 31,1995.

[...]

95. Things continued to go from bad to worse for the Wise Stores-Peoples organisation and what eventually was the last straw which did in both companies was the release of Exhibit P-15, a draft dated December 6, 1994 with respect to the Peoples financials as at October 29, 1994, covering the first three-quarters of fiscal January 1995. That draft balance sheet and draft statement of earnings (loss) were released to the representatives of

M. & S. and M. & S. plc at a meeting held with Me Tass Grivakes at the offices of Mackenzie Gervais (as it was then known) on December 6, 1994, a Tuesday.

96. Me Max Mendelsohn, an attorney specialized in the area of bankruptcy and insolvency, had been consulted between November 29 and December 1, 1994 by the Wise Brothers with respect to the imminent Bankruptcy of Wise Stores and Peoples.

97. Me Mendelsohn was in attendance at that meeting at the offices of Mackenzie Gervais on December 6. Also present were two Wise Brothers (Mr. Lionel Wise was not feeling well that day and remained at his office), Me Cossette, Mr. Manel, two representatives of M. & S. (Mr. Colvill and presumably Ms. Munro), Me Grivakes, Mr. André Giroux and, as Me Mendelsohn put it, perhaps some others. It was a very strained meeting and broke up immediately after the draft financials Exhibit P-iS were turned over to the representatives of M. & S. Within 3 days, that is on Friday, December 9,1994, in the morning. a receiver on behalf of the secured indebtedness of M. & S. entered the head office of Peoples-Wise Stores in order to take possession of M. & S.' security.

[...]

98. In conclusion, we may thus observe that, unless a recapitalization would have taken place, the slide into Bankruptcy by Peoples from February 1, 1994 to December 9, 1994 was constant, inexorable and unavoidable, in large part due to the adoption and putting into effect as at February 1,1994 of the new domestic inventory procurement policy.

CHAPTER 7 - THE LAW

(A) THE C.B.C.A.[2]

99. The relevant provision of that Statute for our purposes, Section 122, is set out at page 9 above.

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(2) R.S.C. 1985, c. C-44, first enacted as S.C. 1974-75-76, c. 33 on March 24, 1975, proclaimed in force as and from December 15, 1975.

100. Prior to the enactment of the initial version of the C.B.C.A. in 1975, the Canadian Corporations Act,[3] (hereinafter the "C.C.A.") governed federally chartered companies.

101. Although the C.C.A. enacted specific liabilities of directors -such as for example, Section 99(1) in favour of employees for unpaid wages not exceeding 6 months, or Section 101(2) in favour of a public company in relation to shares issued and allotted as fully paid-up for less than the fair equivalent of the cash that the company ought to have received if the shares had been issued and allotted for cash - it had no general provision creating directors' liability equivalent or similar to Section 122 C.B.C.A.

102. However, since Canadian Company Law historically and traditionally had as its source and inspiration the principles of British Company Law, Canadian courts had developed principles of directors' liability along the lines of the British Common Law jurisprudence.

103. The Common Law had evolved the concept of a duty of care, diligence and skill for corporate directors. Each of the three components of that Common Law concept was of a subjective nature in view of the practical difficulty to construe an objective standard by which all directors' actions (or failure to act) would be judged.

104. In the U.K., as it has often been described, the "seminal Common Law case" in this area is Re City Equitable Fire Insurance Co. Ltd.[4] That case involved fraud by one director causing a loss to the company. The receiver appointed to the company sought to recover the loss from the other directors and the auditors. The defendants were not involved in the fraud and their honesty was admitted by the plaintiff, who, however, argued that they were negligent in not discovering and preventing the fraud.

(3) R.S.C. 1970, c. C-32
(4) [1925] 1 Ch., 407.

105. The Court of Appeal, pursuant to the opinion of Mr. Justice Romer, exonerated the defendants and, in so doing, laid to rest the notion that in elaborating their duties and liabilities, directors were to be equated with trustees under the Common Law. It is in the nature of business to take risks and hence directors, although they clearly have a fiduciary duty to their company and its shareholders, could not be expected to conform to the same high objective standard of Common Law trustees.

106. Romer, J. elaborated three basic reasons to have exculpated the defendants:

> **"(i)** a director need not exhibit a greater degree of skill than may reasonably be expected from a person of his knowledge and experience;
>
> **(ii)** a director is not liable for errors in business judgment, as his primary function is to use his own particular talents in advocating corporate risk taking; and
>
> **(iii)** a director is not bound to give continuous attention to the affairs of the corporation. In the absence of grounds for suspicion he is fully justified in trusting corporate officials to be honest."

107. That third branch of his holding clearly applies more to what we would call "outside directors", such as for example Messrs. Stevenson and Cossette were here. However, the three Individual Respondents were not only directors and officers of Peoples and Wise Stores, but were also employed full time in the business enterprise of those companies.

108. The rule which had evolved in the U.S.A. required only that a director exercize his personal best judgment and do so with some degree of diligence.[5]

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(5) See Deizer, "Trends in Corporate Director Liability", (1972) 17 5. Dakota L. Rev., 468

109. The usual American defence is described as the "Business Judgment Rule", namely that the courts should not second-guess the judgment exercized honestly and diligently by the director. Me Lalanne invoked that defence here.

110. He also alluded to it while arguing his Motion to Dismiss in this case on March 30, 1998. In our Judgment on that Motion rendered orally in open court on April 6, 1998 and later transcribed, we wrote the following at pages 12 and 13, which we re-iterate here:

> "Further, that notion of mere error of judgment is also known as the "business judgment rule". At Tab number 4 in his Books of Authorities, Me Lalanne produced an extract from a book by Edmund M.A. Kwaw, published by Butterworths, Toronto, entitled The Law of Corporate Finance in Canada. Me Kugler, counsel for the Trustee, aptly brought to our attention the following at pages 18, 19 and 20 of that extract:
> At page 18:
>
> > *"The business judgment rule takes the form of a presumption in making decisions. The presumption is that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation. In the absence of any abuse of the directors' discretion, such a business judgment made by directors will not be challenged by the Courts.*[6] *The business judgment rule in its purest form only protects directors from errors of judgment and not from liability arising out of negligence in the process by which they reached the judgment concerned*[7]*. A number of cases have considered the scope of directors' duties of skill, care, and diligence, and the business judgment rule standard."*

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(6) See Aronson v. Lewis, 476 A. 2d 805 at 811 (Del. 1984); Polk v. Good, 507 A.2d 531 at 536 (Del. 1980); Smith v. Van Gorkom, 488 A.2d 858 at 872 (Del. 1985): and Sinclair Oil Corp. V. Levien, 280 A.2d 717 (Del. 1970).

(7) R. K. Bean, "Corporate Director Liability" (1988)65 Denver U.L. Rev. 59 and 60.

The author refers there to the U.S. Federal Court Judgment in Hanson Trust Plc v. ML SCM Acquisition Inc.[8]. There, Hanson PLc sought a declaration by the Court that a certain approval given by the Board of Directors of SCM was not protected by the business judgment rule. The Court wrote as follows; we find it at page 19 of the book:

> *"... a director as a corporate fiduciary, in the discharge of his responsibilities, must use at least that degree of diligence that an ordinarily prudent person under similar circumstances would use ... In evaluating this duty ... courts adhere to the business judgment rule ... Under the circumstances prescribed in this case, the business judgment rule is misapplied where it is extended to provide protection to corporate board members where there is an abundance of evidence strongly suggesting breach of fiduciary duty."*

At the present stage in the case at bar, the Court is concerned with allegations which must be taken to be admitted and true. The final evaluation will only be made in function of the evidence to be presented by the parties. And then we find the following at page 20 of the Kwaw book:

> *"The court then went on to discuss the nature of the corporate director's duty of care in the context of the business judgment rule as follows:*
>
> > *'Directors are also held to a duty of care. They must meet this standard with conscientious fairness. For example where their methodologies and procedures are ... so shallow in execution ... or half hearted as to constitute a pretext or a sham, then enquiring into their acts is not shielded by the business judgment rule ... The law is settled that ... the duty of due care required that a director's decision be made on the basis of reasonable diligence in gathering and*

(8) 781 F.2d 264 (2d Cir. 1986).

considering material information. In short a director's decision must be an informed.' "

111. In that same case of Hanson Trust plc, HSCM Industries Inc. et al,[9] the United States Second Circuit Court of Appeal declared:[10]

"The law is settled that, particularly where directors make decisions likely to affect shareholder welfare, the duty of due care requires that a director's decision be made on the basis of "reasonable diligence" in gathering and considering material information."

(...)

"(business judgment rule should not be available to directors who do "not exercise due care to ascertain the relevant and available facts before voting") Directors may be liable to shareholders for failing reasonably to obtain material information or to make a reasonable inquiry into material matters."

112. We will discuss below the question of the extension of that last proposition to creditors as "stakeholders" in a corporation.

113. See also in the Hanson Case:[11]

"To ascertain that management's proposal has not crossed this critical line, the Board certainly should have subjected the proposal to some substantial analysis. Instead, we view the board as only minimally fulfilling, if not abdicating, its rôle.

The proper exercise of due care by a director in informing himself of material information and in overseeing the outside advice on which he might appropriately rely is, of necessity, a pre-condition to performing his ultimate duty of acting in good faith to protect the best interests of the corporation. Although the SCM independent directors have not been shown to have acted

(9) 781 Federal Reporter, 2d Series, 264.
(10) At pages 274-275.
(11) At pages 276-277.

out of self-interest or to have been fraudulent or self-dealing in breach of their duty of loyalty, they do not appear to have pursued adequately their obligation to ensure the shareholders' fundamental right to make the "decisions affecting [the] corporation's ultimate destiny". *Nor/in*, 744 F.2d at 258, as required by their duty of care."

114. It is noted that the Court there referred to "independent" directors, i.e. outside directors. That dictum should therefore apply *a fortiori* to the Wise Brothers.

115. Some five years prior to the enactment of the C.B.C.A., the Canadian government appointed a task force to look into and study the matter, make recommendations and prepare and present as well a draft statute. That group was chaired by Robert W. Dickerson, of the British Colombia Bar. Its final report, in 1971, was entitled "Proposals for a New Business Corporations Law for Canada". It became known as the "Dickerson Report", which did contain a draft statute which formed the basis for the C.B.C.A.

116. We may read the following in Part 9.00, "Directors and Officers", at Paragraph No. 242 on page 83 of Volume 1:

"**242.** The formulation of the duty of care, diligence and skill owed by directors represents an attempt to **upgrade** the standard presently required of them. The principal change here is that whereas at present the law seems to be that a director is only required to demonstrate the degree of care, skill and diligence that could reasonably be expected from him, having regard to his knowledge and experience - *Re City Equitable Fire Insurance Co. [19251 Ch. 425* - **under s. 9.19(1)(b) he is required to conform to the standard of a reasonably prudent man. Recent experience has demonstrated how low the prevailing legal standard of care for directors is, and we have sought to raise it significantly**. We are aware of the argument that raising the standard of conduct for directors may deter people from accepting directorships. The truth of that argument has not been demonstrated and we think it is specious. The duty of care imposed by s. 9.19(1)(b) is exactly the same as that which the common law imposes on every

professional person, for example, and there is no evidence that this has dried up the supply of lawyers, accountants, architects, surgeons or anyone else. It is in any event cold comfort to a shareholder to know that there is a steady supply of marginally competent people available under present law to manage his investment."

(Emphasis added.)

117. Section 122 of the C.B.C.A. is the result of that recommendation. It has partly objectified the standard which theretofore had been purely subjective. That partial objectification consists of the element of a **reasonably diligent** (that is, prudent) director and **NOT** of a **reasonably skilful** director. If by his experience and knowledge the director has skills (subjective) he must apply them with reasonable diligence (objective).

118. If he does not have the skill, he must be diligent by seeking out professional advice. Hence, the exculpatory provision of Section 123(4)(b) C.B.C.A., which declares:

> "**123.(4) [Reliance on statements]** A director is not liable under section 118, 119 or 122 if he relies in good faith on
> (a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
>
> (b) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him."

119. In delivering the 1975 Meredith Memorial Lecture at McGill University, John L. Howard opined:[12]

> "The term diligence [in Section 122(1)b)] was expressly used to abrogate the low standard of English law and to substitute the higher standard of U.S. law, which requires that a director turn his attention to the affairs of the corporation."

(12) John L. Howard, A.D.M. Corporate Affairs, Department of Consumer and Corporate Affairs. "MEREDITH MEMORIAL LECTURES", the Faculty of Law, McGill university, Richard De Boo Limited, 282, at pages 297-298.

120. Mr. Lavigne demonstrated that, essentially, the entire final balance of the interco was incurred after September 1994. The explanation of the Individual Respondents in that regard is that, once Peoples had purchased and received all the merchandise for the Christmas 1994 season, they had no choice but to transfer Wise Stores' needs to its stores. Otherwise, Wise Stores would not have had enough merchandise to sell and Peoples would have remained with more merchandise than it could sell.

121. That explanation is seductive at first blush, but does not resist analysis. It is correct to argue that, once Peoples had purchased more than it needed for itself, it had no choice but to make the transfers to Wise Stores. However, the flaw in that "logic" is that Peoples should never have purchased for Wise Stores in the first place. Therein lies the fault and negligence of the Wise Brothers.

122. Bruce Welling[13] is of the opinion that the statutory reforms introduced by Section 122 C.B.C.A.:

> "... appear to have brought us what is generally regarded as the American rule: directors and officers must exercise diligence and use their own personal best business judgment. While the requirements for care and skill may remain unchanged, it is clear that the reformed Canadian statutes..."

(Some provincial legislation mirrors the C.B.C.A. For example, Ontario, British Columbia and New Brunswick.)

> "... require the diligence of a person who is reasonably prudent, although he may be otherwise unreasonable in many respects.."[14]

(13) Associate Professor of Law. University of Western Ontario, "Corporate Law in Canada: The Governing Principles", Butterworth, Second Edition 1991, see at pages 329-336.

(14) At page 334.

123. We shall now turn to the abundant jurisprudence and doctrine cited and pleaded by the parties. It will be recalled that the reforms brought forward by the C.B.C.A. relating to directors' liability were drawn more upon American than British sources. Moreover, the Dickerson Report also drew on other Commonwealth sources, citing jurisprudence and trends in the United Kingdom, New Zealand and Australia.

124. ***QUAERE:*** Is it therefore appropriate and permissible, in addition to Canadian doctrine and jurisprudence, to draw and rely upon British, American, Australian and New Zealand jurisprudence and doctrine in that regard? We believe so.

125. On a similar question relating to the B.I.A., the undersigned wrote ("the Act" being the defined reference to the B.I.A.):

> "Traditionally, until the recent major amendments to the Act, Canadian bankruptcy law has been inspired by British bankruptcy law. Thus, it has been common to refer to British authorities and only less frequently to American authorities. However, as a result of those recent amendments, one now speaks of «protection under the Bankruptcy Act», a concept which has been long known to American bankruptcy law but not known to Canadian bankruptcy law as expressed in the former version of the Act.
>
> This explains in large part the frequent recourse in the past by debtor companies to the Companies' Creditors Arrangement Act, (hereinafter the «CCAA»). The Act now has been reformed to bring it more in line with the spirit of the United States Bankruptcy Act, which we believe gives this Court even greater justification to refer to and to some extent rely upon American jurisprudence and authorities."[15]

126. In that light, counsel for the Wise Brothers invoked the notion found in the American jurisprudence of the interests of a corporate group of companies as contrasted

(15) A. & F. Baillargeon Express Inc., [1993] 27 C.B.R. (3d), 36, at page 41.

with the interests of one member of such a group. In support, he invoked doctrine and jurisprudence. In "CANADIAN BUSINESS ORGANISATION LAW"[16] the authors Tom Hadden, Robert Forbes and Ralph Simmonds wrote:

> "No doubt, where a subsidiary is wholly-owned, the interests of the group as a whole may legitimately be preferred to those of the individual company. But where there are minority shareholders, the conflict of interest cannot be avoided."

127. However, in his article entitled "CORPORATE GROUPS AND THE CORPORATE VEIL IN CANADA: A PENETRATING LOOK AT PARENT-SUBSIDIARY RELATIONS IN THE MODERN CORPORATE ENTERPRISE"[17] Neil C. Sargent nuanced that assertion when he wrote:

> "From a legal perspective a group has no separate existence under Canadian law. Each corporation in a group must be managed as an independent entity, even if wholly-owned and controlled by another corporation. In practice, however, this legal model often bears little or no relation to the realities of corporate control within an integrated corporate group. Consequently, Landers argues that corporate decision-making within a multi-corporate enterprise will normally be directed towards the overall return on investment for the enterprise as a whole, rather than for each individual subsidiary. Indeed, there may be good commercial or fiscal reasons for operating an individual subsidiary at a loss or as a dormant company."

128. Counsel for the Individual Respondents also cited, among others, the judgment of the Supreme Court of Delaware in Anadarco Petroleum Corporation vs. Panhandle Eastern Corporation:[18]

> "However, in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders."

(16) Butterworths, Toronto, 1984, at page 623.
(17) [1987] 17 Man. L J.156, at page 162.
(18) Del. Supr., 545 A.2d, 1171, at page 1174.

129. Hence, he argued, the Individual Respondents were entitled to ignore the interests of Peoples as such and make decisions concerning the latter by taking into account only the best interests of Wise Stores. This, we find, is in fact what they did.

130. Responding to that argument, Mes Kugler and Amdursky directed the Court to doctrine and several cases, Canadian, American and British.

131. There is firstly the book by Hadden, Forbes and Simmonds, cited above, specifically with regard to Chapter 9, entitled "CORPORATE GROUPS". At page 623 we find:

> "The possibility of complex corporate structures of this kind, which as has been seen are particularly common in large Canadian companies, increases the risk that minority shareholders in subordinate companies may be prejudiced. The primary protection in this context is the duty of the directors and officers of each individual company to pursue the interests of that company and of all its shareholders regardless of its position within a larger group or association of companies."

170. At page 632, under the heading "Common Law Rules", the authors declare:

> "It is an established legal rule that holding and subsidiary companies must be regarded as separate legal entities in the same way as any other company, and that their directors and officers must look to the interests of their own company to the exclusion of those of other companies within the group or of the group as a whole. This view was forcefully expressed in the leading British case of Charterbridcie Corp. Ltd. vs. Lloyds Bank Ltd.:[19]
>
> > 'The controlling director of a group of companies arranged for one of its subsidiaries, of which he was a director, to guarantee the debts of an associated company within the group and for its assets to be charged

(19) [1970] Ch., 62.

> as security for that guarantee. The validity of the charge was subsequently contested by a third party who had purchased the assets of the subsidiary in question. It was held that the charge was valid in that the director in his capacity as director of the subsidiary had validly considered the interests of the subsidiary in relation to those of the group as a whole: but it was stressed that it was not sufficient for the directors of a subsidiary to look only to the interests of a group in conducting the affairs of a subsidiary. Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interests of that company in preference to the interest of the group.'

This formal legal rule, however, is often ignored both in corporate practice and in the decisions of the courts."

132. It is not the intention of this Court to ignore that rule.

133. Further, on page 633, we find:
"It follows from the general principle that each company within a group is a separate legal entity that the directors of a subsidiary are both entitled and obliged to assert the interests of their own company as opposed to those of the group or of any other company within it. In many cases, this will cause little practical difficulty, in that the long term interests of each individual company in the group may be said to lie in the prosperity of the group as a whole. But there are a number of situations in which conflicts of interest may arise, notably where a holding company and its subsidiary are subject to different legal obligations, where there is a difference of opinion between the directors of the subsidiary and those at group headquarters, and where there are minority shareholders in the subsidiary."

134. Those same authors then dealt with the parallel duty on the part of the parent company. See at pages 636-637:

"The duty imposed on the directors of a subsidiary company not to subordinate the interests of their company

to those of the group is paralleled by a duty on the part of the holding company not to use its power of control unfairly. This has long been established both in Britain and the United States, though the different terminology and reasoning have served to obscure the practical similarity in the law.

In Britain, the duty or the part of a holding company to deal fairly with its subsidiaries has been most clearly formulated in respect of the statutory remedy against oppression. In the leading case on the topic, it was held that a holding company was liable to minority shareholders in a subsidiary whose business had been deliberately run down in order to increase the profitability of the holding company."

135. We turn now to the case of Westfair Foods Ltd. vs. Watt et al.[20] In this case, Chief Justice Moore of the Alberta Court of Queen's Bench was seized with an oppression remedy by class A shareholders of the subsidiary pursuant to Section 241 C.B.C.A. The impugned act was a dividend which had been declared by the subsidiary, the parent being the sole beneficiary by virtue of the fact that it held all of the issued and outstanding common shares of the subsidiary. Unlike the case at bar, in the Westfair case there were minority shareholders of the subsidiary. Nevertheless, we feel that certain general concepts evoked by Moore C.J.Q.B. can be of assistance to us. It should be noted that Kelly Douglas was the parent and that it owned 100% of the common shares of the subsidiary, Westfair. Chief Justice Moore wrote at page 349:

"Moreover, the decision to dividend and borrow back was made in the absence of any independent analysis of the value of this purported expertise to Westfair or any independent commercial valuation of the payments. Given the fact that there are only two classes of shareholders of Westfair and that Kelly Douglas owns 100 per cent of the common shares, such a decision creates, at least, an apprehension of disregard for the interests of the class A shareholders."

(20) (1990) 73 Alta. L.R., 326.

174. And at page 351:

> "While it is not unusual for companies, when one is a subsidiary of the other, to have directors and officers in common, extreme care must be exercised by the directors to act in the best interests of both companies, having regard to the interests of all classes of shareholders."

136. As in the present affair, Westfair (the subsidiary) had not undertaken any independent evaluation of the dividending and borrowing-back policies at issue.

137. In Scottish Co-op. Wholesale Soc. Ltd. vs. Meyer et al.[21] Viscount Simonds declared:

> "As I have said, nominees of a parent company on the board of a subsidiary company may be placed in a difficult and delicate position. It is then the more incumbent on the parent company to behave with scrupulous fairness to the minority shareholders and to avoid imposing on their nominees the alternative of disregarding their instructions or betraying the interests of the minority."

138. In the present case there was no minority interest in Peoples. However, we can extrapolate by completing that last thought as: "... and to avoid imposing on their nominees the alternative of disregarding their instructions or betraying the interests of the subsidiary company".

139. In the case at bar, *a fortiori*, the Wise Brothers, when acting as the directors of Peoples, were more than mere nominees of Wise Stores. They represented the Wise family's 75% equity stake in Wise Stores, where they were also directors. We thus believe that their duty as directors of Peoples was, if anything, accentuated.

140. In Rolled Steel Products Ltd. vs. British Steel Corp. et al.[22] the Chancery Division considered a case where, as here, the subsidiary entered into a transaction with its

(21) [1958] 3 All E.R., 66, at page 71.
(22) [1982] 3 All E.R., (Chancery Division), 1057.

parent which was contrary to the commercial interests of the subsidiary. Vinelott, J. wrote at pages 1077-1078:

> "... if a transaction is entered into in purported reliance on a provision in the memorandum of association of a company which on construction can be seen to be a power conferred for the furtherance of the company's commercial objects, the question whether the transaction was *ultra vires* in the wider sense as being an abuse of the power and the question whether the transaction was entered into for the benefit and to promote the prosperity of the company in large measure overlap if they do not coincide. It is difficult to see how a transaction apparently within the scope of such a power but which was clearly detrimental to the company's commercial interests could be said to be one entered into in pursuance of its commercial purposes.

179. Further, at page 1079:

> "It is quite clear that the directors of RSP did not, in fact, decide that it would be in the interests of RSP to enter into the proposed transaction in order to obtain the benefits I have outlined. Moreover, if an independent board had been faced with the suggested choice it could not, as I see it, have decided that it was in the interests of RSP to enter into the proposed transaction without any commitment on the part of Mr. Shenkman..."

141. We hasten to add that in the present case, the Wise Brothers derived no direct personal benefit from the new domestic inventory procurement policy, albeit that, as the controlling shareholders of Wise Stores, there was an indirect benefit to them. Moreover, as was conceded by the other parties herein, in deciding to implement the new domestic inventory procurement policy, there was no dishonesty or fraud on their part.

142. In the conceptually similar case of Re Horsley & Weight Ltd.,[23] before the United Kingdom Court of Appeal, Civil Division, by Templeman, LJ., at page 1056:

(23) [1982] 3 All E.R., 1045.

> "In the absence of fraud there could still have been negligence on the part of the directors. If the company could not afford to spend £10,000 on the grant of a pension, having regard to problems of cash flow and profitability, it was negligent of the directors to pay out £10,000 for the benefit of Mr. Horsley senior at that juncture. There could have been gross negligence, amounting to misfeasance. If the company could not afford to pay out £10,000 and was doubtfully solvent so that the expenditure threatened the continued existence of the company, the directors ought to have known the facts and ought at any rate to have postponed the grant of the pension until the financial position of the company was assured."

143. Turning now to an American case on this point, see Sinclair Oil Corporation vs. Levien.[24] This was a case heard by the Supreme Court of Delaware. Chief justice Wolcott declared at page 720:

> "When the situation involves a parent and a subsidiary, with the parent controlling the transaction and fixing the terms, the test of intrinsic fairness with its resulting shifting of the burden of proof, is applied The basic situation for the application of the rule is the one in which the parent has received a benefit to the exclusion and at the expense of the subsidiary."

182. Further, on page 720:

> "A parent does indeed owe a fiduciary duty to its subsidiary when there are parent-subsidiary dealings. However, this alone will not evoke the intrinsic fairness standard. This standard will be applied only when the fiduciary duty is accompanied by self-dealing - the situation when a parent is on both sides of a transaction with its subsidiary. Self-dealing occurs when a parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary."

(24) (1971) 280 Atlantic Reporter, 2d Series, 717.

144. We are of the view that one can equally read the end of that last citation as: "... receives something from the subsidiary to the exclusion of, and detriment to, that subsidiary."

145. Me Lalanne invoked Section 44(2)(c) of the C.B.C.A., which decrees:

44.(2) A corporation may give financial assistance by means of a loan, guarantee or otherwise

...

(c) to a holding body corporate if the incorporation is a wholly-owned subsidiary of the holding body corporate."

146. Hence, he argued that Peoples was entitled to give financial assistance to Wise Stores. Of course, vis-à-vis M. & S., such financial assistance was prohibited. However, we are not here enforcing against Wise Brothers or Peoples the rights or claim of M. & S.

147. In Primex Investments Ltd. vs. Northwest Sports Enterprises Ltd. et al.[25] Tysoe, J. declared at page 323:

"The fact that the transaction complied with Policy Statement 9.1 of the Ontario Securities Commission is of little moment. The Policy Statement is directed at matters of securities law, not transfers of assets by a company. Compliance by the directors with securities law does not necessarily mean that they have complied with all of their duties."

148. We can easily substitute "Section 44(2)(c) C.B.C.A." for "Policy Statement 9.1 of the Ontario Securities Commission". Hence, compliance by the directors with Section 44(2)(c), or more correctly, acting as permitted therein, does not necessarily mean that they have complied with all their duties. Here they did not.

149. Based on all the foregoing doctrine and jurisprudence, this Court concludes that the directors of a wholly-owned subsidiary may consider the best interests of the parent and, where those and the best interests of the subsidiary overlap or coincide, they may act accordingly.

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(25) (1995) 13 B.C.L.R.(3d) 300.

Where those respective interests are not congruent, they must attempt to conciliate the two. Hence, where there is mutuality of interests, there is no problem. However, where the best interests of the subsidiary are in direct conflict with those of the parent, the former must prevail in regard to the actions of the directors of the subsidiary.

150. We were invited by counsel for the Trustee-Petitioner to consider the notion of creditors as "stakeholders" in a corporation:

Over the past 20 years or so:

"…. British, Australian and New Zealand courts have repeatedly held, at least where a company is insolvent or near to insolvency, that the directors' duties lie not only towards the company's shareholders, but that they are also bound to act in the best interests of the company's creditors The aggregate effect of these developments is to change radically the traditional corporate law doctrine that the directors' duty is to promote the welfare of the company's shareholders and that creditors must be expected to look after them selves."[26]

190. In Nicholson vs. Permakraft (NZ) Ltd.,[27] Cooke, J. wrote a landmark opinion where lie declared:

At page 249:

"The duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider *inter alia* the interests of creditors. For instance creditors are entitled to consideration, in my opinion, if the company is insolvent, or near-insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardise its solvency."

(26) "CREDITORS AS CORPORATE STAKEHOLDERS: THE QUIET REVOLUTION - AN ANGLO-CANADIAN PERPECTIVE", (1993) 43 UNIVERSITY OF TORONTO LAW JOURNAL, 511; by Jacob G. Ziegel, Faculty of Law, University of Toronto.

(27) The New Zealand Court of Appeal, [1985] 1 NZLR, 242, at pages 249-250.

151. This would appear to closely describe the status of Peoples as it was plunged headlong into the new domestic inventory procurement policy.

At page 250:

"I would respectfully adopt the approach of Cumming-Bruce and Templeman LJJ in *Re Horsley & Weight Ltd.[1982]* Ch 442, 454-456. Both Lord Justices favoured an objective test: whether at the time of the payment in question the directors "should have appreciated" or "ought to have known" that it was likely to cause loss to creditors or threatened the continued existence of the company.

(...)

I also share the view to which Cumming-Bruce and Templeman LJJ evidently inclined in their obiter observations that in such cases the unanimous assent of the shareholders..."

(As we may assume in the case at bar that Wise Stores assented.)

"... is not enough to justify the breach of duty to the creditors. The situation is really one where those conducting the affairs of the company owe a duty to creditors. Concurrence by the shareholders prevents any complaint by them, but compounds rather than excuses the breach as against the creditors."

152. The Courts of Australia echoed that holding in Nicholson and also record judgments to the same effect even prior to Nicholson.

153. In Kinsela vs. Russel Kinsela PTY Ltd.,[28] Street, CJ wrote:

"The obligation by directors to consider, in appropriate cases, the interests of creditors has been recognised also in the High Court of Australia. In *Walker v Wimbome* (1976) 137 CLR I Mason J said (at 6-7):

(28) [1986] 4 NSWLR, 722, at page 732.

"...it should be emphasized that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of the creditors will have adverse consequences for the company as well as for them"

Barwick CJ concurred in the judgment of Mason J.

It is, to my mind, legally and logically acceptable to recognise that, where directors are involved in a breach of their duty to the company affecting the interests of the shareholders, then shareholders can either authorise that breach in prospect or ratify it in retrospect. Where, however, the interests at risk are those of creditors I see no reason in law or in logic to recognise that the shareholders can authorise the breach. Once it is accepted, as in my view it must be, that the directors' duty to a company as a whole extends in an insolvency context to not prejudicing the interests of creditors *(Nicholson v Permakraft* (NZ) *Ltd.* and *Walker v Wimbome)* the shareholders do not have the power or authority to absolve the directors from that breach."

154. In England, the House of Lords put its stamp of approval on this concept in Winkworth vs. Edward Baron Development Co. Ltd. et al:[29]

"But a company owes a duty to its creditors, present and future. The company is not bound to pay off every debt as soon as it is incurred and the company is not obliged to avoid all ventures which involve an element of risk, but the company owes a duty to its creditors to keep its property inviolate and available for the repayment of its debts. The conscience of the company, as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.

(...)

(29) [1937] 1 All ER, 114, by Lord Templeman, at page 118.

> These breaches of duty would not have mattered if Mr. and Mrs. Wing had been able to maintain the solvency of the company and to see that all its creditors were paid in full."

155. Even though in Winkworth the directors' actions were motivated by the wish to benefit themselves, and that was not the case with the Wise Brothers here, the general rationale of that Judgment applies in the present case.

156. We also note with interest the U.K. judgment in Liquidator of West Mercia Safetywear Ltd. vs. Dodd & Anor:[30]

> "But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company s assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration."

157. We agree with the thrust of those judgments and find that Canadian Corporate Law should evolve in that direction.

158. As professor Ziegel wrote in conclusion in his article cited above:[31]

> "... it is not unresonable, in exchange for the benefit of limited liability, to impose a duty on directors not to sacrifice creditors' interests when the going gets rough. Chief Justice Street's analogy in *Kinsela* is apt. If the company is insolvent..."

(Or, we are of the view, if the company is embarking on a course of action which will inevitably in the short run render it insolvent, as was the case here when Peoples embarked on the new domestic inventory procurement policy.)

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(30) (1988) 4 B.C.C., 30, at page 33.
(31) At page 530.

"... only the creditors still have a meaningful stake in its assets. This will be obvious if the company has been formally declared bankrupt. Why should it make a difference that bankruptcy has been delayed for a period of time? If we accept the paramountcy of creditors' interest when the company is insolvent, it must likewise be wrong, and a waste of economic resources, for the directors to continue to buy goods and services on credit knowing there is no reasonable prospect of the creditors ever being paid."

We agree.

159. In conclusion, for all the reasons analysed and discussed above, there will be Judgment rendered against each of the Wise Brothers as Directors of Peoples, in virtue of Section 122 C.B.C.A., in an amount to be analysed, calculated and determined in conformity with Chapters 8 to 13, 15 and 16 below.

160. In view of the above conclusion, it is, strictly speaking, no longer necessary for this Court to consider and resolve the issues raised by the parties pursuant to Section 100 B.I.A. Yet, seeing what is involved here, it is likely that the present Judgment will be taken to appeal. In such an eventuality, should higher judicial authority overrule that conclusion, it would be expected that the Appeal Court would order that this file be returned to the undersigned so that a ruling be made with regard to the pretentions of the parties regarding Section 100 B.I.A.

[...]