Directors' Liability and the Individual Assessment of Fault

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"Myself when young did eagerly frequent
Doctor and Saint and heard great Argument
About it and about; but evermore
Came out by the same door as in I went."

Edward Fitzgerald
The Rubaiyat of Omar Khayyam

A Common Legal Standard?

Every director of a company brings to the board his or her own unique combination of qualifications, experiences and skills. A large corporation with a complex business may deliberately create a board on which the directors will come from different backgrounds and fields of endeavour relevant to the business of the corporation. Implicit in such an approach is the notion that many directors may lack any expertise or experience in important aspects of the company's business. Individual directors may come from particular professions whereas others may have purely technical or business backgrounds. Some directors may represent and project specific values with which the company wishes to associate itself, whereas others may be in a position to impact more directly on the operations of the company. Some directors may play a role in supporting a relationship with key stakeholders in the company's business and others may not. Finally, some directors may play an important day to day role in the management of the business, serving as officers or employees of the business as well as directors, whereas others (particularly in public companies) may have been appointed to play the specific role of being independent of management and of any particular stakeholder.

The expectations as to what skills a director will bring to his or her performance on a board may be contrasted with expectations relating to other social and professional activities which might cause harm if not performed to a reasonable standard. For example, society expects all drivers to have a very standardized set of minimum driving skills. A driver can not avoid liability by saying that he could not have avoided the accident because, while he excels at making right turns, he has never claimed to be very good at making left turns. Similarly with professionals the expectations of clients and third parties are usually defined by quite standardized expectations as to the objectives sought to be achieved and the skills that will be brought to bear on a professional assignment. A real estate lawyer is expected to complete a transaction with an assurance that title has been obtained or with specific advice as to any defects in title. Where there is a differentiation in skills required to accomplish a specific task, a professional, who is only qualified in one aspect may be expected to realize that and involve or recommend the involvement of a specialist with another necessary skill. For example, it is a reasonable expectation that a surgeon would involve an anesthesiologist.

On the other hand, there are broad categories of activities in which individuals may share a common title but in which there are very different expectations as to the qualifications and skill sets which will be brought to bear. We do not have to look very far to find such an example. A Chief Executive Officer, a Chief Technology Officer and a Chief Financial Officer of a corporation may all be "officers" of a company but clearly the expectations as to their standard of performance on issues within and outside their respective areas will be very different. Similarly, it could never be rationally suggested that all "employees" should be held to the same standard of performance on all issues regardless of the qualifications they put forward when

applying for the job, the area of work to which they are assigned or even their demonstrated capabilities over an extended period of time.

Directors on a board have a common title; but it is evident that they all may not (and, it may be argued, should not) have the same contributions to make to the work of the board and the welfare of the company. It is certainly crucial from a socio-economic point of view that the financial affairs of a corporation should be run properly, i.e. effectively and honestly. However, it can not be denied that from the same socio-economic point of view, it would be wrong to exclude from the governance of corporations the representation of cultural, familial, environmental, multicultural, consumer, legal and political values – indeed any kind of values that would give shareholders the confidence that the corporation will be run in their interest having regard to the overall context and objectives of the business. The success of the recipe will ultimately depend on the combination and quality of the ingredients and how they have been blended together. But each ingredient must of necessity be judged on its own qualities. It is not the fault of the pepper, if the dish lacks salt.

The question then is whether there is a common legal standard by which the care and skill of all directors to a corporation may be judged. Surprisingly, all possible answers to this question may, in one sense or another, be correct.

The Statutory Standard

One could say the answer to this question is that there is a common legal standard enshrined in major corporate statutes, including the Ontario Business Corporations Act ("OBCA") and the Canada Business Corporations Act ("CBCA"). Both the OBCA and the CBCA provide a very

simple and seemingly self evident standard to describe the duty of care owed by directors to the corporation. In the case of the OBCA section 134(1)(b) provides as follows.

> "134.(1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

Thus, purely at the level of legal codification, it may be said that a single statutory standard applies to the standard of care expected of directors in Ontario and, through virtually identical provisions in other Canadian statues, in Canada generally. However, on closer examination the phrases "reasonably prudent person" and "in comparable circumstances" beg the question as to what point of reference or norm of behaviour will be used to evaluate the conduct of a given director in the circumstances of any given case.

The "Reasonably Prudent Person" Standard

Those familiar with the common law will recognize section 134(1)(b) as an adaptation of the "the reasonable person" test which is generally applied in all negligence cases where the issue is whether a defendant's lack of reasonable care has caused harm to another. When the test is formulated in this manner it is said to be an "objective" test in the sense that the defendant's conduct is viewed from an external perspective. It is a test which is intended to eliminate "the personal equation" and is "independent of the idiosyncrasies of the particular person whose conduct is in question"[1]. The "reasonable person" test is intended to impose a minimum level of performance on everyone, whether they are capable of it or not.[2] The emphasis is on judging conduct by a consideration of external factors and generalized expectations as to the conduct of

[1] *Glasgow Corp v. Muir*, [1943] A.C. 448 at 457.
[2] Allen M. Linden, *Canadian Tort Law,* 7th ed (Markham: LexisNexis Canada, 2001) at 131.

an individual as opposed to a consideration of the individual's internal thought processes or motivations.

However, it is not the case that the common law prescribes a uniform standard in all circumstances. For example, as one would expect, the standard that has been applied to professionals when they are practicing their professions has been said to be more onerous than a standard that would be applied to other individuals:

> "The reasonable person standard is more onerous for professionals as they hold themselves out as possessing special skill and competence which often has come about through special training and experience. A professional is required to exercise reasonable care, skill and knowledge in the performance of the professional service which has been undertaken. Thus, the professional will be judged by what is reasonable and appropriate to expect of a professional in the same calling exercising reasonable care and skill in similar circumstances. The standard of care is an objective one and it will not be sufficient to disprove negligence if the professional simply proves that he did the best that he was able to based on his skill and knowledge in the circumstances."[3]

Similarly, although it has not yet become fully entrenched in the law except with respect to medical cases, professionals who hold themselves out as having a specialization within their profession may be held to a higher standard when dealing with matters within their specialty. Again, this is in keeping with the objectively higher expectations of those dealing with specialists that a greater degree of skill and care, commensurate with the state of the particular specialty at the time will be brought to bear.[4]

The "more onerous" standard that is applied to professionals is simply a result of the fact that each professional is compared to the standards of a reasonably competent practitioner within the

[3] John A. Campion & Dianna W. Dimmer, *Professional Liability in Canada,*(Toronto: Carswell, 1994) at 3.25-3.26.
[4] *Ibid.* at 3.27-3.28.

particular profession. The standard can also vary according to local conditions of practice. Therefore, it might be said that the application of the standard is based upon first identifying the appropriate peer group, i.e. a group identified by similar objective characteristics, and then establishing what reasonable standards of care exist within that peer group. This is relatively easy when a reference group necessarily shares certain qualifications and competencies based on the performance of well defined functions, perhaps under the auspices of a governing body. In such cases, quite specific and possibly "onerous" standards might be established. Where the reference group consists of people of varied skills and backgrounds objective standards are still possible based on routine objectives and tasks which are shared by the group, but the reference group becomes less relevant as more specialized or unusual issues are encountered.

The Director as a "Reasonably Prudent Person"

A brief examination of the basic common law standard of care immediately raises questions when that standard is applied to directors. As has already been noted, there is no one uniform type of contribution that is expected from all directors. Indeed, a corporation is well served by a diversity of contributions. Nor does our legal system establish liability on a group basis or mete out collective punishment to a board of directors when something goes wrong. The assessment of fault is inherently and invariably made on an individual basis.

It is perhaps important to observe that the Dickerson Report of 1971 which had proposed a statutory standard based on the "reasonably prudent person", did so in the belief that by imposing the common law, objective standard of care upon directors they were raising the standard of care beyond that which had formerly been imposed on directors by the common law. In other words there was a perception that the common law rule had been previously relaxed in its application to

directors by failing to apply a uniform objective standard but instead taking into account the individual qualifications and experience of particular directors when judging their performance.

> "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.,* [1925] Ch. 425 – under [the proposed statutory standard] 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 [the "reasonably prudent person" standard] 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].[5]

As mentioned in the Dickerson Report, the famous case of *In re City Equitable Fire Insurance Company Limited*, [1924] 1 Ch. 407 at 427-428 had established the standard of care for directors in the early 20th century. In that case it was held by the Chancery Division in England that:

> "In order, therefore, to ascertain the duties that a person appointed to the board of an established company undertakes to perform, **it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and other officials of the company**, provided always that this distribution is a reasonable one in the circumstances and is not inconsistent with any express provisions of the articles of association...**a director need not exhibit in the performance of his duties a greater**

[5]Robert W.V. Dickerson, John L. Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada*, 1971 cited in Carol Hansell, *Directors and Officers in Canada: Law and Practice,* vol. 2 (Scarborough: Carswell, 1999).

> **degree of skill than may reasonably be expected from a person of his knowledge and experience."** [emphasis added].

It is interesting to note that, despite the criticism of it in the Dickerson Report, the *City Equitable* case takes into account two inescapable realities of the governance of modern companies, especially public companies, which necessarily imply differential liability: the first is the fact that many of the directors on a given board will not take part in the operation of the business and the second is that the directors may be intentionally chosen to possess different skills and experiences.

It may also be noted that, contrary to the assertion in the Dickerson Report, the differentiated standard in *City Equitable* does not necessarily lead to a lower standard of care. It would be quite consistent with the approach in *City Equitable* that an individual might be held to a higher standard having regard to his or her personal qualifications, particularly if the "work of the company is...distributed" in such a manner as to suggest some reliance on those specialized qualifications. The facts surrounding the appointment of an individual might speak to that issue. On the other hand, an individual no matter how well qualified in a specific field may not be expected to actually perform to the relevant professional standard with respect to a particular issue unless it specifically arises in the course of the deliberations of the board in a manner which permits the exercise of professional judgment. A real estate lawyer without a title search is not more likely to discover a flaw in title than someone who does not have that professional qualification. On the other hand, a professional might be expected to apply a heightened level of sensitivity or concern to issues within his or her field of expertise. It would seem therefore that, in the arena of directorships, an individualized assessment of conduct is inevitable.

"Comparable Circumstances"

The suggestion that the statutory standard in section 134 (1)(b) of the OBCA sets up a single, objective standard of care for directors in contrast with the common law standard becomes even more dubious when one considers the words "in comparable circumstances". These words were added by the legislative drafters to the" reasonably prudent person" test proposed by the Dickerson Report "to permit a court to consider all aspects of an impugned transaction – the kind of business, the extraordinary nature of the transaction and the status of each director as a professional, an insider or an outsider".[6]

In light of these words and given that the legislative drafters appear to have explicitly rejected the one size fits all proposal of the Dickerson Report, it is open to question whether the statutory test in its final form differs from the common law test as set out in *City Equitable* in any material way. Certainly, based only on the words of section 134(1)(b), it would be difficult to argue that the statutory test results in a standard that is more – or less – stringent than the common law test. Depending on the facts of a given case, it would seem that, in applying the statutory standard of care, the court may take into account comparable circumstances such as the involvement of the director in the actual running of the business, the directors actual knowledge of the problem which arose, the professional or other qualifications of an individual director as well as the expectation or opportunity for that director to bring those qualifications to bear.

Judicial Interpretation of the Statutory Standard

The statutory standard in section 134(1)(b) of the OBCA is replicated in section 122(1)(b) of the CBCA , section 227.1(3) of the *Income Tax Ac*t and numerous other Canadian corporate statutes. This has allowed for the development of significant jurisprudence in which courts across the

[6] Carol Hansell, *Directors and Officers in Canada: Law and Practice,* vol. 2 (Scarborough: Carswell, 1999).

country have interpreted and applied the standard in a manner which, it is submitted, has been very consistent with the *City Equitable* approach.

For example, in the *Golfman (W.R.)* v. *M.N.R.*, [1990] 2 C.T.C. 2344 a lawyer who served as an outside director was held not to be liable for tax remittances as there was no reasonable way for him to have become aware of the state of the remittances through his participation in the board of directors. Similarly, in *Davies* v. *Canada*, [1994] 1 C.P.T.C. 2744 three outside directors who lacked expertise relating to financial issues were held not to be personally liable for tax remittances because they lacked sufficient information and knowledge to impose liability.

The decision of the Federal Court of Appeal in *Soper* v. *Canada*, [1998] 1 F.C. 124 followed this approach. Indeed, the court in *Soper* explicitly asked itself the question "whether the standard of care formulated in *City Equitable* has been upgraded pursuant to subsection 227.1(3)" of the *Income Tax Act*. In effect, the court in *Soper* held that the common law standard, as codified by statute, continued to apply. As Marceau, J.A. stated:

> "Rather than treating the directors as a homogenous group of professionals whose conduct is governed by a single, unchanging, standard, that provision embraces the subjective element which takes into account the personal knowledge and background of the director, as well as his or her corporate circumstances in the form of, *inter alia*, the company's organization, resources, customs and conduct. Thus, for example more is expected of individuals with superior qualifications (e.g. experienced business-persons)."

It is crucial to note that the court in *Soper* characterized as "a subjective element" the analysis which flows from the words "in comparable circumstances". In so doing, the Federal Court of Appeal found that the statutory standard of care is neither purely objective nor purely subjective:

> "It is not enough for a director to say he or she did his or her best, for that is an invocation of the purely subjective standard. Equally clear is that honesty is not enough. However, the standard is not a professional one. Nor is it the negligence law standard that governs these cases. Rather, the act contains both objective elements – embodied in the reasonable person language – and subjective elements – inherent in individual considerations like "skill" and the idea of "comparable circumstances". Accordingly, the standard can be properly described as "objective subjective."

The Supreme Court of Canada subsequently disagreed with the notion that the words "in comparable circumstances" introduce a subjective element into the statutory standard of care applicable to directors. In the case of *Peoples Department Stores Inc. (Trustee of)* v. *Wise*, [2004] 3 S.C.R. 461 [2004] S. P. J. No. 64 the Supreme Court of Canada summarized its views as follows:

> "The statutory duty of care in s. 122(1)(*b*) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the [page 491] statutory standard by requiring the context in which a given decision was made to be taken into account. **This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care.** It is clear that s. 122(1)(*b*) requires more of directors and officers than the traditional common law duty of care outlined in, for example, *Re City Equitable Fire Insurance, supra.*
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> The standard of care embodied in s. 122(1)(*b*) of the CBCA was described by Robertson J.A. of the Federal Court of Appeal in *Soper* v. *Canada*, [1998] 1 F.C. 124, at para 41, as being "objective subjective". Although that case concerned the interpretation of a provision of the *Income Tax Act*, it is relevant here because the language of the provision establishing the standard of care was identical to that of s. 122(1)(*b*) of the CBCA. With respect we feel that Robertson J.A.'s characterization of the standard as an "objective subjective" one could lead to confusion. We prefer to describe it as an objective standard. **To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the s. 122(1)(*b*) duty of care,**

> **as opposed to the subjective motivation of the director or officer, which is the central focus of the statutory fiduciary duty of s. 122(1)(*a*) of the CBCA.**
>
> The contextual approach dictated by s. 122(1)(*b*) of the CBCA not only emphasizes the primary facts but also permits prevailing socio-economic conditions to be taken into consideration. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions." [Emphasis added.]

In rejecting the use of the term "subjective" in describing the statutory standard, the Supreme Court of Canada appears to have focussed on a possible confusion that might arise based on the use of that term. Specifically, the *Peoples* case makes it clear that the actions of a director are to be judged based on the objective facts surrounding the actions of the director as opposed to the subjective motivation of the director or officer. It is submitted that the Supreme Court of Canada did not decide that all directors must be judged by a single standard within the facts of a given case, with no differentiation based on individual knowledge and skills. Indeed, given that the statutory standard applies to both directors and officers, to take such a position would imply that all officers of a company should be judged by a single standard with no differentiation based on individual considerations – a patently untenable proposition.

Unfortunately, the case sequence of *City Equitable*, then *Soper* then *Peoples* has itself created a potential for confusion. The *City Equitable* case suggested that the standard of care may differ from one director to another based upon that individual's knowledge and experience as well as on other factors which differentiate one director from another in terms of responsibilities within the company. The original wording for the standard of care proposed by the Dickerson Report might have precluded any such consideration of differential liability based upon the objective facts pertaining to an individual director. The legislative drafters of the statutory standard added

words which clearly allowed for a consideration of differential liability based upon the objective facts of any given case. In so doing, the legislative drafters specifically cited as an example the differing positions of inside and outside directors.

The present difficulties seem to arise from the fact that the *Soper* case characterized the statutory standard as including a "subjective" element. Arguably the *Soper* case used the term "subjective" in an imprecise manner. What the *Soper* case and many other cases cited in it, actually did was to consider all of the objective facts (i.e. all of the "comparable circumstances") which should be taken into account in determining whether or not a particular individual met an appropriate standard of care[7]. It is not actually clear that the *City Equitable* case or the Dickerson Report or the legislative drafters intended to include a subjective element in the sense of allowing for a consideration of the subjective motivation or thought processes of a director. Nor did *City Equitable* propose that the standard of care should vary based on subjective valuations of the competence of a given director. Indeed that is the entire reason why an objective standard, in the sense of a standard which is based only upon the consideration of objective facts external to the defendant is so important. Otherwise, it would be possible for a defendant in any type of negligence action to say "I am not liable because I did my best." This would result in lower standards of care for less competent people – creating in effect a race to the bottom. This is quite different from an individual who says "I could not have been expected to perform in that way given that, to the knowledge of those who placed me in this position, I

[7] This approach is not unlike the Supreme Court's reformulation of the test of causation in cases of medical negligence based on improper physician disclosure. In *Reibl v. Hughes* [1980] 2 S.C.R. 880 the Supreme Court adopted the "modified objective" test for causation, a test which seeks to determine what a reasonable person in the position of the plainitiff would have done if properly informed. The modified objective test thus evaluates the "reasonableness" of the plaintiff's actions through an objective consideration of the plainitff's particular circumstances.

lacked certain qualifications" -- or "given that I was not provided with the information or resources necessary to bring my skills and qualifications to bear".

Similarly, in rejecting the "subjective" characterization of the statutory standard the Supreme Court of Canada in *Peoples* was arguably seeking to avoid confusion which could occur by treating "comparable circumstances" as not merely encompassing objectively determinable facts but also the alleged internal thought processes and subjective evaluations of competence of an individual director. There is nothing in the Supreme Court of Canada decision in *Peoples* to suggest that objective facts which differ from one director to another on a given board may not be taken into account in applying a different standard of care, for example whether or not the particular director is a member of management or a specific committee of the board, whether or not a particular director was provided with information which should objectively have raised a particular concern, whether or not a particular director was selected to serve on the board because of a professional qualification or skill etc. Although such considerations may lead to a differential standard of care, they need not be viewed as leading to a subjective standard of care. An individual who may be held to a higher standard of care if he or she is an accountant who sits on the firm's audit committee, will not necessarily be excused because, after all, he or she was not a very good accountant or simply did not notice an obviously inflated entry on the financial statement. Ultimately, liability is assessed on an individual and not a group basis. Therefore, it is inevitable that objective factors that apply to one individual may not apply to another even though they sit on the same board.

Where the issue of "subjectivity" is most likely to arise is in cases in which it is alleged as a defence that a particular director "did his or her best". Applying such a test will inevitably lead

to a consideration of "subjective", not to mention sympathetic considerations. It is noteworthy that the *Soper* case itself rules out any assessment of a directors conduct on that basis. The Supreme Court of Canada in effect addresses the same issue, in a different way, by pointing to the business judgment rule as the proper legal means to defend business decisions which lead to unsatisfactory outcomes. The court cited the decision in *Maple Leaf Foods Inc.* v. *Schneider Corp.* (1998), 42 O.R. (3d) 177 which summarizes the business judgment rule as follows:

> "The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the "business judgment rule". [Emphasis added].

The Supreme Court of Canada went on to reaffirm and reformulate the business judgment rule as follows:

> "Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made."

Soper **Revisited**

In light of the foregoing discussion, it is useful to revisit the *Soper* case and determine whether or not the analysis of the law contained in that case can be reformulated with a simple revision, namely referring to the factors characterized therein as "contextual" rather than "subjective." In other words, does the *Soper* case advocate taking into account factors which cannot in fact be objectively ascertained. On the whole, it is submitted that the distinctions which are put forward by the Federal Court of Appeal in *Soper* are distinctions which meet the test of being objective contextual facts. For example, it is hard to argue with the *Soper* court's assertion that an important starting point of any analysis is whether or not an individual is an inside as opposed to an outside director. Clearly, an outside director who attends monthly or quarterly director's meetings will simply not be privy to a great deal of information which might raise concerns and lead to specific corrective measures. Similarly, it is evident that a director who is a senior member of management will have a difficult time in establishing a due diligence defence when it fell within his or her purview to have managed the very aspect of the business which has caused the problem. Nevertheless, it is hard to imagine that even an inside director would be found to have failed in his or her responsibilities if he or she had been misled or deceived by a sophisticated fraud.

One might also imagine a situation in which an individual with a disability is placed on a board to represent a family perspective or a group of stakeholders within the corporation. It is hard to imagine that such an individual would be held to the same standard as non-disabled directors where the nature of the disability played a part in the individual's failure to fully participate in the resolution of the particular issue. On the other hand, even a director with limited qualifications with reference to the potential corporate problem may be judged as having failed in his or her

duty if he or she becomes aware of circumstances which, viewed objectively, should have raised a concern. And again, by way of contrast, if the specific cause of the corporate problem was an issue which by its very nature should have been obvious to an individual director with specialized qualifications, it is hard to imagine that he or she would be exonerated on the grounds that imposing a higher standard would involve a measure of "subjectivity".

All of these examples are detailed in the *Soper* case and, it is submitted they continue to apply to any analysis of the liability of a director as long as the factors reviewed as "comparable circumstances" are based on objective facts rather than on subjective evaluations of an individual director's competence, thought processes or motivations.

It can therefore be argued that the approach in *Soper* is correct except for the labelling of certain factors as “subjective” rather than as “contextual”. It also may be said that the *City Equitable* case is correct in the general approach it sets out, although it has undeservedly acquired a reputation for lowering the standard of care for directors. On the other hand, it would perhaps be just as well not to rely on either case in the Supreme Court of Canada ! Not would it seem necessary to do so to obtain the same result.