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**Controlling the Use and Abuse of Poison Pills in Canada:**  
*347883 Alberta Ltd v. Producers Pipelines Inc.*

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As even the most cursory review of recent business publications would reveal, considerable corporate restructuring is underway in several sectors of North American industry. At the same time, government and business continue to redefine industrial and trade policy in reaction to dramatic changes in the structure and behaviour of markets at home and abroad.<sup>1</sup>

The legal issues that these developments are generating take on added significance when one considers that there is little sign that the forces propelling change are about to abate: several sectors of North America's economy continue to be either on the verge of profound upheaval or are in the midst of significant transformation.<sup>2</sup> The capacity of our business law to provide a framework that facilitates rather than frustrates necessary change will continue to be put to the test for the foreseeable future.<sup>3</sup> It is therefore essential that one pay close attention to challenges to that legal structure that have arisen in particularly active

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© McGill Law Journal 1992

Revue de droit de McGill

To be cited as: (1992) 37 McGill L.J. 887

Mode de citation: (1992) 37 R.D. McGill 887

<sup>1</sup>As a study released by the Economic Council of Canada in 1991 observed:

International trade barriers are coming down between continental trading partners such as the members of the European Common Market, and the United States and Canada, as various agreements to that end are implemented. New and powerful trading blocs, such as the one comprising the Pacific Rim countries, are emerging, while some existing blocs, like COMECON, have begun to disintegrate. The emerging blocs threaten the hegemony of Western countries in many of their traditional areas of dominance, and although the disintegrating ones present scarcely envisaged opportunities, the fluidity of the surrounding political environment — to say nothing of the economic environment — may for some time daunt all but the most intrepid entrepreneurial spirits.

See Economic Council of Canada, *Corporate Mergers and Acquisitions: Evidence on Profitability* by A. Tarasofsky & R. Corvari (Ottawa: Supply and Services, 1991) at 1.

<sup>2</sup>Apart from the oil and gas industry, with which this article is particularly concerned, there was major upheaval in 1991 in such areas as the manufacturing and retailing sectors of the Canadian clothing industry.

<sup>3</sup>For particularly useful studies of the role of mergers and acquisitions in this process in Canada, see B.E. Eckbo, "The Market for Corporate Control: Policy Issues and Capital Market Evidence" in R.S. Khemani, D.M. Shapiro & W.T. Stanbury, eds, *Mergers, Corporate Concentration and Power in Canada* (Halifax: Institute for Research on Public Policy, 1988) 143; V.M. Jog & A.L. Riding, "Post-Acquisition Performance of Partially Acquired Canadian Firms" in Khemani, Shapiro & Stanbury, *ibid.*, 233; Tarasofsky & Corvari, *supra*, note 1.

sectors of our economy and that one go on to assess whether our corporate and securities law framework is making the grade.

One sector of our economy that has evolved markedly and that has made extensive use of this business law framework is Canada's petroleum industry. Over the past decade, oil and gas companies have been subject to diverse pressures, not the least of which has been a notoriously fickle oil price. Major players have had to abandon corporate missions adopted in the late 1970s and early 1980s and have formulated a variety of restructuring tactics. Acquisitions, be they friendly or hostile, have in turn formed an integral part of this process of adaptation and reorientation.<sup>4</sup>

Legal developments in the energy industry have frequently foreshadowed those in other sectors of our economy.<sup>5</sup> We do well, therefore, to pay attention to the extent to which our corporate and securities law has succeeded in facilitating or hampering efforts to restructure petroleum companies while accommodating the concerns of parties whose economic interests are affected by this process.

In particular, it is important to assess whether institutions entrusted with enforcing the principles that give shape to our business law have a clear understanding of the framework that they are working with and whether they are, in turn, able to provide equally clear guidance regarding the manner in which statutory provisions should be interpreted. Absent a well-focused vision both of the role of institutions like the judiciary and securities commissions in monitoring the restructuring process and of the nature of the principles that each institution may legitimately enforce, one runs the risk of having to live with a hotchpotch of institutions and principles. Obviously, a confused regulatory climate is not likely to produce the stable context that companies need to work within as they develop tactics for addressing new economic challenges.

This comment concentrates on one institution, the judiciary, and on one aspect of the acquisition process that courts in Canada are only beginning to confront: the use of shareholder rights agreements (also known as "poison pills"). Shareholder rights agreements are of course contentious devices that have given rise to arguments about whether they play a constructive role in take-overs or whether they serve only to harm the acquisition process. But it is precisely because shareholder rights agreements are contentious that they provide insight into the strengths and weaknesses of the regulatory structure in which corporate acquisitions take place. Because shareholder rights agreements are controversial, they challenge institutions like the judiciary to pay close

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<sup>4</sup>In addition to the examples considered in this article, one can point to NOVA Corporation of Alberta's decision in 1988 to expand into the petrochemical business through its acquisition of Polysar Energy & Chemical Corporation. See also G. Boyd, "Big Oil Starts Thinking Small" *Canadian Business* (January 1992) 24; E. Clifford, "Oil and gas producers get bad review" *The Globe and Mail* (10 January 1992) B5; "Oil mergers, acquisitions up" *The Globe and Mail* (31 January 1992) B3.

<sup>5</sup>In the United States some of the earlier hostile take-over bids were launched in the oil industry: for example, in 1984, T. Boone Pickens' Mesa Petroleum made an unsuccessful run at Gulf Oil and in 1985 Mesa made an unsuccessful run at Unocal Petroleum Corp.

attention to the standards that they may legitimately use to regulate such devices.

The comment explores this challenge in two parts. The first part provides a summary of the first Canadian case in which a court has had to confront a shareholder rights agreement: *347883 Alberta Ltd v. Producers Pipelines Inc.*<sup>6</sup> The second part engages in a critical analysis of the decision and is divided into four sections.

The first section addresses and dismisses an argument concerning the illegality of shareholder rights agreements that turns on a claim that the discrimination they effect violates a statutory provision concerning the equality of rights that make up a share. The second section points to where the locus of the debate regarding shareholder rights agreements is properly situated: the standards that should govern their use. The third section delves into this debate through an analysis of one of the more troubling features of the judgment: the Saskatchewan Court of Appeal's reliance on the Canadian Securities Administrators' *National Policy 38*.<sup>7</sup> The analysis reveals that the judgment is likely to reinforce the kind of regulatory confusion that our business law can ill-afford. The fourth section explores why the Court may have been sidetracked into pursuing an unsatisfactory line of inquiry. The open-ended nature of the oppression remedy is singled out for particular attention.

The comment concludes that rather than get bogged down in unpromising arguments about the legality of particular features of shareholder rights agreements, what is needed is clear thinking with respect to the circumstances in which shareholder rights agreements may form part of the take-over process, the distinctive roles of institutions like the judiciary and securities commissions in ensuring that these devices are used constructively, and the tools that each institution may legitimately draw on in fashioning the constraints that it is authorized to place on the acquisition process.

## I. The Rise and Fall of Producers' Poison Pill

### A. *The Context*

In late 1990, Saskatchewan Oil and Gas Corporation (Saskoil) revealed that it was interested in acquiring all shares of Producers Pipeline Inc. (Producers). Producers, incorporated under Saskatchewan's *Business Corporations Act*,<sup>8</sup> had become a public company in 1985. While its business initially revolved around a crude oil gathering system in southern Saskatchewan, in 1988-89 it acquired a significant interest in a gas field and in a gas gathering network and processing plant in western Saskatchewan. In April 1989, Produ-

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<sup>6</sup>[1991] 4 W.W.R. 577, 80 D.L.R. (4th) 359 (C.A.), rev'g [1991] 4 W.W.R. 151, 91 Sask. R. 162 (Q.B.) [hereinafter *Producers* cited to W.W.R.].

<sup>7</sup>Adopted by the Canadian Securities Administrators on 1 August 1986. See (1986) 9 O.S.C.B. 4255. See also *Ontario Securities Act and Regulations, with Policy Statements, Blanket Orders and Notices*, 20th ed. (Scarborough, Ont.: De Boo, 1991) at 3-108.

<sup>8</sup>R.S.S. 1978, c. B-10 [hereinafter *SBCA*].

cers also purchased an asphalt plant at Moose Jaw. The result of this rapid expansion was that the book value of Producers' shares, as well as that of its net assets, total revenues and net income increased significantly in the five years after it went public. From Saskoil's perspective, Producers was therefore an attractive prospect. As the chambers judge noted, "[i]t is patently apparent ... that Producers has prospered significantly since it became a public company... ."<sup>9</sup>

In August 1990, Producers had 1 433 945 common shares outstanding and 230 000 preferred shares. These were distributed among approximately 170 shareholders.<sup>10</sup> The shares traded in the over-the-counter market, though there had never been any significant trading. Prior to the spring of 1990, the over-the-counter price for one Producers' common share was approximately \$5.15. But the price began to move as 1990 unfolded. And on 23 August 1990, Scotia McLeod informed an officer at Producers that the market price in the last trade had been \$10.00 per share.

Saskoil was also subject to the *SBCA* and at all relevant times its shares were listed on the Montreal and Toronto stock exchanges. It engaged in crude oil and natural gas exploration, development and production in western Canada, as well as in the transportation and marketing of its products across North America. On 27 August 1990, Saskoil wrote to the president of Producers stating that it wished to make an offer for all shares of Producers and that this offer would likely be in the range of \$16.00 to \$18.00 per share.

In response to this proposed bid, Producers adopted a shareholder rights agreement (S.R.A.) dated 27 August 1990. The agreement provided that "rights" were to be granted to each shareholder on the basis of one "right" for each share outstanding. Each "right" would entitle its holder to purchase 10 additional common shares for a price equivalent to \$7.50 per share upon the occurrence of a "triggering event," that is, in the event that any "acquiring person" acquired more than 10% of the outstanding shares of the company after 27 August 1990 and on or before 27 December 1990. Moreover, the acquiring person would not be entitled to exercise its "rights." The S.R.A. also included a "permitted bid" provision which specified the types of take-over bids that were deemed acceptable and that would not trigger the S.R.A. The definition was drafted in terms that effectively excluded Saskoil from the range of permitted bidders.<sup>11</sup>

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<sup>9</sup>*Supra*, note 6 at 157, Matheson J.

<sup>10</sup>Penfund Capital (No. 1) Ltd (Penfund), an Ontario pension fund, owned all of Producers' preferred shares and 280 000 of its common shares. It also controlled 170 800 common shares held by other institutional shareholders, giving it ownership or control over a total of 31.4% of the common shares in August 1990. A nominee of Penfund was a director of Producers. Together, Penfund, the directors of Producers and their associates controlled more than 50% of Producers' voting shares prior to December 1990. On 15 February 1991, Penfund converted all of its preferred shares into common shares, giving it single-handed ownership or control of 680 000 common shares or 40.9% of the 1 633 945 common shares outstanding at that date.

<sup>11</sup>The definition excluded a take-over bid by a person who beneficially owned more than 5% of the outstanding common shares of Producers or who was not "grandfathered" by the agreement (see para. 1.01(t)(iv) of the S.R.A. (27 August 1990) between Producers Pipeline Inc. and the

On 3 December 1990, acting through its wholly owned subsidiary, 347883 Alberta Ltd, Saskoil paid \$18.25 a share for all the common shares held by the former President and Chief Executive Officer of Producers. Saskoil therefore came to control 143 200 common shares. This amounted to 9.9% of the outstanding common shares, thereby ensuring that it remained below the S.R.A.'s 10% threshold until 27 December 1990, when the S.R.A. was meant to expire.

### *B. The Issues*

Saskoil's principal complaints focused on three matters. First, on 15 December 1990 Producers' directors adopted a resolution whereby a bid would have to be unanimously approved by Producers' board of directors in order to fall within the definition of a "permitted bid." Saskoil emphasized that as a result shareholders were being deprived of a say on whether the bid should be accepted.

Second, although the agreement was initially meant to lapse on 27 December 1990, it was twice amended: once to extend its duration to 26 February 1991 and a second time to extend it to 15 April 1991. But these extensions were initiated solely by Producers' board of directors and were never submitted to, let alone approved by, Producers' shareholders. And this despite there having been an annual meeting of shareholders on 26 October 1990 and a special meeting on 25 February 1991. Once again, Saskoil claimed that Producers' shareholders were being denied an opportunity to consider whether to accept the bid.

Finally, at the special meeting of 25 February 1991, a resolution was passed authorizing Producers to make an issuer bid to purchase a maximum of 560 000 common shares at a price of \$21.50. While Saskoil voted against the resolution, it was nonetheless approved by 88.2% of the outstanding shares represented at the meeting. The management information circular that had accompanied the notice of the special meeting stated that a shareholders agreement was in the process of being concluded between a majority of the members of Producers' board of directors, their affiliates and associates, and a group of shareholders controlled by an Ontario pension fund known as Penfund.<sup>12</sup> This agreement provided that its signatories would not tender their shares into a bid other than the issuer bid unless the bid satisfied a number of conditions, including a requirement that it be an all cash bid at \$25 per share and that it be approved by the board of directors. The shares that were subject to this agreement represented approximately 45% of Producers' outstanding shares. Saskoil stressed that the effect of this agreement was both to deny Producers' shareholders an opportunity to consider Saskoil's bid and to force them to tender to the issuer bid.

Acting at Saskoil's behest, 347883 Alberta Ltd applied for an order under section 234 of the *SBCA* (the statutory oppression remedy) that would set aside

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Royal Trust Company). Since Saskoil acquired approximately 9.9% of the outstanding common shares during the course of its bid, it fell outside the ambit of the definition of a "permitted bid."

<sup>12</sup>See the trial judgment, *supra*, note 6 at 154, 172-74, for details of Penfund's involvement with Producers.

the rights agreement and the issuer bid as being oppressive, or unfairly prejudicial to, or as unfairly disregarding its interests and those of other Producers' shareholders.<sup>13</sup>

### 1. Saskatchewan Queen's Bench

Matheson J. dismissed the application. He observed that the S.R.A. did not violate subsections 24(3) or 24(4) of the *SBCA*,<sup>14</sup> provisions which set out the requirement that there be equality with respect to the rights attaching to shares of the same class. In this instance, the discrimination that the S.R.A. effected did "not arise because of any restrictions on shares, but with respect to the 'rights' granted by the S.R.A."<sup>15</sup> The case was therefore distinguishable from *Bowater Canadian Ltd v. R.L. Crain Inc.*,<sup>16</sup> in which the Ontario Court of Appeal disapproved of an attempt to differentiate between voting rights attaching to shares within a class of shares.

After reviewing Canadian jurisprudence governing directors' fiduciary duties in the face of a take-over bid, Matheson J. asked: "When coupled with the subsequent issuer bid, were the acts of the directors more consistent with self-interest than with the bona fide interests of Producers?"<sup>17</sup> He concluded that they were not. Producers' directors had instead acted in the best interest of the company:

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<sup>13</sup>Section 234 of the *SBCA* states:

234(1) A complainant may apply to a court for an order under this section.

(2) If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates:

(a) any act or omission of the corporation or any of its affiliates effects a result;  
 (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or  
 (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner;

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

The wording of this section is virtually identical to that of section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [hereinafter *CBCA*].

<sup>14</sup>Subsections 24(3) and 24(4) of the *SBCA* [both of which were reenacted in S.S. 1979, c. 6, s. 8] state:

24(3) Where a corporation has only one class of shares, the rights of the holders thereof are equal in all respects and include the rights

(a) to vote at any meeting of shareholders of the corporation;  
 (b) to receive any dividend declared by the corporation; and  
 (c) to receive the remaining property of the corporation upon dissolution.

(4) The articles may provide for more than one class of shares and, if they so provide,

(a) the rights, privileges, restrictions and conditions attaching to the shares of each class shall be set out therein; and  
 (b) the rights set out in subsection (3) shall be attached to at least one class of shares but all such rights are not required to be attached to one class.

The wording is identical to subsections 24(3) and (4) of the *CBCA*.

<sup>15</sup>*Supra*, note 6 at 165.

<sup>16</sup>(1987), 62 O.R. (2d) 752, 46 D.L.R. (4th) 161 [hereinafter *Bowater* cited to O.R.].

<sup>17</sup>*Supra*, note 6 at 170.

[W]hen one considers that the directors established a fair market value for the shares, which was significantly higher than the price range in which Saskoil contemplated the purchase of all shares, that the directors thereafter established a market at the top of the estimated fair market value range, and that the actions of the directors were fully disclosed to the shareholders, who nevertheless, with the exception of Saskoil, rather overwhelmingly approved of the issuer bid, it is quite impossible to conclude that the directors have acted in a manner which was oppressive or unfairly prejudicial to any shareholder.<sup>18</sup>

## 2. Saskatchewan Court of Appeal

### a. *The Majority*

On appeal, the chambers judge was overturned. Sherstobitoff J.A. (Tallis J.A. concurring) began his reasons by reviewing policy considerations underlying Canadian take-over legislation. He noted that in Canada the scope for the deployment of the kind of coercive tactics that poison pills are intended to counteract is limited by provincial securities laws that seek to protect shareholders in the case of take-over bids.<sup>19</sup> As a result, Canadian securities regulators have generally taken the position that poison pills are unnecessary in Canada. In his view, this position was reflected in *National Policy 38*, which favours unrestricted auctions and expresses concern regarding the use of defensive measures that would deny shareholders the ability to make unconstrained decisions about offers.<sup>20</sup> The question in this case was the extent to which the policy considerations behind securities legislation should influence the Court's interpretation of (a) the directors' power to act without approval of shareholders, (b) the directors' duty to act in the best interests of the corporation, and (c) the shareholders' right to decide when they wish to dispose of their shares.

Sherstobitoff J.A. noted that section 117 of the *SBCA*<sup>21</sup> states that the duties of directors are owed to the corporation. But "the authorities say that the corporation cannot be considered as an entity separate from its shareholders."<sup>22</sup>

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<sup>18</sup>*Ibid.* at 174.

<sup>19</sup>*Ibid.* at 587, where Sherstobitoff J.A. pointed to two-tier bids, street sweeps and greenmail as examples of the kind of coercive tactics that poison pills are intended to counter.

<sup>20</sup>Nevertheless, Sherstobitoff J.A. noted that the policy statement did provide room for defensive tactics that are genuinely designed with a view to obtaining better offers. And he pointed out that prior shareholder approval of corporate action against apprehended or actual take-over bids would, in appropriate cases, allay concerns with respect to the potential for the infringement of shareholders' rights that exists with respect to defensive tactics like the S.R.A. (*ibid.* at 587-88).

<sup>21</sup>Subsection 117(1) of the *SBCA* states:

117(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall:

(a) act honestly and in good faith with a view to the best interests of the corporation; and  
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Subsection 122(1) of the *BCA* is identical.

<sup>22</sup>*Supra*, note 6 at 590.

Thus, "[t]he directors must act in the best interests of the corporation and all its shareholders."<sup>23</sup>

After reviewing Canadian and American jurisprudence concerning directors' fiduciary duties in the course of a take-over bid,<sup>24</sup> Sherstobitoff J.A. concluded that the tests set out in the leading cases extend considerable deference to *bona fide* business judgments of the directors. But in his view these cases did not go far enough to enable him to determine the outcome of the issue before him:

They give no principles for determining whether or not the defensive strategy was reasonable in relation to the threat posed. They do not deal with the principle that shareholders have the right to determine to whom and at what price they will sell their shares as stated in *Howard Smith Ltd.* They fail to consider the effect of the take-over provisions in the provincial securities legislation.<sup>25</sup>

As a result, he thought it necessary to turn to *National Policy 38* for interpretive guidance. He stressed that *National Policy 38*'s provisions were designed both to limit unfair bidding tactics and to allow shareholders to decide to whom and at what price to sell their shares. Thus,

defensive measures should not deny to the shareholders the ability to make a decision, and it follows that, whenever possible, prior shareholder approval of defensive tactics should be obtained. There may be circumstances where it is impracticable or impossible to obtain prior shareholder approval, such as lack of time, but in such instances, delaying measures will usually suffice to give the directors time to find alternatives. The ultimate decision must be left with the shareholders, whether by subsequent ratification of the poison pill, or by presentation to them of competing offers or other alternatives to the take-over bid, together with the take-over bid itself.<sup>26</sup>

Moreover, the onus was on the directors to show that at all times their acts were reasonable in relation to the threat posed and were directed to the benefit of the corporation and its shareholders as a whole, and not for an improper purpose such as entrenchment of the directors.

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<sup>23</sup>*Ibid.* Sherstobitoff J.A.'s observations are far from uncontroversial. For example, Jeffrey MacIntosh has noted that there is a strong current of thought to the effect that the basic principle is that directors owe their duties to the corporation and not to shareholders ("The Oppression Remedy: Personal or Derivative?" (1991) 70 Can. Bar Rev. 29 at 43 n. 70). Similarly, referring to the position in England, J.H. Farrar observes: "Basically directors owe these duties to the company and not to individual shareholders" (*Farrar's Company Law*, 3d ed. (Butterworths: London, 1991) at 380). However, Farrar goes on to explain that acting in the best interests of the company has traditionally meant in the interests of the shareholders and it is the directors' subjective opinion as to the interests of the corporators as a general body, balancing the short-term interests of the present members against the long term interests of future members which counts (*ibid.* at 384).

<sup>24</sup>Among the cases that Sherstobitoff J.A. reviewed were *Howard Smith Ltd v. Ampol Petroleum Ltd*, [1974] A.C. 821, 1 All E.R. 1126 (P.C.); *Teck Corp. Ltd v. Millar* (1972), 33 D.L.R. (3d) 288, [1973] 2 W.W.R. 385 (B.C.S.C.) [hereinafter *Teck*]; *Exco Corp. v. Nova Scotia Savings & Loan Co.* (1987), 78 N.S.R. (2d) 91, 35 B.L.R. 149 (T.D.); *Olympia & York Enterprises Ltd v. Hiram Walker Resources Ltd* (1986), 59 O.R. (2d) 254, 37 D.L.R. (4th) 193 (Div. Ct); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

<sup>25</sup>*Supra*, note 6 at 594.

<sup>26</sup>*Ibid.* at 595.



With these guiding principles in hand, Sherstobitoff J.A. turned to Producers' directors' purpose in implementing the S.R.A. In his view, it was fair to infer both that the directors saw Saskoil's proposed bid of August 1990 to be too low and that they implemented the S.R.A. to give Producers time to consider alternatives. Given that subsequent valuations of Producers' shares were in the \$19 to \$21.50 per share range, Sherstobitoff J.A. concluded that the directors' initial concerns were justified and that their actions to this point were reasonable in all but one respect: "[t]hey did not put the S.R.A. to the shareholders for ratification at the meeting in October 1990."<sup>27</sup>

While the motive for this initial failure to submit the S.R.A. to Producers' shareholders may not have been improper, the motive underlying subsequent decisions to amend and to extend the S.R.A.'s duration, to launch an issuer bid and to enter into an agreement regarding the conditions under which shares could be tendered to a bid other than the issuer bid was suspect:

The purpose of the defensive action is apparent: effective prohibition of the appellant's proposed take-over bid or any other take-over bid, until after the shareholders were forced to consider authorization of and tender to the issuer bid. The result was to deprive the shareholders of any alternative to the issuer bid except to hold their shares which, if marketable, would no doubt continue to trade at a value substantially less than appraised value. The fact that the S.R.A. was not put to the shareholders for ratification either prior to, or simultaneous with, the issuer bid confirms the view that the purpose of the directors was to force the issuer bid on the shareholders without the choice of any possible alternative such as the appellant's proposed take-over bid or any other take-over bid.

These actions were in interference with the shareholders' right to determine the disposition of their shares. That raises the question of whether acting without shareholder approval of the S.R.A. was necessary in the circumstances. No reason was advanced by the directors for failure to put the matter to the shareholders. The only inference which can be drawn from that is that the directors wished to make the decision themselves in order to ensure their continued control of the company. They thus acted for an improper purpose.<sup>28</sup>

Sherstobitoff J.A. then pointed to additional factors that supported the conclusion that the defensive action was neither reasonable in proportion to the threat posed, nor taken in the best interests of the company:

- a) the directors made no effort to show that a take-over by Saskoil would be harmful to the corporation;
- b) they made no effort to negotiate with Saskoil with a view to obtaining a better offer;
- c) they sought no competitive bid;
- d) no effort was made to demonstrate that the issuer bid would provide better value to shareholders than the take-over bid;
- e) they agreed not to permit a bid that was not at least some 25% above the appraised value of the shares; and
- f) they offered no valid business reason for the issuer bid, "the completion of which would further entrench the directors at the expense of a substantial increase in the indebtedness of the company."<sup>29</sup>

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<sup>27</sup>*Ibid.* at 597.

<sup>28</sup>*Ibid.* at 598-99.

<sup>29</sup>*Ibid.* at 599.

These acts were not consistent with an effort to increase or maximize the value of the shares. Instead, they pointed to only one objective:

the prohibition of any take-over bid until after completion of the issuer bid, the result of which would be that the directors group would control a majority of the shares, thus making the company impregnable to any take-over bid unacceptable to the board.<sup>30</sup>

The result was that Producers' shareholders had been denied the right to consider possible take-over bids. As a Producers' shareholder, 347883 Alberta Ltd had the requisite status to claim relief under section 234 of the *SBCA*. Producers' directors had acted beyond their powers and had thereby denied the appellant the right to determine how it would dispose of its shares. This action was unfairly prejudicial to the appellant and entitled it to relief under section 234.

Sherstobitoff J.A. concluded that the most appropriate relief was an order to set aside the S.R.A. and to extend the closing date of the issuer bid from 28 March 1991 to 45 days after the date of his judgment.<sup>31</sup> This would give the appellant and any other interested persons the opportunity to make a take-over bid and would enable shareholders to choose the bid to which they wished to tender their shares.<sup>32</sup>

*b. The Dissent*

Bayda C.J. dissented. He distinguished between challenges to poison pills based on the legal validity of the pill and challenges based on the way in which a pill was being used. In his view, section 234 of the *SBCA* was not the appropriate vehicle through which to launch an attack to the legal validity of an S.R.A. Section 234 was instead limited to complaints concerning alleged inequities flowing from the way a party had acted. Furthermore, he asserted that it was only a party that had itself suffered a wrong that could bring an action under this provision.

In this instance, it was not self-evident that 347883 Alberta Ltd had been prejudiced. The prejudice that it alleged it had suffered "did not consist of loss of money or loss of value but loss of control — control in that specific sphere involving take-over bids."<sup>33</sup> It was far from obvious that this sort of complaint fell within the spirit of section 234 since it was difficult to think of a party that had never had anything to do with the target corporation prior to its take-over bid as someone who was oppressed. Nonetheless, Bayda C.J. concluded that even if 347883 Alberta Ltd's claim was not within the spirit of section 234, it did fall within the letter of the section since the combination of the extensions to the duration of the S.R.A. and the launching of an issuer bid had prevented

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<sup>30</sup>*Ibid.*

<sup>31</sup>That is, 45 days after 9 May 1991.

<sup>32</sup>Ultimately, Saskoil chose not to proceed with a new bid since this would have required it to make a more substantial offer than that contained in the issuer bid. However, in early June 1991 Saskoil announced that it planned to purchase Producers' Moose Jaw Asphalt plant. See "Company News" *The Globe and Mail* (6 June 1991) B-14.

<sup>33</sup>*Supra*, note 6 at 625.

the appellant from making a take-over bid and since this could be said to constitute a form of prejudice.

Bayda C.J. noted that the S.R.A. gave Producers' directors the power to change the time at which the S.R.A. would expire. But it also required that the "rights" holders confirm any amendment. In this instance, no such confirmation was given. As a result, the amendments to the S.R.A. were never effective. The S.R.A. had therefore expired on 27 December 1990. After that date there had been no obstacle to Producers' proceeding with a take-over bid:

Between December 27 and February 20, 1991, if anything prevented Alberta from making a take-over bid, it was Alberta's own misinterpretation of the rights agreement and the law pertaining to it.<sup>34</sup>

Furthermore, since the appellant stated that it would not have objected to the issuer bid without the concurrent presence of the rights agreement and since, in effect, there was no longer a valid S.R.A. in place when the issuer bid was launched, the appellant's complaints with respect to the issuer bid were ultimately without foundation.

## II. Analysis

### A. Discrimination

It is worth pausing before broaching the Court of Appeal's decision in order to deal with a red herring that plagues the analysis of poison pills in Canada. This red herring is the notion that poison pills violate provisions in our business corporations acts that stipulate that there be equality with respect to the rights that make up shares of the same class.

For example, Jeffrey MacIntosh has advanced the proposition that the discrimination effected by a poison pill may well be illegal precisely because it is inconsistent with statutory provisions of this kind.<sup>35</sup> He points to the Ontario Court of Appeal's treatment of subsection 24(3) of the *CBCA* in *Bowater*,<sup>36</sup> where the Court struck down a provision in a company's articles of incorporation that would have awarded more voting rights to an initial shareholder than to subsequent holders of the same share.<sup>37</sup> MacIntosh observes that the Ontario Court of Appeal upheld the lower court's conclusion that:

both at common law and under the *CBCA* rights attach not to shareholders but to shares. Consequently, except as expressly permitted by the incorporating statute, any provision in the corporate charter that results in shareholders of a class having different rights constitutes improper discrimination and is void.<sup>38</sup>

MacIntosh concludes that this proposition can be applied to poison pills:

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<sup>34</sup>*Ibid.* at 630. The provision in question was para. 5.04(a)(i) of the S.R.A., cited in *supra*, note 11.

<sup>35</sup>J. MacIntosh, "Poison Pills in Canada: A Reply to Dey and Yalden" (1991) 17 *Can. Bus. L.J.* 323.

<sup>36</sup>*Supra*, note 16.

<sup>37</sup>See *supra*, note 14, for the full text of this subsection.

<sup>38</sup>*Supra*, note 35 at 345.

The pill allows all shareholders, except the acquiring person, to exercise the pill rights once triggered. This clearly discriminates between shareholders of the same class. On the basis of the Ontario Court of Appeal decision in *Bowater*, this discrimination would be illegal.<sup>39</sup>

It is one of the more unfortunate aspects of the debate surrounding poison pills that the term “rights” is used to denote more than one concept. As a result, considerable confusion has arisen between the rights that are constitutive of a share, the “rights” issued under an S.R.A. and the amorphous notion of shareholder rights. This confusion has led some, like MacIntosh, to recharacterize the relatively straightforward proposition embodied in provisions like section 24 of the *SBCA* or *CBCA*, which are concerned with the rights that are constitutive of a share, as a much broader claim concerning shareholder rights. The inability of an “acquiring person” to exercise the “rights” issued under a poison pill is then measured against this broader claim and is found wanting.

No doubt the broad proposition concerning shareholder rights derives some of its attraction from the fact that it coincides with one of the general policy objectives underlying aspects of our business corporations law and much of our securities law: looking after the interests of shareholders. But however attractive the end result, broad principles concerning the “fair” treatment of shareholders do not underlie section 24 of the *SBCA* or *CBCA*. Matheson J. quite rightly points out in the course of his reasons that statutory provisions like the one in issue in *Bowater* are concerned solely with the rights that are constitutive of a share (for example, the rights to vote, to receive dividends or to receive property upon dissolution).<sup>40</sup> In no way are they concerned with the kind of “rights” issued under an S.R.A. or with shareholder rights in some broad sense that goes beyond the rights that are constitutive of the shares that they hold.

While Matheson J.’s treatment of this issue is quite sound, given the confusion regarding the legality of the discrimination that a poison pill effects, it is worth pushing a little further. Indeed, it is important that one clarify just why it is that a provision like subsection 24(3) of the *SBCA* or the *CBCA* deals only with the treatment of rights that are constitutive of a share and why it does not constitute a general prohibition against all activity that discriminates between shareholders.

The case law that underlies section 24 of the *CBCA* and, in turn, section 24 of the *SBCA*, confirms the soundness of Matheson J.’s position. For example, the concept of equality that lies at the heart of early English company law cases like *Oakbank Oil Company v. Crum*<sup>41</sup> — where the House of Lords concluded that all shares of a company were equally entitled to dividends regardless of the amount paid up on those shares, and *Birch v. Cropper*<sup>42</sup> — where the House of Lords held that a company’s partly paid up common shares carried the same rights as its fully paid up preference shares with respect to the distribution of surplus assets, embodies equitable principles that are intricately linked to the

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<sup>39</sup>*Ibid.*

<sup>40</sup>*Supra*, note 6 at 165.

<sup>41</sup>[1883] 8 A.C. 65 (H.L.) [hereinafter *Oakbank*].

<sup>42</sup>[1889] 14 A.C. 525 (H.L.) [hereinafter *Birch*].

number of shares that one holds. Indeed, in *Birch*, Lord Fitzgerald pointed to *Oakbank* as an example of the method to be used when deciding what each shareholder should receive, emphasizing that

the only equitable principle to be acted on in this case is that of equality ... and every shareholder should receive *in respect of his share an equal proportion of this surplus*. [emphasis added]<sup>43</sup>

Lord MacNaghten, for his part, observed that

[i]t is through their shares in the capital, *and through their shares alone*, that members of a company limited by shares become entitled to participate in the property of the company. [emphasis added]<sup>44</sup>

In other words, the principle of equality at play in these cases was simply intended to protect the rights that are constitutive of a share (in these instances the right to dividends or to surplus assets), thereby ensuring that these rights were respected and that one received one's proportionate share of entitlements, given the size of one's holdings relative to the number of shares that the company had issued. The principle went no further: it neither addressed questions about shareholder rights that went beyond the nature of the rights obtained through a share, nor was it intended to act as a guarantee that the relative size of one's holding would never decrease.

If one examines subsequent decisions emanating from lower courts in England, one finds that the House of Lords' position in *Birch* was regularly affirmed.<sup>45</sup> And while the House of Lords subsequently refined aspects of *Birch* in *Scottish Insurance v. Wilsons*,<sup>46</sup> this refinement consisted in drawing a firm line between the status of common shareholders and that of preference shareholders. Thus, their Lordships held that a proposed reduction of capital, which involved returning capital to holders of preference shares with a view to extinguishing the shares prior to the company going into voluntary liquidation, was not unfair or inequitable: the company's articles of association formed a complete statement of the preference shareholders' rights and if the articles did not specify that the preference shareholders had a right to surplus assets on distribution, then one was not to assume that they did.<sup>47</sup>

But what is particularly important about this decision is that while the House of Lords modified its approach to ascertaining a preference shareholder's rights, it continued to recognize that it was the rights that are constitutive of a share that determine shareholders' entitlements. Thus, whereas in the earlier part of the twentieth century courts using the principle of equality of treatment of shares had not sought to distinguish between the rights associated with different classes of shares, it was now clear that the governing principle was that

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<sup>43</sup>*Ibid.* at 542.

<sup>44</sup>*Ibid.* at 546-47.

<sup>45</sup>See, for example, *Re Espuela Land and Cattle Company*, [1909] 2 Ch. 187 (Ch. Div.); *Re Fraser and Chalmers Ltd*, [1919] 2 Ch. 114 (Ch. Div.); *Re William Metcalfe and Sons*, [1933] 1 Ch. 142 (Eng. C.A.).

<sup>46</sup>[1949] A.C. 462.

<sup>47</sup>*Ibid.* at 481.

there should be equality of treatment of shares only within a class: the general equitable doctrine put forward in *Birch* was limited to shares of a particular class. But the most important feature of the decision in *Birch* was unchanged: the principle of equality of treatment remained intricately linked to the number of shares that were held. In other words, the principle was still intended to protect the rights that were constitutive of a share, and was in no way intended to protect the size of a shareholder's holdings relative to the number of shares that a company had issued.

Cases in Canada that touch on this principle reiterate that it has to do with rights that are constitutive of a share and that one should look to a company's articles for guidance with respect to the nature of those rights. And as with cases in England, the rights at play in Canadian case law have most often been rights to dividends or to a proportionate part of the distribution of surplus profits. At no point have these cases suggested that the kind of "rights" that are issued under an S.R.A. are subject to the equitable principle set out in *Birch*. Nor have they set out broad claims about shareholder rights.

For example, one of the earliest Canadian cases to discuss the principle of equality of treatment of shares was *Wunderlich Brothers v. Northwestern Mutual Fire Association*,<sup>48</sup> in which the Saskatchewan Court of Appeal asserted that *Birch* and *Oakland* were part of a series of cases that reflected the principle that there should be equality of treatment of shares, a principle that the Court had no doubt was a fundamental tenet of Canadian corporate law. Dealing with an attempt by an insurance company's board of trustees to vary a dividend rate after a dividend had been declared, such that the plaintiff would have received dividends at a rate that differed from that got by others in the same class of policy holders, Martin J.A. observed that:

In the case of shareholders of a company where a dividend has been declared, all holders of shares of the same class are entitled to participate *on the basis of the number of shares held* without regard to the amount paid thereon unless due provision is made to the contrary: *Birch v. Cropper*; *In re Bridgewater Navigation* (1889) 14 A.C. 525; *Princeville Fox v. Jordan* (1929) 64 O.L.R. 172 [emphasis added].<sup>49</sup>

Similarly, in *Re The Canada Trust Company and The Guelph Trust Company*,<sup>50</sup> where the issue was whether holders of partly paid up shares of the Guelph Trust Company were entitled to share in the proceeds of the business and the sale of the assets of the company in proportion to the shares held by them, or only in proportion to the amount paid up on the shares held by them, Schroeder J. indicated that he too viewed *Birch* as authoritative. As a result, the Court held that the proceeds were to be distributed in accordance with the number of shares held by particular shareholders.<sup>51</sup>

While *Birch* has received less attention in Canada than in England, its claims with respect to equality of treatment of shares *have* been adopted by

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<sup>48</sup>[1936] 1 W.W.R. 297, 3 I.L.R. 305 [hereinafter *Wunderlich Brothers* cited to W.W.R.].

<sup>49</sup>*Ibid.* at 303.

<sup>50</sup>[1950] O.R. 245 (Ont. Weekly Ct) [hereinafter *Canada Trust Company*].

<sup>51</sup>*Ibid.* at 249.

Canadian courts and ultimately lie at the root of section 24 of the *CBCA*. To be sure, the wording of section 24 is such that companies have less freedom to discriminate than under the *Birch* doctrine (under which one might arguably have been able to vary the rights that made up shares of a class, provided that one described the nature of these intra-class variations in the company's articles). And after *Bowater*, it is clear that even if one has more than one class of shares, one is nonetheless required to treat the rights that are constitutive of shares of a given class as equal in all respects. But this limitation on a company's discretion to vary the rights that are constitutive of a share *within* a class does not alter the fact that ultimately it is *through* the rights that are constitutive of a share (and not by virtue of some broader conception of shareholder rights) that a shareholder obtains a proportionate part of the dividends, surplus, remaining assets, votes or other entitlements made available to other shareholders of the same class.

Moreover, the common law that underlies section 24 makes clear both that the application of the equitable principle that has wound its way through English and Canadian jurisprudence has always been limited to the bundle of rights that are constitutive of a share and that it is a principle that is tempered by a concern for flexibility with respect to corporate finance. Statements about shareholders' rights in these cases have been about rights got by virtue of their being constitutive of a share and the courts today continue to conceive of a share in this manner. Recently, for example, the Supreme Court of Canada observed that:

A share is ... a "bundle" of interrelated rights and liabilities. A share is not an entity independent of the statutory provisions that govern its possession and exchange. Those provisions make up its constituent elements. They define the very rights and liabilities that constitute the share's existence. The *Canada Business Corporations Act* defines and governs the right to vote at shareholders' meetings, to receive dividends, to inspect the books and records of the company, and to receive a portion of the corporation's capital upon the winding up of the company...<sup>52</sup>

Thus, at no point have statements about the rights that are constitutive of a share been ones that would support the claim that shareholders in Canada are to be treated equally when dealing with a distribution of "rights" under an S.R.A., "rights" that are in no sense constitutive of a share and that are instead a creature of contract designed to provide rights holders with an option to purchase a share.<sup>53</sup> Indeed, *Wunderlich Brothers* and *Canada Trust Company* make clear both that the principle of equality of treatment of shares speaks to the

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<sup>52</sup>*Sparling v. Caisse de dépôt et placement du Québec*, [1988] 2 S.C.R. 1015 at 1024-25, 55 D.L.R. (4th) 63.

<sup>53</sup>Referring to "conversion privileges," Hills observes that:

[T]he conversion privilege [is] an optional and alternative right of the holder in addition to and separate from the right to be paid a sum of money or to exercise the usual rights of a stockholder. Although the privilege may not be divorced from the holder of the security to which it is attached, it is no part of the security itself and must be construed as if embodied in a separate instrument. *Fundamentally, it is an independent optional right* [emphasis added] (G.S. Hills, "Convertible Securities — Legal Aspects and Draftsmanship" (1930) 19 Calif. L. Rev. 1 at 2).

rights that are constitutive of a share — to the need to preserve a share's integrity — and that one's final standing relative to other shareholders is ultimately dependent upon the number of shares held relative to the number of shares issued, an equation about which the principle makes no guarantees.

The absence of any guarantee against dilution is no doubt the reason why it was thought necessary to address the question of pre-emptive rights in the *CBCA*. Section 28 provides that a company's articles may be drafted to provide shareholders with the option to preserve their relative position by acquiring newly offered shares "in proportion to their holdings of the shares of that class." However, the legislature's decision *not* to follow the Dickerson Committee's recommendation that pre-emptive rights be presumed (in the absence of express provisions in the articles limiting or excluding these rights)<sup>54</sup> reveals that the legislature wished to leave the corporation considerable flexibility with respect to the way in which it raises capital and that it therefore chose not to put statutory guarantees in place respecting the size of one shareholder's holdings relative to that of other shareholders. Reasoning *a contrario* from the Dickerson Committee's Report, which saw a need for presumed pre-emptive rights because it felt that fiduciary duties were inadequate as a mechanism for controlling dilution, it is reasonable to conclude that in refusing to endorse this portion of the Report, the legislature felt that fiduciary duties provided a more satisfactory control mechanism than the Dickerson Committee was willing to concede and that these duties *should* be used to control problems of dilution.<sup>55</sup>

Nor should one be surprised about the legislature's willingness to tolerate dilution. As long ago as 1932, in their seminal work *The Modern Corporation and Private Property*, A.A. Berle and G.C. Means observed that permitting dilution was part of a general move to inject greater flexibility into corporate management.<sup>56</sup> So the legislature's decision to permit dilution was just that: a conscious decision, designed to allow for flexibility with respect to the management of a company's capital accumulation process, yet one that subjected that process to rules regarding directors' fiduciary duties to the corporation.

Given this body of law and its implications for the distinction between the treatment of shares and the treatment of shareholders, it should come as no sur-

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<sup>54</sup>R.W.V. Dickerson, J.L. Howard & L. Getz, *Proposals for a New Business Corporations Law*, vol. 1 (Ottawa: Information Canada, 1971) at 113, para. 114.

<sup>55</sup>See Dickerson, Howard & Getz, *ibid.*, vol. 1 at 113, para.(s) 114-16. For examples of analyses of a board of directors' fiduciary duties in connection with decisions to dilute a shareholder's position see *Teck, supra*, note 24; *Olson v. Phoenix Supply Ltd.*, (1984), 9 D.L.R. (4th) 451, [1984] 4 W.W.R. 498 (Man. C.A.).

<sup>56</sup>See *The Modern Corporation and Private Property*, rev'd ed. (New York: Harcourt, Brace & World, 1968), where the authors observe:

Mechanisms have been made available permitting the "dilution" of participations — *i.e.*, the reduction of the *pro rata* part of assets and earnings accruing to each share through the issue of additional shares not representing a corresponding contribution to the corporate capital. Here devices deleting the old common law "pre-emptive right," serve to remove from the shareholder his guarantee of an opportunity either to preserve his ratable position, or else, to the extent that he has lost that position, to secure compensation through the sale of his pre-emptive rights (*ibid.* at 142-43).



prise that MacRae J. in *Bowater* should observe that “the rights which are attached to a class of shares must be provided equally to all shares of that class, *this interpretation being founded on the principle that rights, including votes, attach to the share and not to the shareholder.*” [emphasis added]<sup>57</sup> When the distinction that MacRae J. draws is viewed in the light of the common law underlying section 24 of the *CBCA*, it is difficult to see how his observations could possibly be treated as a foundation on which to erect more general principles regarding the treatment of shareholders.

When subsection 24(3) of the *CBCA* states that the rights of the holders include the rights to vote, to receive dividends, and to receive remaining property upon dissolution, the common law suggests quite strongly both that the only appropriate interpretation of the term “rights” in this provision is those rights that are constitutive of a share and that one must treat the rights stipulated by subsection 24(3) as illustrative of the meaning of the term “rights” used in the subsection. These rights will normally comprise rights to vote, to receive dividends and to receive a return of capital upon a winding-up, but one should also have regard to a company’s articles in order to ascertain whether there are other rights that form part of that company’s shares.<sup>58</sup> However, rights that are constitutive of a share are neither the same as “rights” issued under an S.R.A. (which are creatures of contract and provide an option to purchase shares), nor should they be confused with amorphous and general statements concerning shareholder rights (which embody notions about the fair treatment of *shareholders*).

The principle of equality of treatment of shares of a class referred to in *Bowater* and in statutory provisions such as subsection 24(3) of the *CBCA* is in the end quite limited in scope and certainly does not provide a basis for a credible argument challenging the legality of a poison pill. If anything, explicit references in the case law to the fact that one’s entitlements depend on the proportionate size of one’s holdings make quite clear that the courts have long been aware that the relative size of one’s holdings might vary, even if in absolute terms one retains the same number of shares. This is not to say that there may not be other grounds on which one could base arguments about the illegality of poison pills, grounds that do reflect broader concerns about the treatment of shareholders. But it is to say both that one cannot simply assume that such concerns underlie those parts of our business corporations acts that are concerned to facilitate capital accumulation and that section 24 of the *CBCA* cannot serve as the backbone of an argument regarding the unfairness of differential treatment of shareholders.<sup>59</sup>

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<sup>57</sup>*Supra*, note 16 at 754.

<sup>58</sup>Indeed, subsections 49(13) and 49(14) of the *CBCA* stipulate that the rights which are attached to shares of a class must be described on share certificates issued by the corporation.

<sup>59</sup>These points are canvassed in summary form in P. Dey & R. Yalden, “Keeping the Playing Field Level: Poison Pills and Directors’ Fiduciary Duties in Canadian Take-Over Law” (1990) 17 *Can. Bus. L.J.* 252 at 272-74. For examples of American cases that make the mistake of recharacterizing statutory provisions concerned about the status of a share as provisions that are also about shareholder equality, and that thereby collapse the share/shareholder distinction, see *Bank of New York v. Irving Bank Corporation*, 528 N.Y.S.2d 482 (N.Y. Sup. Ct 1988), *aff’d* without opinion (1st

### B. *The Locus of the Debate*

While other arguments exist with respect to the reasons why a poison pill might be thought to violate some of the more technical features of our business corporations law, one must at all times remain sensitive to the extent to which these arguments ultimately rely on broader claims regarding what constitutes fair treatment of shareholders rather than on narrow claims with respect to the rules regarding such matters as capital formation. Only if one focuses directly on the larger picture can one hope to talk openly about the nature of the fairness claims being drawn on and the factors that should be taken into account when formulating broad principles with respect to the treatment of shareholders. Fortunately, both the Chambers Judge's decision and that of the Court of Appeal in *Producers* suggest that the focus of the legal debate regarding poison pills is likely to be less on their legality given the rules governing corporate finance and more on big picture issues concerning the way in which poison pills should or should not be used.

This is not to say that somewhere in Canada a court may not one day conclude that a poison pill contains a feature that is *prima facie* inconsistent with a particular statutory provision concerning the nature of a share. But in the long haul Canadian business lawyers are likely to continue to prove adept at designing poison pills that circumvent technical objections to the way pills operate. As a result, the focus of inquiry will in all likelihood continue to be whether devices of this kind should be allowed in the first place and, if so, what kinds of fairness principles should govern their use.

Questions concerning the desirability of poison pills are, at the end of the day, linked to deeper issues concerning the most appropriate way to structure a framework in which take-over bids may be effected. A lively debate exists with respect to this issue,<sup>60</sup> a debate that is well beyond the scope of this article. Suffice it to say that despite the arguments for prohibiting poison pills, neither our legislators nor our securities regulators have so far taken the position that poison pills are an anathema. On the contrary, it would appear that at least in so far as securities regulators are concerned, the real issue is whether poison pills are being used to advance the bidding process or are instead being manipulated either with a view to preventing take-over bids from being made or in order to hamper the ability of shareholders to choose between competing bids.

For example, in a decision concerning Canadian Jorex Limited, the Ontario Securities Commission (OSC) recently observed that a poison pill that had served the purpose of providing an opportunity for a competing bid to come forward should not then prevent shareholders from choosing between different take-over bids. The OSC was not concerned with the legal validity of the poison pill. Instead, it focused its attention on the way in which the pill was being used in the course of a take-over battle. While the Panel that decided the case was

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Dept 4 October 1988); *Amalgamated Sugar Co. v. N.L. Industries* 644 F. Supp. 1229 (S.D.N.Y. 1986); *Smith v. Preway* 644 F. Supp. 868 (W.D. Wis. 1986).

<sup>60</sup>See for example, J. MacIntosh, "The Poison Pill: A Noxious Nostrum for Canadian Shareholders" (1989) 15 Can. Bus. L.J. 276; Dey & Yalden, *ibid.*; MacIntosh, *supra*, note 35.

quick to emphasize that OSC staff had not asked it to consider anything other than issues concerning the use of the pill in question, it is nonetheless revealing that the OSC did not use the occasion to suggest that there was something inherently problematic about the way a poison pill functions.<sup>61</sup> The majority's decision in *Producers* is consistent with the approach that the OSC has so far favoured: in both instances emphasis was placed primarily on whether the S.R.A. was misused rather than on whether the S.R.A. was *prima facie* illegal.

Where, then, does this leave Bayda C.J.'s dissent in *Producers*? Bayda C.J. makes a valid point with respect to the logic of the S.R.A. that *Producers* adopted: by the very terms of the S.R.A., absent subsequent "rights" holder approval, any attempt to extend the duration of *Producers*' S.R.A. was ineffective.<sup>62</sup> But from a practical point of view it is not hard to envisage the dilemma that Saskoil faced: should it proceed with a bid on the assumption that the S.R.A. was not in effect until the amendments were approved and risk finding out subsequently that a majority of shareholders *were* prepared to approve the S.R.A.? Would such approval retroactively validate the S.R.A., a situation that might ultimately give rise to a significant dilution of its holdings?

This is a dilemma that any bidder will face when confronted with the kind of situation at play in this case and it is not clear that Bayda C.J.'s analysis provides much comfort. If a company's directors threaten that they will seek share-

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<sup>61</sup>Ontario Securities Commission, *In the Matter of Canadian Jorex Ltd and Manville Oil & Gas Ltd* (1992), 15 O.S.C.B. 257 (21 January 1992) [hereinafter *Canadian Jorex*]. The OSC ordered the removal of the poison pill that Canadian Jorex had put in place for three reasons:

- i) the Manville bid could not proceed to the Jorex shareholders unless the rights plan was removed;
- ii) there was no reason to believe that maintaining the rights plan was going to result in any other party joining the Jorex auction; and
- iii) there was no reason to believe that keeping the rights plan in place was going to lead to any further enhancement of the Manville bid (*ibid.* at 264-65).

The OSC also observed that the pill had succeeded in attracting a competing bid from Canadian Trans-Arctic & Southern International Corp., a company whose principal shareholder had been the Chairman, President and CEO of Jorex until the day before the Trans-Arctic bid was announced. So having attracted a competing bid, and with no real prospect of an increase in Manville's bid, the OSC concluded that the time had come "when the pill has got to go" (*ibid.* at 264). In the end, the Trans-Arctic bid won out over the Manville bid. See "Former Jorex President wins his company back" *Financial Post* (9 January 1992) 16; T. Carlisle, "Jorex, Manville both gain from deal" *Financial Post* (13 January 1992) 15.

Perhaps the most intriguing feature of the decision comes where the OSC observed:

For us, the public interest lies in allowing shareholders of a target company to exercise one of the fundamental rights of share ownership — the ability to dispose of shares as one wishes — without undue hindrance from, among other things, defensive tactics that may have been adopted by the target board with the best of intentions, but that are either misguided from the outset or, as here, have outlived their usefulness (*ibid.* at 266).

It is disappointing that the Panel did not explain on what authority it relied for the proposition that freedom with respect to the disposition of one's shares is a "fundamental right" associated with share ownership and that it did not explain in greater detail what constitutes "undue hindrance" on the exercise of this right. One can expect to see further cases that will force the OSC to discuss these concepts at greater length.

<sup>62</sup>*Supra*, note 6 at 628-30.

holder approval that will retroactively validate an S.R.A., how many bidders will invest substantial sums in a bid and live with the risk that a court will find the retroactive validation legal? At the end of the day, the reality of the matter is that the fundamental question concerning poison pills in Canada remains the issue that the majority addressed: is a board of director's purpose in adopting a poison pill one that is in the best interests of the corporation and what should the judiciary's point of reference be in developing standards of conduct that directors must live up to when implementing and manipulating a poison pill?

### C. National Policy 38 as an Interpretive Guide

One of the most disappointing features of Sherstobitoff J.A.'s judgment is its failure to provide much in the way of an answer to a question that he himself singles out as one of "the fundamental issues" in the case: namely, the extent to which securities policy *should* influence the interpretation of particular provisions of a business corporations act.<sup>63</sup> While it ultimately becomes clear that he feels that it is entirely appropriate that securities policy play a role in the interpretation of certain corporate law provisions, at no point does he explain why this constitutes an acceptable interpretive approach. Instead, he suggests that the absence of sufficient guidance in case law concerning directors' fiduciary duties in the course of a take-over bid leaves him with no alternative but to turn to *National Policy 38*.<sup>64</sup> And yet the issues surrounding this interpretive move are by no means inconsequential: it is far from obvious why policy statements, issued in a securities law context, that have never been considered by the legislature should become the touchstone for the interpretation of corporate law provisions that *are* an expression of the will of the legislature.

This is not to say that the interpretive move that Sherstobitoff J.A. engages in is necessarily illegitimate. It may be that a coherent account of the way in which one bridges policy statements and statutory provisions can be provided. Moreover, such a link may be necessary in order to produce a framework in which our corporate and securities law work together to provide an effective package within which corporate transformation may take place. Nonetheless, it remains the case that in seeking to make the link, Sherstobitoff J.A. provides no principled account of the reasons for departing from traditional principles of statutory interpretation when confronting a business corporations act. It is therefore important that one consider the forces driving Sherstobitoff J.A. to adopt a rather novel interpretive strategy and that one then assess the merits of such an approach.

Those familiar with traditional canons of statutory interpretation will recall that one of the cornerstones of late nineteenth and early twentieth century statutory interpretation was Maxwell's classic work *The Interpretation of Statutes*.<sup>65</sup> The starting point for Maxwell's theory of statutory interpretation was the proposition that in a representative democracy the views of a popularly elected legis-

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<sup>63</sup>*Ibid.* at 590.

<sup>64</sup>*Ibid.* at 594-95.

<sup>65</sup>P.B. Maxwell, *The Interpretation of Statutes*, 2d ed. (London: Maxwell & Son, 1883).

lature must prevail over those of an appointed judiciary. Whenever faced with a statute, the court's job was to ignore its own judgments about the policy best suited to resolving a particular problem and to concentrate on the task of discovering and implementing the will of the legislature as expressed through the statute. Maxwell stressed that:

Statute law is the will of the legislature; and the object of all judicial interpretation of it is to determine what intention is expressly or by implication conveyed by the language used, in so far as it is necessary for the purpose of determining whether a particular case or state of facts which is presented to the interpreter falls within it.<sup>66</sup>

For years, this account has shaped judicial approaches to statutory interpretation. How, then, is one to understand Sherstobitoff J.A.'s decision not to limit himself to the statutory provision before him and to resort instead to policy that securities regulators have enunciated? The question is that much more intriguing when one bears in mind that Saskatchewan's legislature has never explicitly sanctioned the policy statement that he turns to for guidance. So the phenomenon at play in this case is not just an instance of a court deferring to the expertise of a regulatory body with respect to the interpretation of its constitutive legislation, a practice that has received considerable judicial support.<sup>67</sup> Nor is the Court of Appeal simply attempting to reconcile the interpretation of two statutes that must inevitably interact. Instead, the Court of Appeal goes one step further and draws on a statement of policy that forms part of an ongoing effort on the part of regulators to make clear *their* conception of the way in which one constituency, the shareholders of the target corporation, must be treated in the course of corporate acquisitions.

While the result of extensive consultation,<sup>68</sup> it remains the case that the policy statement is in no sense an expression of the will of the legislature; it represents the view of securities regulators. Moreover, it reflects a very particular set of policy concerns.<sup>69</sup> This is hardly surprising: contemporary securities regulators have made clear that they are concerned to ensure that shareholders are treated fairly in the course of a take-over bid. But it is not self-evident that this objective, however admirable, necessarily underlies all aspects of our business corporations acts. The latter also reflect a concern to allow corporations and their boards a measure of flexibility in the pursuit of corporate objec-

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<sup>66</sup>*Ibid.* at 1. He went on to observe:

The business of the interpreter is not to improve the statute, but to expound it ... to give it a construction contrary to, or different from that which the words impart or can possibly impart, is not to interpret law, but to make it; and judges are to remember that their office is *jus dicere*, not *jus dare* (*ibid.* at 7).

<sup>67</sup>See, for example, Madame Justice Wilson's concurring reasons in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1336-46, 74 D.L.R. (4th) 449.

<sup>68</sup>The OSC issued a request for comments on 23 March 1984. A draft policy was published on 7 December 1984. A new version of the policy was released in February 1986 that reflected many of the comments. This redrafted policy became the basis for *National Policy 38*.

<sup>69</sup>For an excellent discussion of the rationale underlying *National Policy 38*, see S. Beck & R. Wildeboer, "National Policy 38 as a Regulator of Defensive Tactics" in *Meredith Memorial Lectures 1987: Acquisitions and Take-Overs* (Cowansville, Qué.: Yvon Blais, 1988) 119.

tives,<sup>70</sup> flexibility that has at times had to be balanced carefully against the interests of various constituencies, including shareholders. Indeed, Ronald Daniels' excellent work on the forces at play in shaping Canadian business corporations acts makes clear that all jurisdictions in Canada have had to struggle to reconcile these distinct policy objectives.<sup>71</sup> And it is far from obvious that the specific balance between shareholder protection and flexibility that securities regulators favour is identical to the one that our legislatures have endorsed. This comment has already suggested both that the *CBCA*'s provisions governing capital accumulation reveal a clear concern to promote flexibility and that Parliament chose to subject this process to rules regarding directors' fiduciary duties to the corporation rather than to the kind of principles regarding the protection of shareholders that securities regulators have increasingly brought to bear on their analyses of corporate transactions.

The tensions in Sherstobitoff J.A.'s reasoning reflect difficult issues that are at the heart of contemporary Canadian business law: the appropriate relationship between our business corporations law and our securities law and the extent to which the particular balance of principles underlying our business corporations law must be adjusted in order to accommodate growing concerns regarding the treatment of shareholders. Unfortunately, it has been some time since this debate was played out in the legislature. In that setting, one might have hoped to see an open discussion about the balance between flexibility and fairness (and between shareholders' interests and other stakeholders' interests) that is most appropriate to current economic realities and that would most effectively ensure that corporate Canada remains able to compete internationally while treating shareholders and other stakeholders fairly. But these issues are instead being hammered out through a curious dialectic between courts, securities regulators and the business community. Given the absence of the legislature from this ongoing debate, it is little wonder that Sherstobitoff J.A. felt compelled to leave Maxwell to one side and to look beyond the terms of the statute in order to interpret section 117 of the *SBCA*.

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<sup>70</sup>As F.H. Buckley observes in *Corporations: Principles and Policies* (Toronto: Emond Montgomery Publications, 1988):

Though one might have thought that nineteenth century corporations legislation would offer greater freedom to incorporators, in fact modern corporations are considerably more facilitative. The history of modern corporations law is one of reduction of management restrictions and shareholder rights in matters of investment and financial policy, including the term of the corporation's existence, the businesses it might take up, self-dealing standards, share issuances and repurchases, dividend policy and charter amendment. Corporate law barriers to business decisions have never been lower than under modern "enabling" corporate statutes such as the *CBCA* (*ibid.* at 152).

Of course, with this greater flexibility have come new remedies designed to limit the potential for abusive treatment of shareholders: for example, the oppression remedy.

<sup>71</sup>R.J. Daniels, "Should Provinces Compete: The Case for a Competitive Corporate Law Market" (1991) 36 *McGill L.J.* 130. Daniels sets out the problem that governments in Canada have to contend with:

The existence of overlapping securities and corporate laws in Canada means that the benefits of a province's corporate law regime may be undermined by the operation of provincial securities law administrators located in the incorporating province or, more significantly, in other provinces (*ibid.* at 183).

Discomfort with Maxwell's conception of statutory interpretation is of course hardly a new phenomenon. In an administrative law setting, many have pointed to the implausibility of some of Maxwell's most basic premises, for example the notion that there is a single easily ascertained "intention" underlying a given statute. They have gone on to discuss the problems surrounding attempts to isolate a single legislative intent in a multiparty legislature with an ever-growing body of representatives.<sup>72</sup> It has been accepted that, on occasion, it is entirely appropriate for a regulator entrusted with the administration of a statute to dispense with the notion that Parliament's intention is always self-evident and to draw on its expertise in order to interpret provisions in that statute. But these critics have nonetheless remained sensitive to the need for a democratic frame of reference, one that is ultimately sanctioned by the legislature. That is, they have stressed that courts and regulators are subordinate to the legislature and must respect the logic of the legislation that they are called upon to interpret.<sup>73</sup> Few have gone so far as to suggest that in interpreting a statutory provision one should feel free to look to an entity other than the legislature in order to draw on its pronouncements, not simply about how best to interpret the statutory provision in question, but about how broad issues of public policy should be dealt with. Yet this is precisely what the Saskatchewan Court of Appeal is up to.

This is not to say that it is inappropriate for a regulator to issue policy statements. Far from it. One can readily justify a regulator's decision to issue statements regarding the way in which it will structure its discretion. The literature in administrative law has long suggested that this is entirely appropriate.<sup>74</sup> But this is a different matter from a situation in which a court entrusted with interpreting one statute reaches out to policy statements designed by regulators who are responsible for the enforcement of another statute. And absent clear evidence that the statutes are fundamentally analogous, at least in so far as their underlying policy objectives are concerned, one can be forgiven for wondering whether it is appropriate for a court to engage in such a manoeuvre.

This comment has already suggested that it is far from clear that the policy objectives underlying our business corporations and securities acts *are* identical. Our business corporations acts display a profound concern to balance the need for flexibility regarding the structure, financing and management of a corporation with concerns about accountability, whereas securities acts in Canada focus almost exclusively on the treatment of shareholders.<sup>75</sup> Before courts entrusted with interpreting provisions of the former seek inspiration from a regulator's statements about its approach to the latter, should the legislature not first provide a clear indication that in its view the objectives underlying these statutes are in fact identical? While the Canadian securities administrators take the view

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<sup>72</sup>See, for example, J. Landis, *The Administrative Process* (New Haven: Yale U. Press, 1983); J. Willis, "Three Approaches to Administrative Law" (1935) 1 U.T.L.J. 53.

<sup>73</sup>See, for example, R. Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46 U.T. Fac. L. Rev. 136.

<sup>74</sup>See, for a recent discussion of this issue, H.N. Janisch, "Consistency, Rulemaking and *Consolidated Bathurst*" (1991) 16 Queen's L.J. 95.

<sup>75</sup>With respect to business corporations acts, see Buckley, *supra*, note 70.

that "the primary objective of take-over bid legislation is the protection of the bona fide interests of the shareholders of the target company,"<sup>76</sup> is it clear that the Saskatchewan legislature conceives of the issues surrounding take-over bids in these very same terms?

After careful analysis, one might of course reach the conclusion that the objectives underlying the rules governing take-over bids in the *SBCA* are identical to those underlying rules regarding take-over bids found in securities legislation and that it is therefore appropriate to draw on securities regulators' policy statements in interpreting either act's take-over bid provisions. But Sherstobitoff J.A. certainly does not provide us with this analysis and it is far from self-evident that detailed analysis would have produced such a conclusion. One can quite credibly contend both that the take-over bid provisions found in a business corporations act must be read in a manner that displays sensitivity to the objectives of the act as a whole, and that this contextual interpretation will produce a different result than a contextual analysis of the take-over bid provisions found in securities legislation; all the more so when one considers that business corporations acts are concerned not just with the treatment of shareholders, but also with providing management with a flexible structure through which to pursue business objectives.<sup>77</sup> Contextual analysis of this kind may be all that much more essential when one is faced with a poison pill, since neither business corporations acts nor securities acts speak specifically to the way in which one should handle this phenomenon.

Moreover, in issuing *National Policy 38*, the Canadian Securities Administrators made clear that even if they were not prepared to formulate a detailed code of conduct, they were nonetheless interested in developing standards that went beyond those imposed by the fiduciary duties required by corporate law.<sup>78</sup> It is not unreasonable, then, to suggest that they issued this policy statement precisely because they were not convinced that our business corporations acts (at least as they have so far been interpreted) place enough emphasis on the fair treatment of shareholders. This may be a valid concern. But do courts interpreting a business corporations act have a mandate to embrace new standards of conduct developed by securities regulators without at the very least showing how they flow from the structure of the relevant business corporations act?

The end result in *Producers* is that in the course of interpreting provisions having to do with fiduciary duties, the Court of Appeal has reached out to a policy statement that was issued in order to set out standards that securities commissions felt were not captured by directors' fiduciary duties. Thus the Court of

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<sup>76</sup>See *National Policy 38*, para. 2.

<sup>77</sup>For example, note that whereas the *CBCA*'s take-over provisions contain measures whereby an acquiring company can squeeze out remaining shareholders of the target corporation once 90% of its shares have been tendered to the bid, the Ontario *Securities Act*'s take-over bid provisions do not deal with this issue. This difference reflects the *CBCA*'s greater preoccupation with flexibility in the management of companies and is but one illustration of the different perspectives and objectives that motivate the two statutes' approaches to take-over bids.

<sup>78</sup>See Beck & Wildeboer, *supra*, note 69 at 119-20, where the authors confirm that *National Policy 38* was in part a response to the perceived inadequacies of fiduciary law.



Appeal ends up adopting a role similar to the one that securities regulators have carved out for themselves: that is, it has embraced fairness claims developed independently of any analysis of the *SBCA*. While one can understand the position taken by securities regulators, it is not easy to formulate a rationale for courts taking it upon themselves to enforce *National Policy 38*.<sup>79</sup> It would have been considerably easier to justify an approach to this case that focused squarely on section 117 of the *SBCA* in light of the division of power between shareholders and management that the Act put in place and that then went on to provide an account of the reasons why, given that framework, shareholders should not be prevented from having the final say with respect to the adoption of a poison pill and the acceptability of a given take-over bid.

While Sherstobitoff J.A. quite rightly notes that Canadian law with respect to directors' fiduciary duties in the course of a take-over bid does not speak to the use of poison pills, there is American case law that tackles this question and that can quite readily be looked to for inspiration.<sup>80</sup> For example, in *City Capital Associates Limited Partnership v. Interco Incorporated*,<sup>81</sup> the Delaware Court of Chancery went quite some way to unpacking the implications of directors' fiduciary duties for the use of poison pills. In concluding that Interco's S.R.A. had outlived its usefulness, the Court observed:

In this instance, there is no threat of shareholder coercion. The threat is to shareholders' economic interests posed by an offer the board has concluded is "inadequate." If this determination is made in good faith ... it alone will justify leaving the poison pill in place, even in the setting of a non-coercive offer, for a period while the board exercises its good faith business judgment to take such steps as it deems appropriate to protect and advance shareholder interests in light of the significant development such an offer doubtless is. That action may entail negotiation on behalf of shareholders with the offeror, the institution of a *Revlon*-style auction for the Company, a recapitalization or restructuring designed as an alternative to the offer, or other action. Once that period has closed, and it is apparent that the board does not intend to pursue a *Revlon*-style auction, or to negotiate for an increase in the unwanted offer, and that it has taken such time as it required in good faith to arrange an alternate value-maximizing transaction, then in most instances, the legitimate role of the poison pill in the context of a non-coercive offer will have been fully satisfied.<sup>82</sup>

The Delaware courts, then, have accepted that a board should have time to explore alternate opportunities to maximize shareholder wealth. But they have emphasized that it would not be appropriate to allow a board to use a rights plan

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<sup>79</sup>Even the argument that Sherstobitoff J.A. does advance, namely the paucity of jurisprudence with respect to the implications of fiduciary standards for this case, seems odd. At the time that *Producers* was decided, securities regulators had never issued reasons (or provided a policy statement) explaining how poison pills should be handled in light of *National Policy 38*. One can hardly contend, then, that the jurisprudence surrounding *National Policy 38* was better developed than that surrounding fiduciary standards governing the use of poison pills. I am grateful to Clay Horner, managing partner of Osler, Renault, Ladner's New York office for pointing out this peculiar feature of the judgment.

<sup>80</sup>For a more detailed analysis of the way in which American jurisprudence might be looked to for inspiration, see Dey & Yalden, *supra*, note 59 at 274-80.

<sup>81</sup>551 A.2d 787 (Del. Ch. 1988).

<sup>82</sup>*Ibid.* at 798.

to deprive shareholders of the opportunity to accept an offer once it becomes clear that the board has not found an acceptable alternative that will enhance shareholder value. And they have reached this conclusion without having to draw on policy statements issued by securities regulators in order to remedy perceived weaknesses with fiduciary duties as a control mechanism. Moreover, the kinds of factors that the Delaware courts have focused on are similar to the ones that Sherstobitoff J.A. was concerned with when, having reviewed the implications of *National Policy 38* in some detail, he then went on to list various considerations that led him to conclude that Producers' defensive action was neither reasonable in relation to the threat posed, nor taken in the best interests of the company.<sup>83</sup> But in Sherstobitoff J.A.'s reasons these factors are presented almost as though they were an afterthought. They do not form the centrepiece of his analysis.

Thus, while Sherstobitoff J.A.'s belated concern about directors' fiduciary duties to a corporation's shareholders was entirely appropriate, his analysis should have placed more emphasis on developing law with respect to those fiduciary duties within the context of the *SBCA*. Analyses of the extent to which our corporate law is consistent with policy statements issued by securities regulators were subsidiary matters in this context that should not have come to overshadow judicial analysis of fiduciary principles (at least until such time as legislators make clear that it is appropriate for courts to interpret business corporations acts in that manner). While securities policies are no doubt pertinent to the debate, they are pronouncements made by Securities Administrators and should serve to guide securities regulators. If these pronouncements are consistent with the corporate law on fiduciary duties, so much the better. If not, then perhaps both courts and securities regulators should look to matters within their jurisdiction to see whether changes are needed. Harmonization may well be a desirable thing. No doubt it is also time that our legislatures faced up to the challenge of better integrating corporate law and securities law. But courts are neither legislatures nor securities regulators and should not reach to policy statements issued by the securities administrators as if they were the touchstone for their approach to questions concerning fiduciary principles. All the more so when there is well developed jurisprudence in other jurisdictions with respect to fiduciary duties that can assist a court in considering how best to interpret the statutory provision that it has a mandate to apply.

It is equally important to remember that at the end of the day, however much their jurisdiction may have expanded, securities regulators are not legislatures either. While the objectives of securities law are important, they are not necessarily identical with those of our business corporations acts. The latter should continue to develop in accordance with their own logic. Courts must of course be sensitive to the framework that our securities law establishes. But sensitivity to that framework is a different matter than a process whereby business corporations acts are hijacked by securities law and in turn become immune to policy considerations that are not central to securities regulation. Authors such as Daniels have pointed to the dangers at play in a context in which there are

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<sup>83</sup>*Supra*, note 6 at 598-99.

overlapping securities and corporate laws. As he notes: "to the extent that securities regulators are able to impinge on the scope traditionally accorded corporate law, the integrity of each government's corporate law product is compromised."<sup>84</sup>

The point is well-taken. If legislatures conclude that ultimately securities policy should rule the day, then so be it. But until they make clear that they have endorsed that state of affairs, courts have no mandate to subsume our business corporations law to the views of securities administrators.

#### *D. The Use of the Oppression Remedy*

But how is it that Sherstobitoff J.A. allowed himself to reach beyond the ambit of the *SBCA* in order to draw on a policy statement designed to remedy perceived weaknesses with the law regarding fiduciary duties? Is counsel entirely free from blame? After all, it was counsel that sought an order under the statutory oppression remedy, a remedy that provides courts with a notoriously large degree of discretion with respect to the kinds of equitable considerations that they may look to when evaluating the fairness of the impugned conduct.<sup>85</sup> Moreover, having run the case through the oppression remedy, it was counsel that then suggested that the Court look to *National Policy 38* for interpretive guidance.

It comes as no great surprise that counsel invoked the oppression remedy. Several authors have suggested that it is one way of controlling the use of poison pills.<sup>86</sup> The oppression remedy's focus on the particularities of the wrong done to the complainant, as opposed to the corporation, no doubt accounts for some of its attractiveness in this context. Moreover, an oppression application may be commenced by a summary form of procedure.<sup>87</sup> In a fast moving takeover battle, the oppression remedy therefore offers distinct procedural advantages for those seeking a speedy way to disarm a poison pill.

But the oppression remedy presents substantive issues of its own that result from the open-ended nature of the provision. In providing courts with the mandate to address acts that are "oppressive," "unfairly prejudicial," or that "unfairly disregard" the interests of shareholders (among others), the provision opens the door to courts to develop new fairness standards that go beyond those seen in the context of an analysis of directors' fiduciary duties. Jeffrey MacIntosh has quite astutely observed that its open-ended nature has made it difficult for courts to pin down a consistent set of criteria that might be used to formulate appropriate fairness standards.<sup>88</sup>

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<sup>84</sup>*Supra*, note 71 at 184.

<sup>85</sup>See *supra*, note 13 for the text of the statutory oppression remedy.

<sup>86</sup>See *supra*, note 60 at 305-06 n. 136; *supra*, note 35 at 347; J. Forsyth, "Poison Pills: Developing a Canadian Regulatory and Judicial Response" (1991) 14 *Dalhousie L.J.* 158 at 185.

<sup>87</sup>See section 248 of the *CBCA* and MacIntosh, *supra*, note 23 at 54 n. 125.

<sup>88</sup>See "Bad Faith and the Oppression Remedy: Uneasy Marriage or Amicable Divorce" (1990) 69 *Can. Bar Rev.* 276, especially at 281-87.

The difficulties surrounding the fluid nature of the provision are particularly evident in *Producers*. Bayda C.J., who does at least focus squarely on the section, barely succeeds in convincing himself that the case can be addressed through this provision. The result is that his reasons never really sink their teeth into the substance of the section or of the real problems that *Producers* gives rise to. His analysis does little to unpack the fairness standards that should be applied to the use of poison pills in the context of an oppression application.

As for the majority's judgment, although one might have expected to see some discussion of the matter, Sherstobitoff J.A. gives just as little attention to fleshing out the fairness standard embodied in section 234 of the *SBCA*. Indeed, even though the action is brought under section 234, he chooses to address the issues in this case through the Act's provisions regarding fiduciary duties, turning to *National Policy 38* when he runs into interpretive difficulty. The oppression remedy is treated as little more than a section concerning the range of court orders that may issue once one has found a breach of section 117 of the *SBCA*. Thus, Sherstobitoff J.A. never spells out the kind of fairness principles that are at the heart of the oppression section, fairness principles that might well place greater emphasis on shareholder interests than do traditional rules with respect to fiduciary duties and that might in turn serve as a solid foundation on which to build principles designed to control poison pills. While it is this comment's contention that concerns regarding the impact of a poison pill *can* be addressed through a sophisticated analysis of directors' fiduciary duties, the oppression remedy is obviously capable of providing assistance in instances where it is felt necessary to look to additional fairness standards. Moreover, unlike *National Policy 38*, the oppression remedy has the merit of forming part of both the *SBCA* and *CBCA*, thereby enabling courts to respect the integrity of the statute they are called upon to interpret.<sup>89</sup>

Unfortunately, one cannot even explain Sherstobitoff J.A.'s decision to reach out to *National Policy 38* as an attempt to compare and possibly harmonize the oppression remedy's fairness standards with those underlying securities legislation. Perhaps a credible argument could be made in favour of such a venture. There is no doubt that as with *National Policy 38* the oppression remedy reflects a concern to go beyond fiduciary duties in order to secure the fair treatment of shareholders.<sup>90</sup> Once again though, it would be essential to conduct such an analysis of the oppression remedy within the confines of the *SBCA* with a view to seeing what conception of fairness a contextual reading of the Act

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<sup>89</sup>As J. MacIntosh, J. Holmes & S. Thompson note: "The broad drafting of the oppression remedy has supplied the courts with a *legislative mandate* to break free of the fetters of the common law..." [emphasis added] ("The Puzzle of Shareholder Fiduciary Duties" (1991) 19 Can. Bus. L.J. 86 at 86-87). For a recent analysis of the oppression remedy, see the Ontario Court of Appeal's decision in *Brant Investments Ltd v. Keeprite Inc.* (1991), 3 O.R. (3d) 289, 80 D.L.R. (4th) 161.

<sup>90</sup>See MacIntosh, *supra*, note 23 at 45, 57, where the author confirms that the oppression remedy was designed to deal with perceived weaknesses with fiduciary duties by creating a standard of fair conduct that captures a wider range of conduct than the common law of fiduciary duties. It is worth noting, however, that the oppression remedy is not concerned solely with shareholders and might therefore be thought to embody a somewhat different perspective on the range of constituencies that warrant protection than that favoured by securities regulation.

entails and whether the end result is consistent with fairness principles that securities regulators favour.

Instead of engaging in this kind of carefully contained project, Sherstobitoff J.A. chose section 117 of the *SBCA* as the starting point for his analysis and sought to incorporate *National Policy 38* into his interpretation of the Act's rules regarding fiduciary duties. It matters little who is ultimately responsible for making this line of reasoning seductive, provided that one sees that of the options that were available to the Court this was in fact one of the least attractive. Whether one favours efforts to refine fiduciary principles, to explore the rules relating to acts that are "oppressive," "unfairly prejudicial," or that "unfairly disregards" a given constituency's interests, or to come up with a hybrid control mechanism that incorporates aspects of fiduciary duties and the oppression remedy, any one of these options promises to respect the integrity of the business corporations law that courts are called upon to interpret. Because these options are properly within the jurisdiction of the courts, they provide a much more satisfactory basis on which courts may build principles designed to control the use of poison pills than the one that the Court of Appeal sets out in *Producers*.

## Conclusion

This comment began by observing that if we are to succeed in meeting the challenges that a rapidly evolving economic climate gives rise to, then it is essential that companies in Canada have a clear idea of the regulatory context in which corporate transformation may take place. Unfortunately, the Court of Appeal's decision in *Producers* does little to assist the development of principles governing the use of poison pills that are grounded in a well focused picture of the respective roles of the courts and securities commissions in the acquisition process, principles that are in turn sensitive to the policy objectives underlying the legislation that each of these institutions is called upon to enforce. Of the various options for controlling poison pills that were open to the Saskatchewan Court of Appeal, the one chosen was one of the least compelling and serves only to muddy the waters.

Instead of providing us with a creative analysis of the law regarding fiduciary duties or the oppression remedy that would have helped companies understand what business corporations legislation demands of them with respect to the use of a poison pill, the decision simply defers to *National Policy 38*. But this policy statement has not only received very limited application in connection with poison pills,<sup>91</sup> it also falls squarely within the jurisdiction of an institution whose role with respect to the acquisition process is quite distinct from the one that courts are entrusted with under business corporations legislation. Thus, the decision in *Producers* gives rise to a situation in which the distinctive

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<sup>91</sup>At the time that this comment was completed, the *Canadian Jorex* case, *supra*, note 61, was the *only* decision concerning the application of *National Policy 38* to a poison pill, a decision that was handed down after the Saskatchewan Court of Appeal made use of *National Policy 38*. See *supra*, notes 61, 79 in connection with this point.

roles of courts and securities commissions are ignored and the objectives underlying corporations and securities law are confused. This is precisely the kind of hotchpotch that this comment has already suggested we can ill-afford.

On a positive note, the decision does have the virtue of moving the debate regarding poison pills away from rather arid objections to their legality based on technical provisions in business corporations acts that concern the process of capital accumulation. This comment has suggested that Matheson J. was quite right in dismissing objections to poison pills that rely on section 24 of the *SBCA* or *CBCA*. Sustained analysis of the history underpinning this provision reveals that rather than prohibiting dilution of a shareholder's position, the section forms part of a series of provisions that were drafted with an eye to the possibility that in some contexts dilution would be entirely appropriate, provided that this occurred in a manner consistent with fiduciary principles. Moreover, a majority of the Court of Appeal succeeds in situating the locus of the debate where it belongs: in the midst of questions concerning the standards that should govern the use of shareholder rights agreements.

Unfortunately, the Court of Appeal gets sidetracked when it comes to the way in which it should approach the formulation of these standards. The Court provides an unsatisfactory analysis of the fiduciary duties that govern the use of a shareholder rights agreement, turning to policy statements instead of looking first at how other jurisdictions have developed fiduciary standards to deal with poison pills and then embarking on a creative extension of Canadian fiduciary principles. Moreover, the majority ignores altogether the possibility that satisfactory principles governing the fair treatment of shareholders might also be found in a careful analysis of the oppression remedy. Instead of examining the implications of the law regarding fiduciary duties and the oppression remedy for the standards that should govern the use of poison pills, the Court reaches out rather awkwardly to policy developed in a completely different setting, policy which the courts simply have no mandate to apply.

In the end, we are left a long way from a well focused picture of the role that poison pills should play in the acquisition process in Canada. There is of course something to be said for trial by error. But if a crisp picture of the standards governing the use of shareholder rights agreements is to emerge, then we need to clarify thinking with respect to the distinctive roles and responsibilities of institutions like the judiciary and securities commissions in ensuring that poison pills are used constructively, as well as with respect to the range of principles that each institution may legitimately draw on in fashioning constraints on the acquisition process. Only if we address these matters in a rigorous manner, one that is sensitive to issues raised by the larger regulatory setting in which corporate restructuring must unfold, can we hope to formulate business law that will provide a stable context in which companies may set about meeting the challenges that rapid economic changes continue to generate.

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## BOOK REVIEWS

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### CHRONIQUES BIBLIOGRAPHIQUES

Gérard Cornu, *Linguistique juridique*. Paris, Montchrestien, 1990. Pp. 412 [53,00\$]. Commenté par Nicole-Marie Fernbach\*

« [L]’évidence s’impose que le temps des ouvrages de synthèse dans ce domaine n’est pas encore arrivé. » Ainsi s’exprimaient Jean-Louis Sourieux, juriste, et Pierre Lerat, grammairien, dans la préface de leur ouvrage *Le langage du droit*, paru en 1975<sup>1</sup>. Quinze ans plus tard, leur voeu aura été exaucé puisque Gérard Cornu leur oppose un démenti formel avec la *Linguistique juridique*<sup>2</sup>. En effet, cet ouvrage s’inscrit tout à fait dans la ligne des recherches annoncées par les deux auteurs, pionniers dans un domaine pluridisciplinaire qui, de l’aveu même de Gérard Cornu, « ne figure pas à la nomenclature des branches du savoir »<sup>3</sup>. Les juristes et les linguistes n’avaient, jusqu’à présent, fait que des recherches à caractère épars dans des domaines spécialisés<sup>4</sup>, ce qui ne permettait pas à la matière de se structurer au niveau d’une science. Hormis certains ouvrages de lexicographie, les réflexions d’ordre stylistique et phraséologique, si elles existaient déjà, n’avaient encore jamais fait l’objet d’une conception aussi systématique et aussi large dans sa portée, au point de constituer des modèles théoriques<sup>5</sup>.

Certes, les auteurs du *Langage du droit* avaient posé les bases de la recherche et montré la richesse pluridisciplinaire que produirait l’exploration

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McGill Law Journal 1992

Mode de citation: (1992) 37 R.D. McGill 917

To be cited as: (1992) 37 McGill L.J. 917

<sup>1</sup>Paris, P.U.F., 1975 à la p. 11. Voir aussi des mêmes auteurs, « L’euphémisme dans la législation récente » D.1983.Chron.221.

<sup>2</sup>Paris, Montchrestien, 1990 [ci-après *Linguistique juridique*].

<sup>3</sup>*Ibid.* à la p. 13.

<sup>4</sup>Voir les bibliographies et ouvrages cités dans la chronique bibliographique concernant, entre autres, le *Vocabulaire juridique*, Paris, P.U.F., 1987 dans N.-M. Fernbach, *Compte rendu* (1989) 34 R.D. McGill 368.

<sup>5</sup>L’ouvrage de M. Sparer et W. Schwab, *Rédaction des lois : Rendez-vous du droit et de la culture*, Québec, Conseil de la langue française, Éditeur officiel du Québec, 1980, est la seule synthèse dans le domaine.

des rapports entre la langue et le droit. Gérard Cornu, quant à lui, s'était distingué comme éminent juriste et lexicologue, surtout grâce à son *Vocabulaire juridique*<sup>6</sup>. Il a, d'ailleurs, fait de nombreuses références à son *Vocabulaire juridique* dans la *Linguistique juridique*, ce qui indique que ses recherches en lexicographie étaient profondément imbriquées dans ses recherches d'ordre linguistique, ces dernières traduisant davantage un effort de synthèse. Si la phraséologie juridique et la stylistique n'étaient, jusqu'à présent, que des « parents pauvres » par rapport au vocabulaire, Gérard Cornu a maintenant corrigé cette lacune. Il explique en introduction que la linguistique juridique comprend deux volets. Le premier tome de son étude porte sur le langage du droit et, dans un deuxième tome à venir, l'auteur annonce qu'il traitera du droit du langage, aussi appelé « droit linguistique ».

La jurilinguistique, ou comme Gérard Cornu préfère la nommer, la linguistique juridique, possède maintenant son manuel théorique, et nous nous proposons d'examiner son contenu afin de mettre en évidence les aspects les plus intéressants pour le lecteur, qu'il soit juriste (ou apprenti juriste), linguiste (ou apprenti linguiste) ou, tout simplement, esprit curieux de science et d'érudition.

Dans l'introduction, l'auteur présente les définitions de base de la matière étudiée. En particulier, il explique en quoi le langage juridique est un langage de groupe, un langage technique et un langage traditionnel. Il expose aussi les caractères plurifonctionnel et pluridimensionnel du langage du droit, notamment dans ses différents genres : le langage législatif, le langage judiciaire, le langage conventionnel (celui du contrat), le langage administratif et le langage doctrinal. D'après Cornu, « [l]a linguistique juridique est l'application particulière au langage du droit de la science fondamentale de la linguistique générale »<sup>7</sup>. Il explique en quoi il s'agit d'une science auxiliaire du droit qui complète les autres sciences auxiliaires que sont l'histoire du droit, le droit comparé, la sociologie et l'informatique juridique. Une fois la matière située par rapport aux autres « branches du savoir », il nous offre une bibliographie partiellement annotée et classée de façon thématique, qui comporte des monographies et articles importants sur le français juridique et son style. M. Cornu ne se borne toutefois pas à citer les auteurs de droit français. Il présente certains ouvrages des jurilinguistes canadiens, en particulier de Jean-Claude Gémar et d'Emmanuel Didier. La longue référence à Jeremy Bentham annonce l'analyse comparatiste du discours législatif en droit anglais qui se trouve dans la deuxième partie de l'ouvrage. L'auteur propose enfin, comme support théorique, des rendiments documentaires de linguistique générale.

L'ouvrage, proprement dit, est divisé en deux titres, le vocabulaire juridique et le discours juridique. Le plan du premier titre est simple puisqu'il porte sur les mots et les rapports entre les mots. On constate que, dans la mesure du possible, l'auteur choisit de s'exprimer dans une langue courante (« mots » au lieu de « termes », par exemple). Le deuxième titre est consacré aux différents

<sup>6</sup>*Supra*, note 4. Parmi les autres publications de G. Cornu, citons : « Les définitions dans la loi » dans *Mélanges Vincent*, Paris, Dalloz, 1981, 77 ; « La codification de la procédure civile en France » (1986) 40 *Revue juridique et politique : indépendance et coopération* 689.

<sup>7</sup>*Linguistique juridique*, *supra*, note 2 à la p. 31.



discours, notamment le discours législatif, le discours juridictionnel et le discours coutumier. L'ouvrage s'achève sur une table des matières très claire et bien présentée sur le plan typographique. Dès le premier abord, le lecteur est surpris par le caractère érudit des références et l'aspect exhaustif de la recherche. Par ailleurs, l'auteur fait montre d'émotivité, et ne cache pas sa passion pour la langue juridique. Il s'exprime en aparté, dans les notes infrapaginales, ce qui confère au texte un ton vivant et imagé qui contraste avec la rigueur et la complexité de l'exposé. C'est ainsi qu'il n'hésite pas à parler d'amour ... du langage, pour ce qui est de la saveur du vocabulaire juridique<sup>8</sup>, ni à s'exclamer : « Amis du droit et de la langue, nous devrions ensemble les réciter par coeur. Ah ! Si le droit européen nous confisquait ces trésors (énorme aveu), je serais contre l'Europe ! »<sup>9</sup> Ces accents vibrants à propos des mots aboutissent à une profession de foi enthousiaste : « À ceux qui ont écrit ces mots, grâce et salut ! Ils sauvent la loi. J'aime le droit pour lui-même, et aussi pour la justice et l'équité. Je l'aime encore pour sa langue. »<sup>10</sup>

L'étude de la linguistique juridique commence au titre premier par celle du vocabulaire juridique. En linguistique, on distingue habituellement le lexique (le vocabulaire), la syntaxe et le style d'énonciation. L'auteur choisit, lui, de traiter des particularités syntaxiques dans le titre portant sur le discours juridique mais il s'avance un peu trop, cependant, lorsqu'il dit que le langage du droit ne présente pas vraiment de spécificité syntaxique<sup>11</sup>. En fait, dans son analyse du discours législatif, il signale des particularités syntaxiques comme l'éllision ou l'élipse<sup>12</sup>. Raymondis et Le Guern, dans leur ouvrage *Le langage de la justice pénale*<sup>13</sup>, ont analysé non seulement les originalités lexicales mais encore les originalités syntaxiques du langage de la justice pénale et font une distinction très claire entre les termes originaux du lexique et la combinatoire spécialisée des mots. Gérard Cornu revient davantage à la tradition linguistique dans sa typologie des termes juridiques puisqu'il distingue les mots en fonction de leur appartenance exclusive au domaine juridique ou de leur double appartenance au lexique général et au vocabulaire spécialisé. Sur les 9 200 termes (mots et sous-mots) recensés par l'auteur du *Vocabulaire juridique*, il n'existerait pas plus de 400 termes exclusivement juridiques. Les autres seraient des polysèmes. Il est, par conséquent, difficile d'attribuer le caractère hermétique du droit à la seule technicité de son vocabulaire.

Ce noyau dur de la nomenclature exclusivement technique est brièvement présenté en colonnes, dans une disposition très claire qui permet au lecteur d'enrichir ses connaissances lexicales et de vérifier les appartenances. La consultation est d'ailleurs facilitée par l'ordre alphabétique des listes de termes. Le classement par matière revêt aussi un grand intérêt par rapport à un dictionnaire ou à un lexique traditionnel, en particulier pour le lecteur étranger, car l'auteur pré-

<sup>8</sup>*Ibid.* aux pp. 71, 122.

<sup>9</sup>*Ibid.* à la p. 334.

<sup>10</sup>*Ibid.*

<sup>11</sup>*Ibid.* à la p. 135.

<sup>12</sup>*Ibid.* aux pp. 332-33.

<sup>13</sup>L.-M. Raymondis et M. Le Guern, *Le langage de la justice pénale*, Paris, Éditions du CNRS, 1976.

sente un découpage en catégories qui est propre au droit français (langage de la procédure, de la théorie générale, du droit successoral, des contrats spéciaux, des fraudes). Aucun terme latin ne figure dans les listes de mots car il s'agit d'un groupe à part<sup>14</sup>. Des termes étrangers comme « ombudsman » ou « estoppel »<sup>15</sup> sont lexicalisés, c'est-à-dire considérés comme français. Ces termes, proprement techniques, n'ont pas pu entraîner de dérivation mais ils donnent souvent lieu à une expression concurrente. En effet, la langue courante préfère des termes plus clairs et plus évocateurs. L'auteur explique que, même si l'on apprenait tous ces mots techniques, on n'apprendrait cependant pas le droit. L'ouvrage offre donc une grande richesse d'érudition et permet d'acquérir des connaissances plus approfondies sur le vocabulaire du droit français, ce qui sera d'un intérêt particulier pour les civilistes québécois.

Après les termes exclusivement juridiques, l'auteur présente la catégorie plus complexe de la double appartenance (les polysèmes), c'est-à-dire surtout des termes qui « ont un sens juridique principal et un sens extrajuridique dérivé [...] »<sup>16</sup>. On apprend ainsi, par exemple, que le langage du droit a influé sur la langue courante car certains termes sont entrés dans la langue non spécialisée avec un sens juridique atténué (par exemple, « l'affaire est dans le sac », « en tout état de cause », « séance tenante » ou « sur-le-champ »). L'auteur procède alors à des classements typologiques d'un grand intérêt théorique qui permettent de constater la dérivation entre le langage du droit et la langue courante, avec des faux amis comme « aliments » et « liquide ». Cette étude des termes le conduit à poser les problèmes de la clarté et de la lisibilité pour les non-initiés. Si les termes de technique juridique, proprement dits, ne sont pas assez évocateurs et sont donc incompris du grand public, ceux qui ont des sens concurrents, parfois opposés dans la langue du droit et dans la langue courante, font davantage écran.

L'auteur se livre aussi à une longue analyse de la polysémie (interne et externe)<sup>17</sup>, en tant que source de confusion, et il se lance alors dans le débat de la lisibilité sans toutefois y faire nommément référence<sup>18</sup>. Il oppose les thèses en présence, à savoir celle (utopique, selon lui) de M. Becquart<sup>19</sup> selon lequel il faudrait exclure les termes du vocabulaire courant dans la désignation des

<sup>14</sup>*Linguistique juridique, supra*, note 2 à la p. 65.

<sup>15</sup>Sur ce point, voir les remarques sur la traduction du mot « estoppel » par « préclusion » dans M. Bastarache et D.G. Reed, « La nécessité d'un vocabulaire français pour la *Common law* » dans J.-C. Gémar, éd., *Langage du droit et traduction*, Montréal, Linguatex, 1982, 207 à la p. 213 et s. L'usage diffère au Nouveau-Brunswick, comme en témoignent les traductions données pour les expressions composées d'« estoppel ».

<sup>16</sup>*Linguistique juridique, supra*, note 2 à la p. 69.

<sup>17</sup>Polysémie interne : le terme a plusieurs sens en droit. Polysémie externe : le terme a un sens en droit et un autre sens courant.

<sup>18</sup>*Linguistique juridique, supra*, note 2 à la p. 85. Sur la question de la lisibilité et du « Plain Language Movement », voir N.-M. Fernbach, *La lisibilité dans la rédaction juridique au Québec*, Ottawa, Centre canadien d'information juridique, 1990.

<sup>19</sup>*Les mots à sens multiples dans le droit civil français : Contribution au perfectionnement du vocabulaire juridique*, Paris, P.U.F., 1928. Par exemple, dans l'optique de l'auteur, selon G. Cornu, au lieu de « prescription acquisitive », on dirait « usucapion » (*Linguistique juridique, ibid.* à la p. 86).

notions juridiques, et celle des tenants de la lisibilité qui voudraient remplacer la terminologie technique du droit, dans la mesure du possible, par des équivalents de langue courante.

L'auteur propose d'arbitrer ce différend entre les deux écoles de pensée par une analyse approfondie des conséquences de chaque choix. « [I] est impossible d'amputer le vocabulaire juridique non seulement, comme il est évident, des termes qui conservent leur sens dans le langage juridique, mais aussi [...] de ceux dont le sens juridique est une application spécifique d'un sens générique »<sup>20</sup>. L'auteur se demande alors : « comment se passerait-on de polysèmes comme cause, motif, matière, substance, objet, condition, etc. »<sup>21</sup> ? Aux tenants de la simplification du langage spécialisé, il répondra, notamment à propos de la version plus « lisible » de la loi française sur le divorce, qu'« il est ridicule d'avoir chassé les termes demandeur, défendeur, demande reconventionnelle pour de maladroites périphrases. La démagogie est mauvaise conseillère. Les définitions légales sont là, quand il le faut, pour livrer le sens du terme technique. »<sup>22</sup>

Gérard Cornu formule aussi sa théorie de la simplification du langage juridique, en ce qui concerne le vocabulaire. Il faut remplacer le terme polysème qui crée de la confusion, quand il a un sens différent en droit et dans la langue courante, par un terme de la langue courante qui serait « plus clair et plus compréhensible », ce terme devant être « aussi spécifique que l'ancien (faute de quoi, il y aurait globalement progrès récessif [*sic*]) »<sup>23</sup>. En fait, pour Gérard Cornu,

la technicité du langage du droit est une exigence irréductible de la fonction sociale du droit [... et ...] la querelle du langage technique, opposé au langage courant, est un *problème mal posé*. D'abord parce que le langage ordinaire n'est pas une alternative du langage juridique. [...] Ensuite parce que le procès du langage technique [...] est surtout celui de l'archaïsme auquel la technicité n'est pas nécessairement liée [...]<sup>24</sup>.

La question des archaïsmes est traitée de la manière suivante : « Tout ce qui est archaïque est ancien, mais tout ce qui est ancien n'est pas archaïque. »<sup>25</sup>

<sup>20</sup>*Linguistique juridique, ibid.* à la p. 85.

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.* à la p. 323. Il s'agit plus précisément du texte de la loi adoptée par le Parlement français le 30 juin 1975, suite à une révision de la version originale jugée moins claire (*Loi n° 75-617 du 11 juillet 1975*, J.O., 12 juillet 1975, 7171). Voir sur ce point L. Fougère, « La modernisation du langage juridique » dans *Études et documents*, Paris, Conseil d'État, 1984-85, 121 à la p. 122 et s.

<sup>23</sup>*Linguistique juridique, supra*, note 2 à la p. 87. Ainsi, dans son nouveau *Code de procédure civile* (de France), il a remplacé « expédition » par « copie », « exploit d'huissier » par « acte d'huissier », « distraction des dépens » par « recouvrement direct ».

<sup>24</sup>*Ibid.* à la p. 25.

<sup>25</sup>*Ibid.* Le mouvement pour la simplification de la langue juridique en France s'est traduit par la réglementation de l'usage officiel. Voir, à cet égard, la circulaire du 15 septembre 1977 relative au vocabulaire judiciaire qui propose une traduction normalisée des expressions latines courantes et des termes de remplacement pour les archaïsmes et locutions surannées, les locutions inutiles ou creuses et les expressions peu intelligibles ou ambiguës (J.O., 24 septembre 1977 (N.C.), 6077). D'autres circulaires sont parues au Journal officiel en 1974, 1976, et 1979 sur ces mêmes thèmes.

L'archaïsme existe lorsque le juriste désigne des choses courantes par des termes anciens et désuets comme « le sieur », « la dame », « il appert », « au pied d'icelle » — des termes qui gagneraient à être remplacés par l'équivalent courant. Toutefois, des termes anciens précis qui n'ont pas d'équivalent courant comme « emphytéose », « antichrèse », « anatocisme », « hoirie » demeurent valables. Pour M. Cornu, le langage du droit n'est pas figé mais dynamique, (par exemple, « puissance paternelle » se dit aujourd'hui « autorité parentale » et « prestation compensatoire » est devenu « pension alimentaire »). Le droit renouvelle aussi son stock lexical par la formation de mots composés, « la source principale des néologismes du législateur », par exemple, « communauté de vie », « régime de protection », « assistance éducative »<sup>26</sup>.

Les rapports entre les mots s'étudient d'abord de mot à mot et selon les familles de mots. L'analyse proposée revêt beaucoup d'intérêt linguistique car l'auteur expose les notions fondamentales d'étymologie et présente des listes de termes et notions inspirés du latin, du grec, de l'italien et d'autres sources dans le vocabulaire du droit français. Il traite aussi des problèmes posés par les homonymes<sup>27</sup>, surtout s'ils sont homonymes parfaits, c'est-à-dire à la fois homographes et homophones, et des synonymes dans leur rapport d'analogie<sup>28</sup>. Il se livre à une intéressante opposition entre les mots dans leur rapport d'antonymie<sup>29</sup>. La classification faite par Sourieux et Lerat suivait déjà ce découpage et les auteurs avaient montré comment le langage du droit fabriquait ses propres termes à base de préfixes et de suffixes, parfois par la substantivation à partir de participes et d'adjectifs<sup>30</sup>. Gérard Cornu analyse la dérivation de la même manière et propose des listes de vocabulaire plus fournies<sup>31</sup>.

L'avantage de cette présentation structurée du vocabulaire, avec ses regroupements par catégories, est évident pour l'apprenti linguiste ou l'apprenti juriste qui cherche à enrichir son vocabulaire ou à mieux comprendre le système de création néologique. Très souvent, l'apprentissage de la langue de spécialité se fait de manière empirique, au coup par coup, c'est-à-dire à coups de dictionnaire. Or, le dictionnaire présente les termes par ordre alphabétique et il ne donne que très rarement des notions connexes ou des renvois de synonymie ou d'antonymie<sup>32</sup>. Le lecteur a donc beaucoup de difficulté à voir la valeur relative des termes. D'une consultation facile, les listes de termes sont ici clairement démarquées. Nous aurions toutefois souhaité qu'il y ait un index de terminologie, au moins, car dans cette perspective de consultation, le lecteur aurait été dispensé de parcourir tout le chapitre pour vérifier un terme.

Dans le titre deuxième, le discours juridique est analysé davantage sous l'angle de la phraséologie que de la terminologie. Gérard Cornu fait alors

<sup>26</sup>*Linguistique juridique*, *ibid.* aux pp. 110-11.

<sup>27</sup>*Ibid.* à la p. 137 et s.

<sup>28</sup>*Ibid.* à la p. 176 et s.

<sup>29</sup>*Ibid.* à la p. 180 et s.

<sup>30</sup>*Supra*, note 1 à la p. 17 et s.

<sup>31</sup>*Linguistique juridique*, *supra*, note 2 à la p. 157 et s.

<sup>32</sup>Le *Dictionnaire de droit privé et Lexiques bilingues* de P.-A. Crépeau, éd., 2e éd., Montréal, Centre de recherche en droit privé et comparé du Québec, 1991, constitue une exception à cet égard car il renseigne davantage le lecteur sur les contextes et il procède par renvoi.

oeuvre originale et pluridisciplinaire car il intègre des notions de communication modernes, comme le modèle de Roman Jakobson<sup>33</sup>. Il manifeste son intérêt pour la notion de communication réussie qu'il résume ainsi : « le récepteur, une fois le contact établi, [... doit connaître] le code qu'utilise l'émetteur [...] et [...] la réalité à laquelle réfèrent [*sic*] les signes de l'énoncé »<sup>34</sup>. Il envisage dès lors toutes les situations de communication, que ce soit entre initiés ou d'initiés à non-initiés, ou *vice-versa*.

S'inspirant du modèle de la communication, l'auteur présente d'abord les différents cas d'élaboration d'un discours juridique, dans un chapitre préliminaire intitulé « Typologie générale ». Il examine, tour à tour, les sujets du discours, les types de message et les modes d'expression. C'est une véritable typologie des messages juridiques qui nous est proposée, de façon systématique, avec les conditions particulières à chaque contexte. Chaque situation est disséquée de façon à montrer les contraintes que subit l'émetteur du message et les conditions de réception, selon que le message est destiné à une personne déterminée (acte réceptice), à un groupe déterminé (acte d'audience) ou à tout entendeur (la loi). L'auteur prend délibérément parti d'emblée pour la lisibilité des messages. D'après lui, la clarté devrait être souveraine, surtout dans la communication avec les non-initiés. Il avait d'ailleurs posé en introduction son interprétation de la maxime « Nul n'est censé ignorer la loi » à savoir « une *directive* [qui] se retourne contre l'auteur du message » et lui fait obligation d'être clair<sup>35</sup>. Celui-ci aurait le devoir d'être clair.

D'ailleurs, Gérard Cornu ne souhaite pas seulement que la clarté s'impose dans les communications avec les non-initiés. Il recommande aussi aux initiés, entre eux, d'améliorer leurs connaissances linguistiques pour communiquer en faisant usage de toutes les ressources de la langue française. La comparaison de l'écrit et de l'oral dans la communication juridique le conduit à constater la prédominance du style oral dans l'écrit, surtout comme en attestent les tropes, c'est-à-dire les figures de rhétorique. Il donne une longue bibliographie sur cette discipline et, en cela, il se rapproche des récents écrits anglo-américains sur la linguistique juridique<sup>36</sup>.

Cet exposé débouche naturellement sur l'analyse phraséologique du discours législatif. De tous les styles, le style des lois est sans doute celui qui a le plus retenu l'attention des juristes et des jurilinguistes, en particulier en droit québécois et en droit fédéral canadien<sup>37</sup>. Gérard Cornu avait déjà contribué à la réflexion théorique canadienne en 1982, dans le collectif *Langage du droit et traduction*, où il avait traité de la question des définitions<sup>38</sup>. La loi en tant que norme se reconnaît, selon Gérard Cornu, à des marques fonctionnelles comme l'emploi de certains verbes et autres conventions de langage. Le lecteur cana-

<sup>33</sup>Voir *Linguistique juridique*, *supra*, note 2 à la p. 212.

<sup>34</sup>*Ibid.*

<sup>35</sup>*Ibid.* à la p. 29.

<sup>36</sup>*Ibid.* à la p. 260 n. 65. Voir aussi, notamment, B. A. Garner, *The Elements of Legal Style*, Oxford, Oxford U. Press, 1991, qui insiste sur les aspects rhétoriques du droit.

<sup>37</sup>Voir, par exemple, Sparer et Schwab, *supra*, note 5.

<sup>38</sup>« Les définitions dans la loi » dans Gémar, éd., *supra*, note 15, 15.

dien retrouvera avec plaisir bon nombre des conventions de style législatif — et juridique en général — qui ont été adoptées, au fil des années, dans un souci de francisation des lois<sup>39</sup>. L'intérêt de la présentation faite par Gérard Cornu tient au fait qu'il raisonne dans une perspective stylistique exclusivement française, sans préoccupation de droit comparé. Il énumère les verbes explicites qui caractérisent la loi en tant que norme, les différentes tournures en usage dans les lois françaises, qu'elles soient civiles ou pénales, et un long développement est consacré à l'emploi de l'indicatif présent. Ce dernier aspect retiendra particulièrement l'attention des traducteurs juridiques qui ont sans cesse à se justifier quand ils utilisent cette forme verbale, au lieu du futur, par exemple. L'auteur explique les règles d'utilisation du futur et de l'impératif. En résumé, l'indicatif présent exprime le devoir parce que l'expression « la loi dispose que [...] » est sous-entendue<sup>40</sup>.

Sur le plan formel et structurel de la loi, l'auteur fait référence précisément à *Guide de rédaction législative*<sup>41</sup> qu'il vient appuyer. La lecture de ce chapitre permettra aux rédacteurs de langue française, légistes et autres, d'adapter les règles et principes à leur contexte, notamment pour les lois québécoises, ontariennes, néo-brunswickoises, manitobaines et fédérales canadiennes. Le fait que Gérard Cornu puise abondamment dans les écrits de Jeremy Bentham pour ce qui est de la bonne rédaction législative est d'ailleurs encourageant pour les comparatistes canadiens. On constate que la logique de la rédaction lisible est supralinguistique, pour ne pas dire métalinguistique. Les principes proposés par le juriste anglais sont analysés et intégrés par l'auteur qui en admire visiblement les qualités et l'efficacité du point de vue de la procédure d'assemblée législative. Bentham s'inscrit dans le mouvement pour la lisibilité des lois et même, plus précisément, parmi les quantitativistes à cet égard puisqu'il fixe des normes chiffrées pour la longueur des articles.

Gérard Cornu propose diverses solutions en vue de ménager la cohésion des lois, de les simplifier et de les normaliser, notamment par les canons. Il résume sa position en matière de lisibilité des lois de la façon suivante :

1. Chaque fois qu'il est possible, le législateur doit s'exprimer de manière à *être compris de tous*. Nul n'est censé ignorer la loi.
2. Chaque fois qu'il est nécessaire, le législateur doit *utiliser la précision de son langage technique*. C'est aussi une garantie de clarté, de sécurité et de liberté<sup>42</sup>.

Le discours juridictionnel fait référence au style judiciaire, lequel a fait l'objet de moins d'efforts au plan théorique, tant en France qu'au Canada, par rapport à la recherche en légistique. Gérard Cornu se réfère à la tradition posée en France par Pierre Mimin<sup>43</sup> et suivie par François-Michel Schroeder<sup>44</sup>. Le

<sup>39</sup>*Guide canadien de rédaction législative française*, Ottawa, Ministère de la Justice, 1991.

<sup>40</sup>*Linguistique juridique*, *supra*, note 2 à la p. 272.

<sup>41</sup>R. Tremblay, R. Journeault-Turgeon et J. Lagacé, Québec, Gouvernement du Québec, Direction générale des affaires législatives, 1984.

<sup>42</sup>*Linguistique juridique*, *supra*, note 2 à la p. 319. Voir aussi M. Sparer et W. Schwab, « Loi et héritage culturel » (1979) 20 C. de D. 399.

<sup>43</sup>*Le style des jugements*, 4e éd., Paris, Librairies techniques, 1978.

<sup>44</sup>*Le nouveau style judiciaire*, Paris, Dalloz, 1978.

juriste constatera le caractère formaliste des jugements français et un certain souci de normalisation et de cohérence dans le style jurisprudentiel. Pourtant, Gérard Cornu nuance son exposé en disant qu'il existe certaines particularités propres à chaque juridiction. Il s'attache donc à montrer ce que les juridictions ont en commun et, en quoi, par exemple, les décisions du Conseil d'État constituent un genre particulier<sup>45</sup>.

Les conventions de langage mises en évidence revêtent un intérêt certain pour le lecteur canadien, une fois encore parce que toutes les formulations sont extraites de textes rédigés en français, sans référence à un droit différent. L'auteur ne mentionne pas, d'ailleurs, le style judiciaire anglais, comme si la valeur radicalement différente des précédents et du rôle du juge rendait la consultation des textes anglais moins utile. L'information contenue dans le chapitre est tout à fait originale car elle est l'oeuvre d'une synthèse, et la trame logique de la décision judiciaire française est disséquée de façon très profitable pour le non-initié<sup>46</sup>.

L'ouvrage se termine sur l'analyse du discours coutumier, plus précisément des maximes et adages du droit. L'intérêt de ce chapitre est manifeste pour le juriste, quelle que soit sa langue, et qu'il soit de droit civil ou de *common law*. Gérard Cornu ramène à la source du droit européen, ce qu'il appelle le « trésor des adages »<sup>47</sup>. Il se réfère à la recherche déjà publiée par Henri Roland et Laurent Boyer en la matière<sup>48</sup>. On apprend que le lot le plus important d'adages provient du droit romain et donc du latin mais que nombre d'adages sont aussi du vieux français, plus précisément du droit coutumier. L'auteur en donne une description historique jusqu'à nos jours et montre que c'est surtout la doctrine qui en est friande.

Certains adages sont « porteurs de *règles techniques, de principes généraux, de directives d'interprétation ou d'explications fondamentales* »<sup>49</sup>. L'auteur présente de longues énumérations en forme de typologie selon les fonctions de l'adage (énoncer le droit, soutenir le droit). L'adage aura plus ou moins de valeur selon qu'il correspond au droit applicable ou s'en écarte. Ses marques stylistiques essentielles, comme la concision ou la valeur littéraire, voire poétique, en font un objet d'étude linguistique. L'analyse de son style raccourci, elliptique intéressera les lecteurs, surtout lorsqu'il s'agit de comparer et d'interpréter des formulations semblables en droit anglais ou américain. L'auteur ne fournit pas de traduction pour les adages latins, ce qui produit donc un répertoire des maximes.

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<sup>45</sup>*Linguistique juridique, supra*, note 2 à la p. 337.

<sup>46</sup>Pour une étude comparative, voir G. Fauteux, *Le livre du magistrat*, Ottawa, Approvisionnement et services Canada, 1980. Voir aussi P. Robitaille, « Le style des jugements » (1979) 39 R. du B. 222.

<sup>47</sup>Au Québec, le juge A. Mayrand avait fait oeuvre originale avec son ouvrage *Dictionnaire de maximes et locutions latines utilisées en droit*, Cowansville, Qué., Yvon Blais, 1985.

<sup>48</sup>*Locutions latines et adages du droit français contemporain*, deux tomes, Lyon, L'Hermès, 1978. Voir aussi des mêmes auteurs, *Dictionnaire des expressions juridiques*, Lyon, L'Hermès, 1983 et *Expressions latines du droit français*, 2e éd., Lyon, L'Hermès, 1985.

<sup>49</sup>*Linguistique juridique, supra*, note 2 à la p. 369.

Comme nous avons pu le constater, l'intérêt, à la fois théorique et pratique de cet ouvrage, ne fait pas de doute et il faut s'attendre à ce qu'il devienne un classique du genre. Force nous est cependant de constater certaines faiblesses qui ont été évoquées au fur et à mesure des commentaires. Ces faiblesses tiennent essentiellement à la forme du texte.

Tout d'abord, la bibliographie fournie n'est pas assez complète et exhaustive, compte tenu des besoins des lecteurs. La documentation juridique française en la matière étant rare et difficile d'accès, l'éditeur aurait eu un moyen privilégié de diffuser davantage les écrits français sur le domaine. La présentation de la bibliographie n'est pas assez rigoureuse, compte tenu des conventions de présentation normalisées, et de nombreuses fautes d'impression s'y sont glissées. Enfin, elle n'est pas placée de façon conventionnelle puisqu'elle se trouve après l'introduction, ce qui gêne la consultation.

Quant au plan du texte, s'il est simple et clair, il aurait dû être retravaillé pour éviter les répétitions entre les chapitres, ce qui aurait permis d'épuiser certains thèmes communs. Le plan suivi est intéressant, mais il ne permet pas de regrouper les réflexions sur les mêmes sujets, par exemple, la question de l'archaïsme ou le problème général de la simplification du langage.

Enfin, le plan n'est pas exhaustif en ce sens que des aspects importants, comme le style des contrats, le style administratif et la comparaison avec le style juridique, en général, et le style de la doctrine auraient mérité davantage d'attention. Le lecteur s'attend à voir traiter la matière de façon exhaustive car il n'a pratiquement pas d'autre ouvrage de synthèse à sa disposition. Dans une prochaine édition, cet aspect pourrait être approfondi par l'auteur.

Que ces commentaires critiques n'assombrissent cependant pas l'impression, par ailleurs très favorable, que devrait laisser l'ouvrage. Cette juxtaposition brillante d'érudition et de simplicité confère au texte une grande valeur didactique<sup>50</sup>.

L'auteur laisse aussi facilement percer son goût pour la poésie et prouve combien elle peut faire bon ménage avec le droit et la dignité de ses magistrats. Ce penchant littéraire trouvera certainement un écho au Québec qui a aussi ses juristes-poètes comme en témoigne ce jugement de la Cour provinciale rendu par M. le juge Jacques Page :

La preuve devant la Cour fut brève et sans éclat  
Des gestes de l'accusé, l'agent en fit état.  
Et ainsi décrivant d'un pêcheur hasardeux  
Près d'un ruisseau tranquille, les agirs scandaleux.  
« Il scruta de ces ondes la bouche d'une épuisette »  
« Mais des nombreuses perchaudes j'ignore le décompte net »  
« Et plusieurs fois je vis cet outil dangereux »  
« Fouiller en profondeur les eaux calmes de ces lieux. »

En vain l'oeil attentif chercha les règlements  
Qui devaient prohiber ces gestes si fréquents.

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<sup>50</sup>L'ouvrage aurait gagné en intérêt didactique si l'auteur avait davantage montré en quoi les pouvoirs publics français se sont distingués par leur souci de lisibilité.



La Cour scrutant la loi chercha la règle écrite ;  
La Couronne fit de même car c'était sa poursuite  
Mais constata enfin que rien dans toutes les lois  
Ne justifiait soudain l'assaut d'un tel émoi.

Pour ces motifs la Cour, de l'acte reproché  
À défaut d'interdit, acquitte l'accusé<sup>51</sup>.

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<sup>51</sup>R. c. *Mailhot* (8 mai 1979), Sherbrooke 450-27-003851-78 (C.P.).