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Stanley M. Beck
Osgoode Hall Law School of York University

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THE SAGA OF PESO SILVER MINES:
CORPORATE OPPORTUNITY RECONSIDERED

STANLEY M. BECK*
Toronto

Introduction

Some thirty-five years ago Professor E. Merrick Dodd of the Harvard Law School asked whether effective enforcement of the fiduciary duties of corporate managers was practicable.¹ His answer was pessimistic; the legal rules of conduct could be enforced, at best, with only moderate success.² Dodd did not, however, advocate the abandonment of the fiduciary standard. Until the evolution of some other standard, its retention was essential as the only means of exerting some control over directors' conduct.³

At the time Professor Dodd wrote, the American federal securities legislation had just been drafted. Its implementation and enforcement by the Securities and Exchange Commission in the intervening years has wrought major changes in corporate law and practice. Accompanying the growth of securities regulation, now so extensive it is characterized as federal corporate law,⁴ have been major reforms in state corporation statutes.⁵ Moreover, federal and state legislative activity has been paralleled by the growth of corporate common law,⁶ mainly through minority shareholders' suits, facilitated by the federal rules of practice governing class actions⁷ and derivative suits, and by the spur of the contingent

*Stanley M. Beck, of Osgoode Hall Law School, York University, Toronto.
¹ Dodd, Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable (1934-35), 2 U. Chi. L. Rev. 194.
² Ibid., at p. 207.
³ Ibid., at p. 206.
fee. And perhaps most important of all, the American judiciary has been alive to the realities of the corporate world and willing to play its essential part in corporate regulation.

The picture in the Anglo-Canadian corporate world, while having patches of similarity, has not developed in nearly so bright a fashion. There has been nothing to match the enormous impact of the Securities and Exchange Commission supported by a receptive judiciary. Serious securities regulation in the Commonwealth dates from the Ontario Securities Act of 1966, now almost uniformly copied by the other Canadian provinces. But the legislative word is far less important than the administrative deed, and while the Ontario Securities Commission has done a commendable job in the few years since the new legislation, it is neither constituted, nor motivated, to be the regulatory agency that the Securities and Exchange Commission is. Moreover, the Securities Commissions of British Columbia and Quebec, the other major Canadian securities jurisdictions, while operating under similar legislation, vary greatly in their philosophy and practice of regulation. What is needed is a single federal agency, but political and constitutional difficulties make its creation in the near future unlikely.

England, not untypically, makes do with a mixture of legislation, codes of conduct and stock exchange rules. It is doubtful they are effective in controlling the conduct of the securities industry. If corporate history and human nature are any guide, only a regulatory agency armed with effective sanctions can do the job required.

It is too often assumed by outsiders that the contingent fee is merely a device to enrich American lawyers. Its role in facilitating access to the courts of minority shareholders and minority groups of all kinds, has never been seriously studied outside the United States. Currently it is playing an important role in public interest class actions. With so much law reform in Canada being copied from American precedents, it is suggested that it is time to re-evaluate the role of the contingent fee in the American legal system and consider whether it, or some modification of it, might not serve a useful purpose in Canada. For an interesting analysis of the contingent fee in the United States see, Schwartz and Mitchell, An Economic Analysis of the Contingent Fee in Personal-Injury Litigation (1970), 22 Stanford L. Rev. 1125. For its relationship to the poor client see, Note, Contingent Fees and the Eligibility of the Poor for Free Government Funded Legal Services (1969), 4 Harv. Civil Rights L. Rev. 415. See generally, Note, Contingent Fees Contracts—Validity, Controls, and Enforceability (1951), 47 Iowa L. Rev. 942. The only article in Canada on the subject is Williston, Contingent Fees in Canada (1968), 6 Alta L. Rev. 184.

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S.O., 1966, c. 142, as am.


The inadequacy of the controls in England is graphically documented in Stamp & Marley, Accounting Principles and the City Code: the Case for
Company law reform has also proceeded slowly. Ontario passed a major new law in 1970\(^\text{12}\) and England revised her Companies Act in 1967,\(^\text{13}\) some five years after the Jenkins Report.\(^\text{14}\) A major “reform in structure and philosophy” is promised in England for some time in the future.\(^\text{15}\) A federal task force was appointed to revise the Canada Corporations Act some three years ago and its full report is still awaited. If the hostile reception that some preliminary reforms received from the Commons and Senate Committees before they were enacted is any guide, it will be a number of years before a new federal corporation law emerges.\(^\text{16}\) Such changes in the law as have been made do go some way to providing for more effective enforcement of fiduciary duties and protection of minority rights. Too often, however, the reforms are only partially thought through, are inadequate to the task, or require complementary reforms that are not forthcoming.

The Anglo-Canadian judiciary while not insensitive to corporate realities, has been neither bold nor imaginative in fashioning a corporate common law commensurate with the need. But the fault has not been the judiciary’s alone. The Bar has shown a similar lack of boldness and imagination in pressing and fighting shareholders’ claims. Part of the reason undoubtedly springs from the rule against contingent fees and the heavy costs involved in fighting—to say nothing of the potentially ruinous cost of losing, shareholders’ suits. And part of the reason is also the procedural thicket surrounding the rule in *Foss v. Harbottle*\(^\text{17}\) and the consequent difficulty and uncertainty in prosecuting derivative suits.\(^\text{18}\) Another part of the reason is that the Bar, unlike its American counterpart, is not oriented to fighting for minority rights, whether


\(^\text{13}\) Companies Act, *supra*, footnote 10.

\(^\text{14}\) (1962), Cmnd 1749.

\(^\text{15}\) President of the Board of Trade (D. Jay) 1966. H. C. Deb., Vol. 741, Col. 359. In introducing the amendments that implemented part of the Jenkins Report in 1967, Mr. Jay told the House of Commons that the then Labour Government would later legislate “for wider reforms in the structure and philosophy of our company law” and that it was time “to re-examine the whole theory and purpose of the limited joint stock company, the comparative rights and obligations of shareholders, directors, creditors, employees and the community as a whole”. No such welcome re-examination was forthcoming from the Labour Government and it does not seem likely that the new Conservative Government will initiate such a study.

\(^\text{16}\) S.C., 1969-70, c. 70.


those of a wealthy but aggrieved corporate minority, or of a dispossessed and abused minority of any kind.

Although the pace has been slow, the cumulative effect has been significant reform in company law and regulation, particularly in the United States, yet it is doubtful that any of the reforms outlined would justify a different answer today to the question that Dodd asked thirty-five years ago. Most of the reasons for his pessimism are still valid. The main reason was that corporate capitalism sets before its managers in the public company the "peculiar ideal of vicarious acquisitiveness". By this Dodd meant that in the public company the directors and officers must be acquisitive on behalf of a group of persons—the shareholders—with whom they have no real connection. It is to this changing, anonymous group that the corporate managers are ultimately, if not legally, fiduciaries.

Dodd doubted whether the idea of working faithfully for the profit of others was one that was calculated to appeal to the directors' instincts. And the legal rules governing the conduct of a powerful group are unlikely to be effective unless they find approval in the minds and feelings of an influential part of that group, regardless of the sanctions that attend their breach. In a capitalist society men work for their own wealth. Power and prestige may also be sought, and at some point may replace wealth as the primary goal, but self-enrichment is the basic motivating force.

This is not to say that corporate managers are more venal or less ethical, or less motivated to conform to legal principles than, say, ministers or professors. It is merely to recognize the psychologically peculiar position in which the corporate form puts them. This conflict is further exacerbated by the obvious fact that the whole purpose of the corporate exercise is profit. Not unnaturally the managers count their success as much in terms of personal profit as in the gain of the enterprise they direct. Thus the impulse to enrichment through breach of fiduciary duty is strong. The forms that such breaches usually take are too familiar. They range from excessive remuneration, unconsolable stock options and pension plans, and unwarranted expense account living, to

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19 Dodd, op. cit., footnote 1, at p. 205.
20 Ibid., at p. 200. An employee can be said to be in the same position. But close supervision by the employer makes effective enforcement of the employees duties a not too difficult task. Also the sanctions for disloyalty—loss of job and possible inability to find other employment, can be quick and severe. Moreover, the employee is not in a comparable controlling position that allows him to profit at the expense of his employer.
21 Excessive remuneration, either directly, or indirectly through stock options, does not necessarily mean there has been a breach of fiduciary duty. In the United States in 1969, five executives made stock option profits of more than one million dollars, twenty-four made more than five hundred thousand dollars, and one hundred and forty-four had gains of one
breaches involved in self-dealing, insider trading and other personal uses of confidential information, "friendly" dealings between interlocked and parent-subsidiary boards, and the taking of corporate opportunities.

Combined with the tempting and difficult position that directors are placed in are a number of factors that minimize the risk of detection and punishment for fiduciary wrongdoing. Among these are the ease with which breaches are concealed in complicated transactions, particularly when combined with the desire of fellow directors and interlocked boards to "get along", the difficulties shareholders have in obtaining the necessary information, the ease with which wrongdoing is classified as business necessity or a matter of business judgment, the procedural difficulties inherent in class and derivative suits, the great costs risk in bringing such suits and the indirect nature of the benefit that flows from them, the ability of management to control through the proxy machinery aided by the shareholder tendency to support management, and a distaste by the judiciary for "getting into business" which leads to management oriented decisions.

The small corporation is a very different economic and social organization but even so many of the difficulties inherent in the enforcement of fiduciary duties in the large, widely held company are present. If the company is wholly-owned by a family group there are, of course, few problems. But if there are minority shareholders almost all that has been said above with respect to the large public company applies. Indeed, psychologically the matter may be worse. The controller most probably began the enterprise as a sole proprietor; his personal business and the enterprise have never been separate matters for him, and he probably still regards the business as "his" business and conducts it as such. This attitude is not uncommon even in the small and medium sized public company particularly where, as in the past five years, the owners

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hundred thousand dollars or more. One fascinating case is that of Eli Lilly & Co., a leading drug company. Over the past five years its five highest paid managers have exercised stock options for gains totalling more than thirteen million dollars, Business Week, Oct. 17th, 1970, p. 49. These figures give mute testimony to the effectiveness of the proxy machinery in allowing management to do as it pleases. Shareholder approval of directors' remuneration does not necessarily mean that excessive remuneration cannot be attacked in a derivative suit. The United States Supreme Court has held that a valid by-law which was passed unanimously by the shareholders may be struck down if the payments become so large as to amount to "waste of corporate property". "If a bonus payment has no relation to the value of services for which it is given, it is in reality a gift in part and the majority stockholders have no power to give away corporate property against the protest of the minority." Rogers v. Hill (1932), 289 U.S. 582, at pp. 591-592. In Rogers, the bonus plan for the executives of the American Tobacco Co. which was passed unanimously in 1912, resulted in bonus payments of two and one-half million dollars in 1930. Cf. Eliasberg v. Standard Oil Co. (1952), 92 A. 2d 862.

22 Dodd, op. cit., footnote 1, at p. 197.
of so many relatively large private concerns have been lured by the tax laws and a receptive stock market to take their companies public. It is simply too much to expect that men who have devoted a lifetime to building and running a business on their own terms are suddenly going to consider and conduct themselves as fiduciaries, despite the educational efforts of their professional advisors.

It is a fact, however, that the flow of reform since Dodd wrote has left in its wake a large number of disloyal fiduciaries who have been brought to account, to say nothing of countless others who have been deterred. Moreover, the legislatures, courts and administrative agencies have never been as taken up with matters of fiduciary responsibility as they are today. And from this it might well be argued that effective enforcement is being shown to be possible, particularly when supported by enlightened law reform. It could be replied, however, that today's more effective enforcement merely reveals the extent of the problem and that for the reasons advanced above, the enforcement of fiduciary duties will never be more than moderately successful. Indeed, in an era of unprecedented prosperity and mass interest in investment—in a time when investment is referred to as the "money game"—it is likely that self-dealing has never been more rampant.

Whether one is an optimist or pessimist with respect to enforcement, the one thing that is essential is that the law—the legislatures, the agencies and the courts, take as realistic a look at the problem as is possible. The foregoing analysis is to suggest that the law-makers have been too optimistic and have too often turned a blind or insensitive eye in dealing with fiduciary problems. What follows is an analysis of one of the most intractable of the problems in this area, that of corporate opportunities. The focus of analysis will be the decision of the Supreme Court of Canada in *Peso Silver Mines Ltd. v. Cropper* and the attempts at reform in the Business Corporations Act, 1970 in Ontario. It will be suggested that Canada's highest court and its most important Corporations Act have both fallen short of giving the leadership that is required to make the practice in the boardroom conform to the law in books.

I. *The Director as Trustee and Corporate Property: An Historical Analysis.*

Most cases of breach of fiduciary duty by directors do not present any great difficulty. There is usually a clear case of conflict of interest or secret profit or both and the wrongdoer is made to ac-

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25 supra, footnote 12.
There is, however, a class of cases involving what are termed "corporate opportunities" that raises difficult questions as to the scope of the fiduciary duties of directors. The decisions, however, have little value as precedent since the judiciary too often has been content with the invocation of a formula ("a fiduciary must not make a profit") or a conclusory statement ("the property, in equity, belonged to the company") to decide the instant case in a manner that is unsatisfactory for future reference. What the policy of the law ought to be with respect to the extent of fiduciary duties is rarely adverted to. As an attempt will be made in this article to suggest such a policy, it is perhaps best to start with a brief examination of the historical roots of directors' fiduciary duties and the concept of corporate property.

The case that is at the root of fiduciary duties is Keech v. Sanford. A lessor refused to grant a new term to the infant beneficiary whereupon the trustee renewed for himself. Lord Chancellor King laid down the rigid rule that the trustee might not have the lease, but must hold it on trust for the beneficiary notwithstanding that the landlord had refused to renew to the beneficiary and that the trustee had acted in perfect good faith. The decision was clearly prophylactic, directed to preventing the inevitable results of temptation. There had been neither loss nor damage to the trust, nor unjust enrichment of the trustee. As to the trustee the decision may well have been inequitable. Indeed, this charge is often made against decisions that apply the Keech principle in the modern corporate context.

Perhaps the earliest case in which trust principles were applied to those who occupied a position analogous to a director was The Charitable Corporation v. Sutton in 1742. The Corporation, created by royal charter, was managed by fifty committeemen who were accused of breach of trust and fraud. In the course of his judgment 26 Typical cases are Zwicker v. Stanbury, [1953] 2 S.C.R. 438, [1954] 1 D.L.R. 257; Canada Safeway Ltd. v. Thompson, [1951] 3 D.L.R. 295; Charles Baker Limited v. Baker, [1954] O.R. 418; Cook v. Deeks, [1916] 1 A.C. 554.

27 Typical cases are Peso, supra, footnote 24; Regal (Hastings) Ltd. v. Gulliver, [1942] 1 All E.R. 378; Burg v. Horn (1967), 380 F. 2d 897 (2nd Cir.); Phipps v. Boardman, [1967] 2 A.C. 46 (although a case involving trustees and not directors, the case is one that examines, on a very difficult set of facts, the corporate opportunity doctrine).

28 Both Bull J.A. and Norris J.A. (dissenting) did make reference to what the governing policy ought to be in their Peso judgments in the British Columbia Court of Appeal (1966), 56 D.L.R. (2d) 117. In affirming, the Supreme Court ducked the policy point.

29 (1726), Sel. Cas. T. King 61, 25 E.R. 223.

30 "... for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to the cestui que use," per King L.C. ibid., at p. 62.

31 See generally, Jones, Unjust Enrichment and the Fiduciary's Duty of Loyalty (1968), 84 L.Q. Rev. 472.

32 (1742), 2 Atk 400, 26 E.R. 642.
Lord Chancellor Hardwicke characterized the committeemen as “most properly agents to those who employ them in this trust...”.  

“By accepting of a trust of this sort, a person is obliged to execute it with fidelity...”. Here we see what runs through all of the earliest cases concerning alleged breaches of duty by partners and directors, a mixing of the language of trusts, agency, and of fiduciary relations generally.

The matter was put clearly by Vice-Chancellor Bruce in Benson v. Heathorn. In holding to account a director of a joint-stock company who had sold his own ship to the company when he was under a duty to purchase for it, the Vice-Chancellor said:

It is mainly this danger, the danger of the commission of fraud in a manner and under circumstances which, in the great majority of instances, must preclude detection, that in the case of trustees and all parties whose character and responsibilities are similar (for there is no magic in the word), induces the court (not only for the sake of justice in the individual case, but for the protection of the public generally, and with a view to assert and vindicate the obligation of plain and direct dealing between man and man in all cases, but especially in those where one man is trusted by another), to adhere strictly to the rule that no profit shall be made by a person so circumstanced.

The Vice-Chancellor then went on to quote Lord Eldon in a passage whose echo is still heard, and often criticized, today:

The rule is founded on this, that though you may see in a particular case that he [the trustee] has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the court, by which I mean, in the power of the parties in ninety-nine cases out of a hundred, whether he has made advantage or not.

In a recent case the English Court of Appeal cast some doubt on the severity of Lord Eldon’s approach, and more than one commentator has recently wondered whether it is sensible to require from every fiduciary the same degree of loyalty that Equity demands from a trustee. Whatever might be the merits of a change in approach in cases concerning individual trustees, it is suggested that the realities of the governance of the modern corporation require that Equity’s severity continue to be applied to corporate directors.

Another important case in which liability was imposed by

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33 Ibid., at pp. 644-645 (E.R.).
34 Ibid., at p. 645.
36 Ibid., at pp. 916-917 (E.R.).
37 Ibid.
analogy to trust and agency principles was *Attorney-General v. Wilson* in 1840. In that case the members of the governing body of a municipal corporation fraudulently alienated certain of the corporation's property. When suit was brought in the name of the corporation against the wrongdoers it was argued that restoration of the property could not be given in a case in which the corporation was plaintiff because the acts complained of were acts of the corporation and a *cestui que trust* cannot complain of a breach of trust to which he was a party. In rejecting this argument Lord Cottenham L.C. said:

> The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and its property; and if such agents exercise these functions for the purpose of injuring its interests and alienating its property... the corporation may complain, and may have redress against such members and agents as are authors of the wrong.

A case which has a good deal of relevance for corporate opportunity problems is *Ex Parte Bennett.* Although the case is not one concerning a director or partner, it does show Equity's uniform approach to those occupying a position of confidence. In *Bennett* the solicitor to the Commission of Bankruptcy retained one of the Commissioners to bid at an estate auction for one of his clients. In setting aside the sale, Lord Chancellor Eldon reiterated the view that it was not necessary to show any advantage had accrued to the purchaser. It was the duty of the assignee and the solicitor to collect for the benefit of the bankrupt and the creditors all the information that would enable them to sell at the most advantageous price. They were barred, therefore, from bidding themselves:

> ... for human infirmity will in very few instances permit a man to exert against himself that providence which a vendor ought to exert in order to sell to the best advantage, and which a purchaser is at liberty to exert for himself in order to purchase at the lowest price.

Moreover, the court could not institute an investigation to discover what information the assignee had or what use he had made of it:  

> No court of justice could institute investigation to that point effectually in all cases; and therefore the safest rule is, that a transaction, which under circumstances should not be permitted, shall not take effect, upon the general principle; as if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of the cases.

These cases illustrate not only that a fiduciary would not be

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40 (1840), Cr. & Ph. 1, 41 E.R. 389.
41 Ibid., at pp. 396-397 (E.R.).
42 (1805), 10 Ves. 381, 32 E.R. 893.
43 Ibid., at p. 897 (E.R.).
44 Ibid., at p. 900.
allowed to profit by direct dealing with the principal and his property, but also the wider rule that a fiduciary must not use his position to appropriate for himself benefits which he ought to have acquired, if at all, for the principal. It is from these cases that a line may be traced to the current problem of corporate opportunity. Lord Brougham gave expression to this wider rule in *Hamilton v. Wright*, a case in which an assignee who had purchased an annuity from the estate was not allowed to enforce it further than repayment of the purchase price:

There cannot be a greater mistake than to suppose, as seems to have been done below, that a trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust; a tendency to interfere with his duty. . . . Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself a sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust. . . .

The early cases illustrating the wider principle are those concerning the renewal of a lease on partnership property by one of the partners in his own name prior to the dissolution of the partnership. Invariably, Equity took the view that the partner had used his position to obtain an advantage for himself and must hold the acquired property in trust for the partnership. With respect to partners, the rule was carried to the extent of not allowing them to carry on a competing business that might injure the partnership, or to carry on any business that but for their connection with the partnership they would not have been in a position to carry on. Lord Lindley put the matter succinctly:

. . . if his connection with the firm enables him to acquire gain, he cannot appropriate the gain to himself on the pretence that it arose from a separate transaction with which the firm had nothing to do.

There has been some debate over whether the cases illustrate a profit rule (a trustee is not entitled to make a profit), or a conflict rule (a trustee must not place himself in a position where his interest and duty conflict), or whether there is a single overlapping rule. Without entering into a lengthy analysis of the cases, it is suggested that the evil that Equity set its face rigidly against was possible conflict of interest. This was clearly the ra-
tionale of the seminal case of Keech v. Sandford. In the great majority of cases, however, both conflict and profit are referred to for a profit has usually been made, or property obtained, as a result of a conflict of interest. But proof of profit is not necessary to obtain the intervention of Equity. In Re Thompson, Clauson J., indicated that he would restrain a trustee from opening a business competitive with that operated by the trust. The position was properly put by Lord Denning M.R. and Lord Upjohn in Phipps v. Boardman, although they disagreed as to the result:

The relevant rule for the decision of this case is the fundamental rule of Equity that a person in a fiduciary position must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict.

In his judgment in the Court of Appeal, Lord Denning M.R., said there was "another ground of liability" apart from the profit the trustees had made. Boardman had "placed himself in a position where there was a conflict between his duty to advise an application to the court and his interest to acquire the shares himself . . .".

In summary it may be said that there are two independent rules, those of conflict and profit; that the conflict rule is the broader rule of general application out of which the profit rule grew; that it is possible to conceive of situations, and indeed there have been cases, where liability has been imposed where there has been profit and no conflict and vice versa, and that in the majority of cases the judicial language mixes the two rules simply because conflict and profit are both present.

This brief survey of the early cases suggests a number of conclusions. First, fiduciary obligations are not imposed on directors because they are trustees or because they occupy a position similar to that of a trustee. The obligations are imposed because they are fiduciaries—because confidence is reposed in them to manage property that, ultimately, belongs to others. The matter was put plainly by Danckwerts J.: 29

... the directors are the persons who in fact control the corporation and decide what shall be done. It is plain that those persons are as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property . . . therefore it

52 Supra, footnote 29.
53 [1930] 1 Ch. 203. The wrongs complained of had been remedied after the writ was issued. For the purposes of costs, Clauson J., had only to decide whether the defendant was entitled to the right he claimed, which was to open a competing business.
54 Supra, footnote 27.
55 Ibid., at p. 123, per Lord Upjohn (dissenting). Viscount Dilhorne also was of the opinion that there were the two separate grounds of liability.
57 See the cases cited in McLean, op. cit., footnote 39.
58 In re The French Protestant Hospital, [1951] Ch. 567, at p. 570.
seems to me plain that they are, to all intents and purposes, bound by rules which affect trustees.

Numerous judges and scholars have pointed out the many essential differences between a director and a trustee and the only excuse for making the point once again is that the question is often asked whether it is sensible, in the modern corporate context, to treat directors as trustees? The view that it is not, depends to a large extent on showing that directors have different functions and duties than do trustees. But this, it is submitted, is irrelevant to the real question. The issue is not whether directors should be treated as trustees. The real question is whether the conceded differences in function between trustees and directors are sufficiently relevant or important to warrant the application of different rules to directors. The answer is not advanced by showing that directors are not trustees. It is advanced by asking whether the rationale of the fiduciary principle has relevance to the corporate director given the management role the director now plays, the legal and factual distribution of corporate power between the director and the shareholder, and the functional and procedural reality behind that distribution of power.

Second, the cases illustrate a much broader scope of fiduciary loyalty than merely refraining from dealing directly with the principal or his property without full disclosure, or making a secret profit at his expense. A fiduciary must not use his position, and all that comes to him because of that position, for his personal advantage. He cannot appropriate to himself property or opportunities, the chance for which came to him because of the position he occupied. It is this principle which is behind the development of the law of corporate fiduciaries in the United States, particularly with respect to insider-trading, but that often has been lost sight of in “corporate opportunity” cases such as Peso Silver Mines in Canada.

Third, the wider rule of fiduciary obligation is that a man may not occupy a position in which his interest and duty may conflict. This principle has been almost completely abandoned in company law with legislation blessing interlocking boards through rules relating to transactions in which directors are interested.

59 See e.g. In Re City Equitable Fire Insurance Company, Limited, [1925] 1 Ch. 407.
61 S. 134 of the Business Corporations Act, supra, footnote 12, is typical of the provisions that allow directors to be interested in contracts with the company providing they give notice of their interest and refrain from voting. S. 134 contains a number of useful reforms in this usual provision. It does not allow a director to make a general declaration of interest in other concerns and forever after remain silent. He must declare “the nature and extent” of his interest at the meeting at which the contract or trans-
and through casual judicial dicta which has allowed directors to serve with competing firms. It is suggested that in a climate of company law reform it is time to take a realistic second look at interlocking boards and directors who are allowed to compete.

II. The Saga of Peso Silver Mines.

The modern doctrine of corporate opportunity is simply an extension of Equity's old rule that a fiduciary must not use his position to appropriate for himself benefits which he ought to have acquired, if at all, for his principal. In corporate terms, the test action is first considered. The director must be "acting honestly and in good faith" and the contract must be in the "best interest of the corporation" for the contract not to be voidable by reason only of the director's interest. If the matter is taken before a general meeting it requires a two-thirds vote for confirmation. While the revision in s. 134 is welcome, it is typical of company law reform that is only half done. There is no requirement of notice to the shareholders of those contracts in which the directors were interested. Surely it is not too much to ask that once a year the shareholders be informed of how many contracts with the company their directors are interested in or, to put it another way, how many times the directors have been excused from their fiduciary duties by their fellow fiduciaries. The rule in North West Transportation v. Beatty (1887), 12 App. Cas. 589 (P.C.) was not abrogated, as it is submitted it ought to have been, and directors are still allowed to vote qua shareholders to confirm their own contracts with the company. It is true that the confirming majority at the general meeting has been raised to two-thirds but this will only mean that fewer of such contracts will be placed before the shareholders for confirmation, leaving them more uninformed than ever. Finally there is a vague standard of materiality raised by which a director does not have to declare his interest unless both his interest and the contract are material. Such vague standards have no place in this type of legislation — the directors should not be the ones to decide what is material. If it was desired to except minor matters then, for instance, contracts or transactions involving less than $5,000.00 should have been excepted.

"London & Mashonaland Exploration Co. Ltd. v. New Mashonaland Exploration Co. Ltd., [1891] W.N. 165; Bell v. Lever Brothers Ltd., [1932] A.C. 161; Waite's Auto Transfer Ltd. v. Waite, [1928] 3 W.W.R. 649 (Man. K.B.). Some of the worse effects of this judicial rule have been lessened by s. 210 of the English Companies Act, 1948, c. 38. In Scottish Cooperative Wholesale Society Ltd. v. Meyer, [1959] A.C. 324, Lord Denning was referred to Lord Blanesburgh's view in Bell, supra, that a director could join the board of a rival company, to which he replied:

"That may have been so at that time. But it is at the risk now of an application under s. 210 if he subordinates the interests of the one company to those of the other."

The Business Corporations Act, (Ontario) 1970, ibid., does not contain any provision similar to s. 210 which is one of the most important legislative provisions written for the protection of minority shareholders. It is found in the Companies Acts of England, Australia, South Africa, India and the province of British Columbia. The Committee which prepared the report upon which the new Ontario Act is based rejected s. 210 for the lame reason that it would result in the courts "getting into business". The same committee did not even consider the problem of competing directors and no provision dealing with the matter appears in the new Ontario Act. These are but two examples of "half-way" company law reform. For an analysis of the applicable American law see, Note, Fiduciary Duty of Officers and Directors not to Compete with the Corporation (1941), 54 Harv. L. Rev. 1191.
should be whether the opportunity was so closely associated with the existing and prospective activities of the corporation that the directors should fairly have acquired it for, or made it available to the corporation. If an affirmative answer is given to the question posed, a showing of good faith should, as in all cases of fiduciary duty, be no defence. The Peso case will be analyzed in light of the above standard. It is a standard which no Anglo-Canadian court has explicitly formulated, but it is one which is implicit in the early cases and it is a natural extension of Equity's guardianship to protect the corporation and its shareholders.

The facts in Peso were as follows. Peso Silver Mines Ltd. was incorporated as a private company in British Columbia in March, 1961, to take over a group of silver mining claims in the Yukon held by Tanar Gold Mines Ltd. The defendant Cropper, along with his associates Walker and Verity, was instrumental in incorporating both Tanar and Peso. Cropper, Walker and Verity were Peso's first directors, and Cropper was the managing director. In September, 1961, Peso was converted to a public company and shares were sold to the public, the proceeds being used to finance development of the claims. Peso acquired further claims and by March, 1962, held 362 claims covering twenty square miles, the purchase and development of which had put a considerable strain on its finances.

63 This is a slight rewriting of the test applied in Rosenblum v. Judson Engineering Corp. (1954), 109 A. 2d 558, at p. 563 (S.C.N.H.). This test is similar too but, somewhat broader than the provision that the Jenkins Committee, supra, footnote 14, recommended for inclusion in the English Companies Act:

"A director of a company should not make use of any money or other property of the company or of any information acquired by virtue of his position as a director or officer of the company to gain directly or indirectly an improper advantage for himself at the expense of the company." (para. 99 (a) (ii)).


65 The sale of the claims from one private company, Tanar, to another private company, Peso, with almost identical shareholders is explicable as the technique used in mining promotion to enable the vendor to acquire a "vendor's position" in the shares of the new company which will subsequently go public to raise money for exploration. How large the vendor's position can be is regulated by the Securities Commissions. In British Columbia in 1961 it was 750,000 shares. The Commissions invariably require that these shares be held in escrow for a stated length of time. The vendor's position shares plus "free" shares (presumably called free shares in mining parlance to distinguish them from the escrowed vendor's position shares) in the new company which the promoters usually acquire for pennies while the new company is still private, assures the promoters of control, at least in the initial stages, of the new company when it goes public. It also, of course, usually assures them of substantial profits regardless of whether or not a mine is ever developed. It can be gathered from Cropper's evidence, Case on Appeal, Vol. 1, that he owned over time, directly, or indirectly through Tanar, approximately 200,000 shares of Peso for which he paid somewhere between 10c and 13c a share. At the time of the trial, Peso was selling for $1.90 a share.
In late March, 1962, Peso, through Cropper and Verity, was offered three groups of claims (the Dickson claims), one of which was contiguous to its Yukon holdings. The Peso board, which by this time had been enlarged to six, turned the offer down because of strained finances and because it felt Peso had enough ground under control. Approximately six weeks later, in May, 1962, Cropper, Walker, Verity and Dr. Aho, Peso’s consulting geologist, formed a private company, Cross Bow, to take up the Dickson claims. The Tanar-Peso cycle was repeated with Cross Bow selling its claims to a new private company incorporated by the same group, Mayo Silver Mines Ltd., for a vendor’s position of 600,000 shares. Mayo was then converted to a public company and shares were sold to finance development. In December, 1963, control of Peso was purchased by Charter Oil for one million dollars. Friction developed between Berlitz, the president of Charter, and Cropper, who had been retained as executive vice-president of Peso, over Charter’s instalment payments of the purchase price. Subsequently Berlitz demanded that Cropper, Walker, and Verity turn over their interests in Cross Bow and Mayo to Peso. Walker and Verity agreed to do so but Cropper refused. Peso then commenced action against Cropper for an accounting and declaration of trust, and dismissed him as managing director.

At the trial Peso’s suit was dismissed on the basis of a finding by Gregory J., that “all of the directors, including the defendant, acted in good faith toward Peso in rejecting the offer of the Dickson claims”. The British Columbia Court of Appeal affirmed in a majority opinion and on further appeal, the Supreme Court of Canada affirmed in a unanimous judgment. Given the finding of good faith rejection of the Dickson claims, each judge who found for Cropper was then faced with Lord Green’s hypothetical in *Regal (Hastings) Ltd. v. Gulliver.* Each quoted the following statement of Lord Russell of Killowen:

One final observation I desire to make. In his judgment Lord Greene, M.R., stated that a decision adverse to the directors in the present case

66 The new claims were turned down by the Peso board on March 19th and Cross Bow was formed to take them up on May 8th, Case on Appeal, Vol. 1, p. 151.

67 A further example of the position of the promoters in this type of transaction, outlined supra, footnote 65, can be gathered from the evidence of Cropper which indicates that at the time Mayo went public in 1962, Cropper, Walker, Verity and Aho owned directly, or indirectly through Cross Bow, between 750,000 and 1,000,000 shares of Mayo for which they had paid only a nominal sum, Case on Appeal, Vol. 1, pp. 180-184.

68 Case on Appeal, Vol. 1, p. 219. Mr. Justice Gregory gave oral judgment at the conclusion of the trial and his reasons for judgment have not been reported.

69 *Supra*, footnote 28.

70 *Supra*, footnote 24.


involved the proposition that, if directors *bona fide* decide not to invest their company’s funds in some proposed investment, a director who thereafter embarks his own money therein is accountable for profits which he may derive therefrom. As to this I can only say that to my mind the facts of this hypothetical case bear but little resemblance to the story with which we have had to deal.

Once the rejection by the board was found to be *bona fide*, any subsequent dealing with the property by a director was held not to be by reason of, and in the course of execution of his office.\(^{73}\) This distinguished the case from what was considered to be the essential finding in *Regal*,\(^{74}\) and Peso’s claim was dismissed.

On this skeletal version of the facts and reasons for judgment, *Peso* can be seen to raise some difficult questions. The line of cases which lead to *Peso*, particularly *Menier v. Hooper’s Telegraph Works*,\(^{75}\) *Cook v. Deeks*,\(^{76}\) *Regal*,\(^{77}\) *Canada Safeway Ltd. v. Thompson*,\(^{78}\) *Zwicker v. Stanbury*,\(^{79}\) *Smith Ltd. v. Smith*\(^{80}\) and *Fine Industrial Commodities v. Powling*,\(^{81}\) all fairly clearly involved the appropriation of corporate assets or the taking of property by directors in which the company was or would have been interested without first offering it to, and making full disclosure to, the company. In *Peso* there was an offer to the company and a finding of *bona fide* rejection before purchase by the directors. Thus Lord Greene’s hypothetical was posed and a negative answer given.

*Phipps v. Boardman*\(^{82}\) raised questions similar to those in *Peso* and it has been suggested that the House of Lords gave a positive answer to Lord Greene’s question and that the decisions in *Phipps* and *Peso* are opposed.\(^{83}\) Whether this is so or not will be considered later; for now it is enough to note that in *Phipps* the trustees commenced to act in the transaction on behalf of the trust, obtained the essential information by reason of that fact, and never really separated themselves from the trust. This brought the case much closer to *Regal* and the line of cases noted above, than do the facts in *Peso*. Before considering the facts and law in these cases, however, it is necessary to go back over the facts in *Peso* in some detail to appreciate the context in which it is alleged Lord Greene’s hypothetical was raised.

The *Peso* Company, until the sale to Charter Oil, was con-

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\(^{73}\) *Peso*, *supra*, footnote 24, per Cartwright J., at p. 8, and *supra*, footnote 28, per Bull J.A., at p. 156.

\(^{74}\) *Supra*, footnote 27, per Lord Russell, at p. 389.

\(^{75}\) *Regal*, 9 Ch. App. 350.

\(^{76}\) *Supra*, footnote 26.

\(^{77}\) *Supra*, footnote 26.

\(^{78}\) *Supra*, footnote 26.

\(^{79}\) *Ibid*.

\(^{80}\) *Boardman v. Phipps*.

trolled by Walker, Verity and Cropper, and particularly by Cropper who was the managing director in charge of exploration policy and finances. Shortly after Peso was incorporated, the board of directors was increased to six. The reason for this was, in Cropper's words: 84

... we decided that additions to the Board would be sensible and people could help us do things, so we added directors. The role that three new directors played is not clear, aside from helping the company "do things", presumably in connection with the public distribution of Peso's shares. What is clear from the transcript is that the Tanar-Peso promoters, Cropper, Walker and Verity, were in effective control.

In March, 1962, a prospector, Dickson, spoke to Dr. Aho, Peso's consulting geologist, about three groups of claims he had staked, one of which was contiguous to the Peso claims. At Aho's suggestion, Dickson offered the claims to Peso for $30,000.00. Dickson spoke to Cropper and Verity who put the matter to the Peso board. Whether all six directors were present at the meeting at which the Dickson claims were considered is not clear. No minutes of that board meeting were introduced in evidence, although many other minutes were, and the other three directors were not called to give evidence. The only evidence on the point is that of Walker, Peso's president: 85

Q. Who else was at the meeting when this offer [the Dickson claim] was made to Peso?
A. I believe all the directors were present.
Q. Was Mr. Cropper there?
A. Yes, Mr. Cropper was there.

In any event, the board turned down the offer because of the strained state of Peso's finances and also because Aho "didn't recommend because of its remoteness" 86 and because "it was a little too much at this time". 87

What happened in the approximate six week interval between the rejection of the Dickson claims by Peso and the formation of Cross Bow to take them up is best told by Cropper, Walker and Verity themselves:

_Cropper:_
Q. What happened then with the Dickson offer?
A. At the time it was out of my mind but I recall Dr. Aho coming to me and suggesting that it might be possible for a group or a separate group to pick that property up because it might have some interest, and we spoke together with Mr. Walker about it initially and then we spoke, the three of us, with Mr. Verity and decided that we might be able to pick up the ground ourselves, we

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84 Case on Appeal, Vol. 1, p. 18.
85 Ibid., p. 34.
86 Ibid., p. 148.
87 Ibid.
might be able to finance the picking up of the ground ourselves.\textsuperscript{88}

\textit{Walker:}

Q. You say they [the Dickson claims] were turned down by the board of Peso. Then what happened after that?
A. Well, we were achieving some fairly good results on Peso I think, and we felt that this ground should be protected, we felt that it was in our best interest.
Q. Did you discuss this claim with Mr. Cropper and Mr. Verity?
A. Yes, I did.
Q. What was the discussion, if you can remember, or the effect of them, if you can?
A. The discussion was that this ground could be valuable ground that we should make an offer to put it together, which the four of us did, namely Mr. Cropper, myself, Mr. Verity and Dr. Aho.\textsuperscript{89}

\textit{Verity:}

Q. But in May of 1962, I would suggest to you that Peso didn't know what it really had up there and what it didn't have in the way of a mining property.
A. It knew that it had an excellent lead, sir.
Q. But you didn't know at this stage whether this was capable of making a mine or not?
A. We thought so.\textsuperscript{90}

On June 13th, 1962, Walker wrote a letter to the Superintendent of Brokers dealing with the Dickson claims. The letter is so central to the case that it is necessary to quote it in full:\textsuperscript{91}

\begin{flushright}
June 13, 1962
\end{flushright}

Office of the Superintendent
of Brokers,
Parliament Buildings,
Victoria, B.C.

Attention Mr. J. Stewart-Smith:

Dear Sir:

As you know, a new group including three directors of Peso Silver Mines Ltd. (Mr. Cropper, Mr. Verity and myself), have picked up and staked "blind" approximately 326 claims northeast of the Peso and Barker ground. Three of these groups of 126 claims were picked up from a prospector by the name of Dickson and one of these groups is contiguous to Peso. We wish to bring this to your attention, so that you will be completely aware of the situation.

As you know, we have been instrumental in picking up for Peso the Barker Estate ground of 128 claims with known mineralization, and within the finances of the Peso Company it has reached its limit in

\textsuperscript{88} Ibid., p. 149.
\textsuperscript{89} Ibid., at p. 35. Counsel for Cropper objected at this point to Walker saying "we thought" and "we felt". Ibid., p. 121. It is clear from Walker's testimony, as well as from that of Cropper and Verity, and from the letter to the Superintendent of Brokers, \textit{infra}, that each used "we" to refer sometimes to themselves and sometimes to Peso. This is not at all evidence of bad faith but simply indicates the way that they reflexively thought of the corporate enterprise they had promoted.
\textsuperscript{90} Ibid., p. 121.
\textsuperscript{91} Ibid., p. 67.
ground control.

The directors of Peso as a board, were not interested in the company acquiring any more ground than they presently have for the very good reasons, one being that considerable work is yet necessary on the present ground, and the second that the finances of the company do not permit the acquisition of additional claims. Other parties however were interested in acquiring other ground in this district, and we felt that some control might be maintained if we joined these groups.

Our first interest is for the Peso shareholders and the continued and extensive development of the Peso ground, and it is to this end that our main interest must lie. We do feel, however, that if we did not become part of this new additional ground control, other people would be participating and acquiring regardless.

We trust that you will appreciate our motives and would welcome any thoughts or suggestion that your department may have, so that we may continue to act with complete integrity and in the best interests of the Peso shareholders.

Yours very truly,

C. S. Walker,
President.

The letter was written from the plaintiff company and signed by Walker in his capacity as President. It is clear, however, that the other three directors were neither informed of, nor knew of the taking up of the Dickson claims by their fellow directors through Cross Bow until sometime after Mayo became a public company. There is evidence that these directors subsequently asked questions about Cross Bow and Mayo, but the matter was not pursued by counsel.

The evidence as to Peso's strained finances at the time the Dickson claims were offered to it was fairly conclusive. Indeed, Peso's counsel admitted that the company was short of funds at that time. It is suggested, however, that Peso's financial position should not have been considered only in isolation at that moment. When considered in the context of how much Dickson was asking for his claims, what he subsequently received for them, and the fact that Cropper was responsible for raising money for Peso, the matter of financial inability is seen somewhat differently.

Dickson initially asked $30,000.00 for his claims. What the Cropper group paid for them is not certain, but there is some indication it was less than that. In his oral judgment, Gregory J., said that the claims were purchased for the same price at which they had been offered to Peso. The transcript reveals no evidence

92 Ibid., p. 53. Cropper expressed the opinion that the other directors knew of Cross Bow and Mayo, but it is clear that they only knew sometime after Mayo went public.

93 The development of Peso's claims was estimated to require $250,000.00 in the first six months of 1962, ibid., pp. 145, 151.

94 Ibid., p. 64.

95 Ibid., p. 213.
of that fact. The only evidence is that of Walker who testified that his total investment in Cross Bow was $2,500.00. As Walker, Cropper, Aho and Verity had equal interests in Cross Bow, it is a fair inference that the total cash paid Dickson was $10,000.00. In return for less cash he probably received a greater proportion of the vendor’s position when Cross Bow transferred the claims to Mayo. Could Peso have raised $10,000.00 and made a similar deal? Its finances were strained, but not so strained that it could not at almost that very time raise the salaries for Verity and Cropper a total of $4,000.00. And the man who was best able to judge if Peso could raise the money was Cropper himself. Between incorporation in 1961 and sale to Charter in 1963, Cropper raised three quarters of a million dollars for Peso’s development. Despite the suggestion that one of the reasons for Peso’s rejection of the Dickson claims was that it had enough ground under control, the evidence of Walker and Cropper, quoted above, and the letter to the Superintendent of Brokers, makes it abundantly clear that if it could have been financed, Walker and Cropper would have caused Peso to purchase the claims. Walker testified to this when asked the question by Mr. Justice Gregory:

Q. At the time the offer was made would you, as the director of Peso, have advocated the purchase of the properties if the purchase could have been financed.

A. Yes sir, I think they would have.

On these facts Mr. Justice Gregory made his finding of good faith rejection of the Dickson claims by the Peso board. In light of the unsatisfactory evidence as to whether or not the full board of Peso considered the matter, and of the relatively short time thereafter that the Cropper group picked up the claims at the suggestion of Aho who had recommended their rejection by the company, and of the fact that the matter was not taken back to the full board for reconsideration at a time when Peso was “achieving good results” and Cropper and Walker therefore thought it would be best to “control the Dickson claims”, this finding is somewhat difficult to accept. Nevertheless it is the essential finding in the case, and the question that must be dealt with is whether given good faith rejection by the Peso board, Cropper was then free, on the facts as indicated by the evidence set out above, to purchase the Dickson claims without making full disclosure to, and getting the

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96 Ibid., p. 34.
97 This was the understanding of Bull J.A. in the British Columbia Court of Appeal, supra, footnote 28, at p. 150, and Cartwright J., in the Supreme Court, supra, footnote 24, at p. 4.
98 See footnote 65, supra.
100 Ibid., p. 126.
101 Ibid., p. 148.
102 Ibid., p. 116. Walker also expressed the opinion once again that at the time Peso could not have financed the purchase.
approval of the Peso shareholders?

III. *The Legacy of Regal.*

In opening his oral judgment in *Peso*, Mr. Justice Gregory complained that his task was made more difficult by the fact that counsel for both parties relied on the same case, *Regal (Hastings) Ltd. v. Gulliver*, in support of their clients. In the British Columbia Court of Appeal, Bull J.A., and Norris J.A., differed in their interpretation of *Regal* as applied to the facts. And in the Supreme Court, *Regal*, as applied in *Zwicker v. Stanbury*, was held to be the governing authority. It is essential, therefore, to reconsider *Regal* and its application to the corporate opportunity problem. First, however, the judgments of the Court of Appeal and the Supreme Court in *Peso* must be considered.

Mr. Justice Bull said that *Regal* laid down two separate grounds of liability. He cited Viscount Sankey’s judgment for the rule that a fiduciary cannot put himself in a position where his interest and duty conflict, and Lord Russell’s judgment for the rule that a fiduciary cannot retain a profit made by reason of his fiduciary position. The Supreme Court had given approval to the conflict rule in *Zwicker*, and to the profit rule in *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. Ltd.*, and Bull J.A., felt bound to apply them to the facts of *Peso*. Before doing so, however, he paid the usual deference to the salutary effects of Equity’s “inflexible rules”, and then expressed his own view of how those rules should be applied today:

... in this modern day and country when it is accepted as commonplace that substantially all business and commercial undertakings, regardless of size or importance, are carried on through the corporate vehicle with the attendant complexities involved by interlocking, subsidiary and associated corporations, I do not consider it enlightened to extend the application of these principles beyond their present limits. That the principles, and the strict rules applicable to trustees upon which they are based, are salutary cannot be disputed, but care should be taken to interpret them in the light of modern practice and way of life.

Such a statement of judicial policy is all too rare in corporate cases,
and whether one agrees with it or not, it is to be welcomed. The wisdom of Mr. Justice Bull's approach will be considered after the differing opinion of Norris J.A. is set out.

The conflict principle received brief consideration by Bull J.A. Once the Peso board had bona fide decided not to purchase the Dickson claims, the company no longer had an interest in them. The evidence showed that the company was continuously receiving offers of properties and once they were rejected any subsequent dealing by a director with any of them did not raise a conflict of interest. In both Keech v. Sandford and Regal the property was wanted but, for differing reasons, could not be obtained. The interests of the fiduciary were, therefore, in conflict with those to whom utmost good faith was owed. This distinguished those cases from the facts in Peso.

This, surely, is too antiseptic a view of the facts in Peso. There was ample evidence that Peso was in exactly the same position as the Regal company—it wanted the property but could not finance its purchase. The company President testified to that effect when asked the question by the trial judge. Moreover, the testimony of Walker and Cropper quoted above, indicates that the next best thing to the company purchasing was to have the Cropper group protect the company's interests by purchasing themselves. The letter from Walker, as Peso President, to the Superintendent of Brokers is exactly to that effect. The evidence also was that Peso was achieving "good results" at that time and this was another reason for wanting to protect the Dickson ground. If by May, 1961, Peso had an indication that it had a mine and the Cropper group thought that Peso's interests should be protected with respect to the Dickson claims, did they not have a duty to take the matter back to the full Peso board rather than purchase themselves? Indeed, by doing what he in good faith thought was best for the company by purchasing the claims, Cropper put himself in a position in which his interest and his duty conflicted. There is every reason to believe that Cropper acted in good faith in the original rejection of the offer to Peso and in the subsequent purchase, but good faith is irrelevant where the interests of the principal call for protection. Moreover, what Danckwerts J., said of another fiduciary may well be applied to Cropper:

... it was easy for him to convince himself of this, [that the patent belonged to him and not the company] because ... he knew nothing of the legal obligations relevant to circumstances of this kind and he

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114 Ibid., at p. 155.
115 Supra, footnote 29.
116 Supra, footnote 104.
117 Supra, footnote 91.
118 Supra, footnote 89.
has, I think, that businessman's standard of morality which easily blinds the possessor of it to the distinction between right and wrong where the interests of the possessor are affected.

The reason for dealing extensively with the facts and quoting from the Peso transcript in the text of this article, is to show how wise Equity was in refusing to delve into the *bona fides* of directors' actions. Cropper and his associates were clearly in control of the company; Cropper was the officer responsible for the company's finances; the company was unquestionably short of money when the claims were offered to it and rejected; and six weeks later the Cropper group purchased themselves "to protect the interests of the company". It is simply not possible in such a situation for a court to do more than guess in judging individual motivations and actions, and it should not set itself the task. In purchasing the claims so short a time after rejection by the company when the company was interested but financially unable to purchase, Cropper put himself in a position in which his interest and his duty were in conflict and he ought to have been required to account. Once a conflict of interest is found a finding of prior *bona fide* rejection of the property becomes irrelevant, and Equity's rigid rule should have been applied.

Lord Greene's hypothetical\(^\text{120}\) cannot be answered in the abstract. There may well be a narrow range of cases in which directors would be justified in taking up opportunities which had, in good faith, been rejected by the company and in which the company was no longer interested. But such was not the case, it is submitted, in Peso. Nor should it be the case on facts where the controlling directors themselves purchase the property a short time after rejecting it on behalf of the company. Nor should it be the case where those responsible for a company's financial policy, which may well be the entire board of directors, take up the opportunity after rejection by the company because of financial inability. The soundest approach to financial inability is that taken in *Irving Trust v. Deutsch*:\(^\text{121}\)

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\(^{120}\) *Supra*, footnote 27, per Lord Russell at p. 389.

\(^{121}\) (1934), 73 F. 2d 121 (2nd Cir.), per Swan J., at p. 124. I do not want to give the impression that financial inability is no defence in the American corporate opportunity cases or that the *Irving Trust* case has been widely followed, for it has not. The courts have been divided on the issue. Compare *Hannert v. Standard Theatre Co.* (1891), 19 S.W. 82: *Alger v. Brighter Days Mining Corporation* (1945), 160 P. 2d 346; and *Beaumont v. Folsom* (1939), 285 N.W. 547, in which *Irving Trust* was not followed with *Electronic Dev. Co. v. Robson* (1947), 28 N.W. 2d 130, which adopted the *Irving Trust* approach. The best approach for the courts to take might be to require the board to take every reasonable step to enable the company to take advantage of the opportunity including a showing of reasonable and diligent effort to raise the necessary funds. See generally, Note, Financial Inability as a Defence under the Corporate Opportunity Doctrine (1951), 29 Kentucky L.J. 229.
The defendant’s argument that the fiduciary principle can have no application where the corporation is unable to undertake the venture is not convincing. If directors are permitted to justify their conduct on such a theory there will be a temptation to refrain from exerting their strongest efforts on behalf of the corporation since, if it does not meet the obligations, an opportunity of profit will be open to them personally.

The profit principle was relied on most strongly by Peso’s counsel. His argument was that since Cropper and his associates acquired their knowledge of the claims as directors of Peso, their subsequent purchase was “in the course of execution of that office” and they must account. Bull J.A., did not agree. He interpreted Lord Russell’s judgment in *Regal* to require a showing that the transaction was entered into only by reason of the fact that they were directors, and in the course of execution of their office. This was the case in *Regal* where the directors, while acting as such, purchased the remainder of the subsidiary’s shares when the company could not itself finance their purchase to enable the subsidiary to enter into the lease. It was, throughout, a corporate transaction in which the directors, in the best interests of the company, had participated. The directors in *Peso* were acting in the course of their office in considering and rejecting the Dickson claims. Once the claims were rejected the subsequent purchase, although based on knowledge they had obtained as directors, could not be said to have been only in their capacity as directors and “in the execution of that office”.

Mr. Justice Bull expressed the opinion that Lord Russell’s comment on Lord Green’s hypothetical in *Regal* would have been superfluous, as the Court of Appeal was being reversed, unless he intended it to be a reservation that he had no quarrel with the proposition set out, but the facts of *Regal* did not fall within it. Bull J.A. was of the opinion that the facts of *Peso* did fall within it and the directors were free to purchase. Cartwright J., in the Supreme Court agreed with this interpretation of Lord Russell’s comment. With respect, a more likely explanation for Lord Russell’s comment was that he wanted to make it clear that the hypothetical was not the case that he was faced with and he did not want to be understood to be deciding that case. Complex corporate cases do not present themselves in the simplicity of Lord Greene’s question, and it is highly unlikely that the House of Lords would want to decide such a difficult point outside of a concrete set of facts.

123 *Regal*, supra, footnote 27, at p. 389.
124 *Peso*, supra, footnote 28, per Bull J.A., at p. 158.
125 *Peso*, supra, footnote 24, per Cartwright J., at p. 9.
The only difficulty Bull J.A., felt in deciding the profit point in favour of the defendants arose from the letter Walker wrote to the Superintendent of Brokers.\textsuperscript{126} The letter was from the company and was written by the president signing himself as such. In the course of the letter Walker used such expressions as "we felt" and "our first interest" and if, as might be expected in a company letter, these words had reference to the company, they could be interpreted to mean that the company had an interest in the claims and was attempting to maintain some control over them. However Bull J.A., was of the opinion that, taken as a whole, the letter indicated that when Walker used the words "we" and "our" he was referring not to the company but to the three directors, Cropper, Verity, and himself. This interpretation is probably correct, but does it not indicate that the three directors never, in their own minds, separated their actions from those of the company? The oral testimony of Cropper and Walker, quoted earlier, is similar in that they both said, in effect, "we felt the ground should be picked up to protect the interests of the company". In so purchasing the Dickson claims, in good faith and in the best interests of the company, they were, like the directors in \textit{Regal}, acting as directors in the execution of their office and were liable to account. They were also, as has been submitted, putting themselves in a position where their interest and duty were in conflict. Bull J.A. did not interpret the letter that way, however, and dismissed the appeal.

Norris J.A. wrote a vigorous dissent in which he said the decision in \textit{Regal} covered the case.\textsuperscript{127} He relied particularly on Lord Wright's judgment in which the governing principle was stated in somewhat broader terms than in the other judgments:\textsuperscript{128}

\begin{itemize}
  \item The question can be briefly stated to be whether a . . . person in a fiduciary position, where a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made the profits with the knowledge and assent of the other person.
\end{itemize}

Mr. Justice Norris read the letter from Peso to the Superintendent of Brokers as indicating that the company was interested in the claims and concluded that by purchasing themselves the directors had made a profit in the course of the execution of their office. The desire of the company to purchase but financial inability to do so, followed by purchase by the directors, brought the case squarely within the facts of \textit{Regal}.\textsuperscript{129} Mr. Justice Norris also re-

\textsuperscript{126} \textit{Supra}, footnote 91.

\textsuperscript{127} \textit{Peso, supra}, footnote 28, per Norris J.A., at p. 125.

\textsuperscript{128} \textit{Regal, supra}, footnote 27, per Lord Wright, at p. 392 (emphasis added).

\textsuperscript{129} \textit{Peso, supra}, footnote 28, at p. 134.
plied to the statement of Bull J.A., that the traditional rules of Equity should not be rigidly applied, or at least not extended, because of the complexities of modern business.

With the greatest respect, it seems to me that the complexities of modern business are a very good reason why the rule should be enforced strictly in order that such complexities may not be used as a smoke screen or shield behind which fraud might be perpetrated. The argument is purely and simply an irrelevant argument of expediency as to what the law should be, not what it is. It might as well be said that such an argument if given effect to would open the door to fraud, and weaken the confidence which ordinary people should have in dealing with corporate bodies. In order that people may be assured of their protection against improper acts of trustees it is necessary that their activities be circumscribed within rigid limits. . . . The history today of the activities of many corporate bodies has disclosed scandals and loss to the public due to failure of the directors to recognize the requirements of their fiduciary position. No great hardship is imposed on directors by the enforcement of the rule, as a very simple course is available to them which they may follow. [Make full disclosure to, and seek approval of the shareholders to purchase.]

The Supreme Court of Canada shed no light on the difficult points raised in the Court of Appeal. The unanimous judgment, delivered by Cartwright J., dealt only with the profit rule and ignored the wider conflict rule. In dealing with the profit rule, the letter to the Superintendent of Brokers, over which the Court of Appeal had disagreed, was not mentioned. And most regrettably, the policy split between Bull J.A. and Norris J.A., over the application of Equity's old rules to modern corporate transactions was avoided and the judicial leadership that one is entitled to expect from the highest court was not forthcoming.

Cartwright J., quoted each of the judgments in Regal and concluded that they all agreed, in varying terms, with the following passages from the judgment of Lord Russell:

\[\ldots\] and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of execution of that office, are accountable for the profits which they have made out of them.

As there was a finding of good faith rejection of the Dickson claims by the Peso board, the subsequent purchase by Cropper was held not to be in the course of execution of his office of director and the appeal was dismissed. All that has been said with respect to the narrow view of the facts, and restrictive interpretation of the law in the judgment of Bull J.A., applies equally to the judgment of the Supreme Court and need not be repeated.

The decision in Peso, with its insistence that a director must

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\[^{130}\text{Ibid.},\text{ at p. 139.}\]

\[^{131}\text{Peso, supra, footnote 24, per Cartwright J., at p. 8, quoting Regal, supra, footnote 27, per Lord Russell of Killowen, at p. 389 (emphasis added by Cartwright J.).}\]
be acting in the course of his office for liability to be imposed, is, it is submitted, inadequate to deal with the corporate opportunity problem. Moreover, to read *Regal* as requiring such a finding, at least as so narrowly interpreted by Bull J.A. and Cartwright J., is not to appreciate the reach of the equitable principles reaffirmed in that case. It is true that the two cases upon which the Supreme Court relied, *Regal* and *Zwicker v. Stanbury*, both involved the making of a profit by directors while in the course of carrying out a corporate transaction. In *Regal*, the lessor required either that Regal’s directors guarantee the lease or that the lessee, a subsidiary company, have a paid-up capital of £5,000. The parent company’s finances would only allow a subscription for 2,500 shares, and the directors did not want to give personal guarantees. As a result the directors (and two others) personally subscribed for 3,000 shares, the parent company for 2,000 shares, and the lease was granted to the subsidiary. The purchase of the 3,000 shares for which the directors were held accountable was clearly part of the lease venture and in that sense was in the course of the execution of the directors’ office. In *Zwicker*, the directors, while carrying out a financial reorganization of the company, purchased some of the company’s securities, including a second mortgage, held by its principal creditor. Again, the directors were in the course of carrying out corporate business when they entered into the conflicting transaction. Does the test of “by reason of the fact that they were directors, and in the course of the execution of that office” require a showing, as the Supreme Court seemed to think in *Peso*, that the director was actually engaged in carrying out a transaction on behalf of the company?

The holding in *Regal* does not allow for such a narrow interpretation. The passage from Lord Russell’s judgment cited by Cartwright J., was the conclusion of an analysis of the facts to determine if the shares were acquired “by reason and in course of their office of directors of Regal”. The facts revealed that the profit was made out of the corporate venture and thus the conclusion that the directors were acting in the course of their office. Lord Russell’s judgment cannot be read to require participation in company business as essential for a finding that the director profited by reason of his fiduciary position. Nothing in Lord Russell’s judgment, taken as a whole, nor in the judgments of the other Law Lords in *Regal*, nor in the judicial history of the imposition of fiduciary standards on directors, justifies such a conclusion.

Each of the Law Lords in *Regal* referred to the old leading

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132 *Supra*, footnote 26. The Supreme Court first adopted the *Regal* principle in *Zwicker*.
133 *Supra*, footnote 131.
134 *Regal*, supra, footnote 26, per Lord Russell of Killowen, at p. 386.
cases on fiduciary duties and each gave approval to the broad general rule that a director cannot use his office to appropriate for himself an advantage that ought, in fairness, to belong to the corporation. Thus Viscount Sankey referred to: 135

...the general rule that a director...is liable to account for profits made by him from knowledge acquired when so acting [in a fiduciary capacity].

Lord Macmillan asked the question whether: 136

...what the directors did so related to the affairs of the company that it can be properly said to have been done in the course of their management and in utilization of their opportunities and special knowledge as directors.

It is this concept of use of the position of director, or use of knowledge that comes to a director by reason of his position to gain advantage for himself when the interests of the company call for protection, that underlies the holding in Regal. If the facts of Regal were that one of the directors heard of an available theatre and personally took a lease of it when he knew the company was looking for another location, can it be seriously contended that he would not be liable to account? It is submitted that he should be liable even if the knowledge of the availability of the theatre did not come to him in his capacity as a director, although it is recognized that the cases do not go that far. He is a fiduciary, and if the circumstances are such that the interests of his principal call for protection, he should be required to look first to those interests rather than to his own. Equity’s negative “do not” takes too narrow a view of the directors’ function, and is inadequate to meet the corporate opportunity problem. The directors should be considered to have an affirmative obligation to advance the interests of the corporation and, at all times, to put the corporation’s interests ahead of their own. 137 Such a standard does not place any great hardship on a fiduciary who, presumably, is well rewarded, monetarily or otherwise, for the office he has

135 Ibid., per Viscount Sankey, at p. 386.
136 Ibid., per Lord Macmillan, at pp. 391-392 (emphasis added).
voluntarily undertaken.

The decision of the House of Lords in *Phipps v. Boardman*\(^{138}\) provides an instructive contrast with that in *Peso*. The facts in *Boardman* are lengthy and complex but may be briefly summarized as follows. A large part of the holding of a testamentary trust consisted of an unprofitable investment in a private company. The solicitor to the trust, Boardman, and one of the beneficiaries, Tom Phipps, commenced negotiations with the company to place a representative of the trust on its board of directors. When they were spurned, they decided that the best way to protect the trust investment was for them personally to make a take-over bid for the company's outstanding shares. The two active trustees were informed of this plan and agreed to it. The third trustee, the testator's widow, was senile and was not consulted. Boardman and Phipps then represented to the company that they were negotiating on behalf of the trust and in that guise obtained information about the company that was essential to their eventually successful personal take-over bid. In fact, the trustees had neither the money nor the legal power to purchase the shares as they were not an authorized trust investment. After complete control was acquired, capital distributions were made which resulted in a profit for the trust and a £75,000 profit for Boardman and Phipps. One of the beneficiaries brought an action to compel Boardman and Phipps to account for their profit.

The House of Lords, by a majority of three to two, affirmed the holding of the Court of Appeal\(^{139}\) and the trial judge\(^{140}\) that the actions of Boardman and Phipps brought them within the profit principle of *Regal*. They had obtained essential information while purporting to represent the trust and notwithstanding that the trust could neither legally nor financially purchase the shares, and that their actions were throughout in the best interests of the trust and resulted in a large profit to it, they must account for their profit. Lord Denning M.R., in the Court of Appeal, and Lord Cohen and Lord Hodson were of the opinion that the conflict rule also applied.\(^{141}\) Boardman had "placed himself in a position where there was a conflict between his duty to advise an application to the court [for sanction to purchase the shares] and his interest to acquire the shares himself . . .".\(^{142}\)

\(^{138}\) *Supra*, footnote 27.

\(^{139}\) [1965] Ch. 992 (C.A.).

\(^{140}\) [1964] 2 All E.R. 187 (Ch. D.).

\(^{141}\) Viscount Dilhorne and Lord Upjohn also both recognized the profit and conflict rules but decided that neither applied to the case.

\(^{142}\) *Supra*, footnote 139, per Lord Denning M.R., at p. 1020. While agreeing that there was a conflict rule separate from a profit rule, Lord Upjohn objected to Lord Denning raising it as the point was not made in the pleadings and was not raised in argument by counsel for the respondent in any of the three courts. *Supra*, footnote 27, at p. 131.
Aside from indicating a more stringent approach to the enforcement of fiduciary duties than that taken in Peso, the judgments in Phipps are interesting for the discussion of whether the information that Boardman and Phipps received while negotiating with the company was property that belonged to the trust. Wilberforce J., at the trial noted that the directors of the private company would initially have refused to deal with Boardman and Phipps as prospective purchasers unless they had appeared as representing a threatening minority. Of what they learned, he said:

This knowledge was (so far as the expression can be used) essentially the property of the trust.

In the Court of Appeal, Lord Denning M.R., said:

Likewise with information or knowledge which he has been employed by his principal to collect or discover, or which he has otherwise acquired, for the use of his principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, he is accountable, . . . for such information or knowledge is the property of his principal, just as much as an invention is.

In the House of Lords, Viscount Dilhorne, Lord Hodson and Lord Guest agreed that knowledge acquired while acting for the principal could be regarded as the principal's property. Lord Cohen also agreed, although he expressed the matter somewhat differently:

Information is, of course not property in the strict sense of that word and . . . it does not necessarily follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit that comes his way as the result of the use he makes of that information and opportunity. His liability to account must depend on the facts of the case.

On the facts in Phipps, Lord Cohen held that the agents must account as they had profited through their share purchases by using information they had acquired while negotiating for the trust.

In his dissent, Lord Upjohn agreed that information could be property, but only in certain limited circumstances:

In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear. The true test is to determine in what circumstances the information has been acquired.

The real rule, is in my view, that knowledge learnt by a trustee in the course of his duties as such is not in the least property of the

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143 Supra, footnote 140, at p. 204.
144 Supra, footnote 139, at pp. 1018-1019 (emphasis added by Lord Denning).
145 Phipps, supra, footnote 27, at pp. 89-90. Viscount Dilhorne, however, did not agree that on the facts in Phipps the information acquired was the property of the trust.
146 Ibid., at p. 107.
147 Ibid., at p. 115.
148 Ibid., per Lord Cohen, at pp. 102-103.
149 Ibid., per Lord Upjohn, at p. 127.
trust and in general may be used by him for his own benefit or for the benefit of other trusts unless it is confidential information which is given to him (1) in circumstances which, regardless of his position as a trustee, would make it a breach of confidence for him to communicate to anyone for it has been given to him expressly or impliedly as confidential, or (2) in a fiduciary capacity, and its use would place him in a position where his duty and his interest might possibly conflict.¹⁵⁰

Lord Upjohn then went on to apparently qualify his second rule:¹⁵¹

... you have to look and see whether the knowledge acquired was capable of being used for his own benefit to injure the trust.

As there was no possibility of the information being used to injure the trust, and as the trust was itself incapable of purchasing the shares, the agents were free to purchase themselves.

It is unfortunate that the idea of information as property was introduced in Phipps to further tangle the problem of fiduciary obligations. It is unfortunate because it was unnecessary. The question is not whether the information acquired by the agent is the property of the trust, but is whether the agent used his position to make a profit without the informed consent of his principal. In Phipps the agents represented themselves to be agents in dealing with the company. As a result of what they learned in that capacity they profited without the consent of their principal. It matters not that the principal could not purchase, or was not interested in purchasing. It is for the principal to say if that is the case when his consent is sought. It is not for the agent to say it after the fact of having made his profit to justify his actions, regardless of how bona fide they may appear to be. One way, among many, in which the position of a fiduciary may be used to make a profit, is to turn to account information which was acquired while acting as such. The idea of the information being the property of the principal only serves to obscure the essential point that it is the use of the fiduciary position to make a profit that is forbidden. The knowledge or opportunity that comes to the fiduciary while so acting must, of course, have some connection with the agency being fulfilled. That, it is submitted, is all Lord Cohen meant when he said that it does not necessarily follow that because a fiduciary acquired some information or an opportunity while acting as such, he is liable for any profit he makes by use of it. In Phipps, and, it is submitted, in Peso, there was a very clear connection.

A finding that the information was acquired by the fiduciary in his capacity as such has been essential to establish liability. It has been suggested that the law should not focus solely upon the capacity in which the information was acquired and that a broader concept of the directors' function is required to deal with the corporate opportunity problem. A director may acquire information

¹⁵⁰ Ibid., at pp. 128-129.
¹⁵¹ Ibid., at p. 129 (emphasis added by Lord Upjohn).
otherwise than as a director and use it in a situation in which he commits a breach of duty. For example, a director of a mining company may have been given information in his capacity as a promoter and speculator in the mining industry without any reference to his membership on the board of any particular company. Yet the information may be valuable to that company and capable of exploitation by it, in which case the director's use of it may well constitute a breach of duty. He could not be said to have acquired the information in circumstances in which he had an obligation to transfer it to the company, yet he has acquired and used information which could have been used by the company and he ought to be held liable to account.

Lord Upjohn's contention that the use of the information must put the fiduciary in a position where his interest and duty are in conflict, and his further elaboration that the information must be capable of being used to injure the trust, are both without foundation. Lord Upjohn himself said that there were two separate rules and that the profit rule is merely part of the wider conflict rule. A showing of profit made by reason of the fiduciary position is enough to found liability without a showing of conflict of interest. Such a conflict will almost invariably be present, particularly where information has been turned to profit, but that will not necessarily be the case (as it was not in Phipps) and its absence does not affect the agent's liability to account. The notion that the information acquired must be capable of being used to injure that trust is contrary to the holding in Regal and the two-hundred-year-old line of cases on which it depends. Moreover, as a matter of principle it would be an unwise rule as it would leave the fiduciary, and ultimately the courts, as the judge of whether it was capable of causing injury or not. The person best able to make that decision is the principal to whom disclosure should have been made in the first place.

The concept of information as property is further clouded by the question of whether the information was confidential. Thus in Peso, Cartwright J. noted that the offer of the claims to Peso was not "accompanied by any confidential information unavailable to any prospective purchaser." Moreover, Cropper "did not have access to any such information by reason of his office." It is not

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154 Peso, supra, footnote 24, per Cartwright J., at p. 8.
155 Ibid. 
156 Supra, footnote 27, at p. 123.
157 As noted in footnote 142, supra, the conflict point was first raised in the Court of Appeal by Lord Denning M.R.; although the point was not pleaded, no evidence had been adduced, and counsel did not argue it. After Lord Denning raised it, Lord Cohen and Lord Hodson made it an additional ground of liability in the House of Lords. At the trial, however, the judgment of Wilberforce J. depended solely on the profit rule, which was the only ground of liability argued.
clear what relevance the question of confidentiality has. If the information relates, or may possibly relate, to the affairs of the company and the director acquired it while in the course of acting for the company, he is bound to give the opportunity of making use of it to the company. If he makes use of it personally he will have made a profit out of his office and must account. If the information was given to him confidentially on behalf of the company the position is exactly the same. If, in either case, the company decides that it does not want to make use of the information, and in the absence of other disabling circumstances, the director should be able personally to use the information. It is the use that is made of the information that comes to a director in his capacity as such that matters, whether it is confidential or not.

One scholar, Gareth Jones, has contended that the essential questions in Phipps were avoided by the House of Lords. These were whether Boardman and Phipps were unjustly enriched, and, if they were not, did policy demand that they be made to account? Leaving aside for the moment the policy question, to ask whether the agents in Phipps were unjustly enriched is just another way of asking whether they acted bona fide in the best interests of the principal, or, as Lord Upjohn would have it, whether they caused injury to the principal. As noted above, to ask such a question is, in effect, to overrule Regal and the Equity learning behind it. The essential reason for the refusal of the judges to delve into bona fides is that the courts are incapable of arriving at the truth of the matter. The point was put succinctly by Lord Wright in Regal:

... the court will not inquire whether the other person [the principal] is damned or has lost a profit which otherwise he would have got. ... Nor can the court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged. They are matters of surmise; they are hypothetical because the inquiry is as to what would have been the position if that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage, if, in short interest had not conflicted with duty.

Does this reasoning still have validity? In a recent trust case, Danckwerts L.J., seemed to think not and rejected the idea that a rigid rule must be applied because it is impossible to ascertain whether the trustee was acting honestly or not. Chancery judges were daily engaged in “ascertaining the knowledge and intentions” of parties to proceedings. Whether a trustee should be allowed to purchase trust property at an auction, which was the issue in

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156 Jones, op. cit., footnote 31.
157 Regal, supra, footnote 27, per Lord Wright, at p. 392.
159 Ibid., at p. 398.
Holder, should be “a matter for the discretion of the judge”.\textsuperscript{160}

It may be that in the usually less complex trust situation it is easier to sort out truth, motivations, and intentions from the evidence and actions of the parties than it is in the company situation. For that reason the courts may well be justified in confining the conflict principle to those cases, to use Lord Upjohn’s phrase, in which “there was a real sensible possibility of conflict.”\textsuperscript{161} and ought not to search for possible conflicts in events not contemplated by the parties at the time. Moreover, even if there is a possibility of conflict, why should the fiduciary not be able to justify his conduct where he can show not only that the trust has not been injured, as in Keech, but also that it has greatly profited as in Phipps? It may be thought that such an argument could be equally well applied to a company case like Regal. There is after all not much good sense in arguing for the maintenance of a rule that is seen on occasion to do injustice merely because it is of ancient lineage.

The facts of modern business “with the complexities involved by interlocking, subsidiary and associated corporations”\textsuperscript{162} argue, it is submitted, for the maintenance and application of the old equitable rules to directors. What was said in the introduction to this article about the ease with which directors exercise almost unchallenged control; how questionable actions appear as business judgment; and how difficult it is for shareholders to ascertain the facts and then take effective action on them, all make it imperative that the courts continue to take an uncompromising attitude in those few cases of breach of fiduciary duty that do surface in the courts. Moreover, it is not true, at least not in the corporate context, that the courts are readily able to “ascertain the knowledge and intentions”\textsuperscript{163} of the parties. The facts and evidence in a case like Peso make that abundantly clear. In a case in which the financial inability of the corporation to take up the opportunity is alleged, it will never be entirely clear whether the corporation could have, or indeed should have secured the necessary financing. How can it ever be entirely clear whether disinterested directors are acting in the best interests of the company or of their fellow directors in rejecting a corporate opportunity? Is it not safer for the courts to continue to make it clear to directors that if they are going to act in a situation in which their duty may conflict with their duty that they must seek the approval of fully informed shareholders? It is suggested that it is, and that the maintenance of Equity’s stern attitude is more than ever required for the reasons so cogently noted in the dissent of Norris J.A. in Peso.\textsuperscript{164}

\begin{footnotes}
\item[160] Ibid. 
\item[161] Phipps, supra, footnote 27, per Lord Upjohn, at p. 124. 
\item[162] Peso, supra, footnote 28, per Bull J.A., at pp. 154-155. 
\item[163] Holder, supra, footnote 158, at p. 398. 
\item[164] Peso, supra, footnote 28, per Norris J.A., at p. 139. 
\end{footnotes}
it seems to me that the complexities of modern business are a very 
good reason why the rule should be enforced strictly in order that 
such complexities may not be used as a smoke screen or shield behind 
which fraud might be perpetrated. . . . No great hardship is imposed 
on directors by the enforcement of the rule, as a very simple course is 
available to them which they may follow.

The decision of the House of Lords in Phipps does not neces-
sarily give a different answer to Lord Greene's hypothetical than 
does the decision of the Supreme Court in Peso. The House of 
Lords was not faced with the hypothetical as the decision at the 
trial was based solely on the fact of use of information acquired 
while acting for the trust without the consent of the beneficiaries. 
This was also the basis of the judgments in the Court of Appeal 
and in the House of Lords. The fact of the legal and financial 
inability of the trust to purchase could not be transformed, with- 
out full disclosure, into bona fide rejection by the trust. The 
hypothetical is still to be answered by the House of Lords. It is 
suggested, however, that if the House were faced with the facts 
of Peso its decision would be different from that of the Supreme 
Court. Whatever the requirements of bona fide rejection should 
be, they should not be satisfied on facts where the controlling 
directors, one of whom is responsible for financial policy, decide 
that the company is financially unable to purchase, and then within 
a few weeks purchase themselves to "protect the interests of the 
company".

IV. Ratification.

Could the problem in Peso have been avoided if Cropper had 
sought and received the approval of the company's shareholders? 
Mr. Justice Norris, in his dissent, expressed the opinion that such 
approval would have protected Cropper and relied on Lord 
Russell's statement in Regal: 165

They could, had they wished, have protected themselves by a resolution 
(either antecedent or subsequent) of the Regal shareholders in general 
meeting. In default of such approval, the liability to account must re-

The question of which breaches of fiduciary duty are ratifiable and 
which are not, is one of the most difficult in company law. 166 If the wrong is ratifiable, the minority is precluded from bringing 
a derivative suit. 167 Moreover, the directors are entitled to vote as 
shareholders on matters in which they are interested 168 and this, 
along with the control that the proxy machinery gives to them, can

165 Regal, supra, footnote 27, per Lord Russell, at p. 389.
166 See generally Gower, op. cit., footnote 83, p. 564 et. seq.
167 Foss v. Harbottle, supra, footnote 17.
mean that the procedure that is designed to protect the shareholders may be used to sanction corporate wrongdoing. Ratification and its relationship to the rule in *Foss v. Harbottle* has been discussed extensively elsewhere and the ratification point will only be dealt with briefly here.

It is said that no majority of shareholders can give away company assets and that this rule lies behind such cases as *Menier v. Hopper's Telegraph Works*, *Cook v. Deeks*, *Canada Safeway Ltd. v. Thompson*, and *Park v. Daily News*. In *Menier*, the directors used their votes as shareholders to compromise pending litigation and then put the company into liquidation. As a result they obtained for themselves the benefit of a contract in which the company had been interested. In *Cook*, two directors negotiated for themselves a contract in which the company was interested and which they were under a duty to obtain for it. They then used their controlling votes at the shareholders' meeting to pass a resolution stating the company had no interest in the contract. In *Canada Safeway*, a director was instructed to investigate the affairs of a major supplier with a view to acquisition. After his investigation, he obtained a personal option to purchase the supplier's shares and upon purchase and resale of the shares to his company through nominees realized a large profit. In *Parke*, the controlling shareholders sold the assets of a subsidiary and proposed to distribute the proceeds among its employees. At the suit of one shareholder they were restrained from doing so.

In both *Menier* and *Cook* the court said, in effect, that although the shareholders may vote as they please, the majority cannot appropriate the company's assets to themselves at the expense of the minority. In *Canada Safeway*, the trial judge observed that the director's breach of duty could only be sanctioned by a unanimous vote of the shareholders. In *Parke*, the giving away of corporate assets for a purpose not incidental to the business was held to be an *ultra vires* act and therefore beyond the competency...

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170 *Supra*, footnote 75.

171 *Supra*, footnote 26.

172 *Ibid*.

173 [1962] Ch. 927.

174 A Canadian case similar to *Menier* and *Cook* is *Elliott v. Orr Gold Mines Ltd.* (1920), 17 O.W.N. 447 where the sale of the company's mining claims at an undervalue to another company which the majority controlled was restrained. The sale was held to be a fraud on the minority as the majority were disposing of company assets to their own advantage. See also *Brown v. Can-Erin Mines Ltd.* (1961), 25 D.L.R. (2d) 250; *Gray v. Yellowknife Gold Mines Ltd. and Bear Exploration and Radium Ltd., (No. 1)*, [1947] O.R. 928, [1948] 1 D.L.R. 473 (Ont. C.A.); *Gray v. Yellowknife Gold Mines Ltd. and Bear Exploration and Radium Ltd., (No. 2)*, [1948] 1 D.L.R. 74 (Ont. C.A.).
of the shareholders to confirm.

In *Regal* the directors were required to account for the profit they had made on the sale of the shares. If they had not sold the shares, they would have been constructive trustees of them for the company and would have been required to transfer them to it. In *Zwicker* the Supreme Court ordered the shares delivered to the company for cancellation. If the plaintiff company had succeeded in *Peso*, Cropper would have been required to transfer his holdings in Cross Bow and Mayo to it. Yet in the opinion of Lord Russell in *Regal*, Kellock J., in *Zwicker*, and Norris J.A., dissenting, in *Peso*, a majority of the shareholders could have sanctioned the breach and allowed the directors to retain the property in each case. If the property ought to have been acquired for the company it is said to belong in equity to the company. Why then can the shareholders permit the directors to keep for themselves assets that belong to the company? How, in short, can one rationalize the *Menier* principle with Lord Russell’s dicta in *Regal*?

It is tempting to say that there is a distinction between giving away property that is in the company’s possession and allowing directors to take up opportunities that have not been reduced to possession. The difficulty is that the cases do not divide that way. *Cook, Canada Safeway, Regal, Zwiker* and *Peso* are all opportunity cases. It is possible that the cases can be divided on the bases of good faith. This would separate *Menier, Cook* and *Canada Safeway* from *Regal* and *Peso* but would not satisfy for *Zwicker* where the matter of *bona fides* was far from clear.

Professor Gower suggests that there is a distinction between “misappropriating the company’s property and merely making an incidental profit for which the directors are liable to account to the company”. Thus it is argued that in *Cook* “it was the duty of the directors to acquire the contracts on behalf of the company” and to allow ratification would be to allow the company to give away part of its assets. In *Regal*, on the other hand, “the directors had not misappropriated any property of the company” and therefore the company could ratify what they had done. With great respect, it is difficult to accept this distinction between *Cook* and *Regal*. In *Cook*, the company was in the construction business and would clearly have been interested in the new contract which the two directors entered into with its primary client. In

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175 *Regal, supra*, footnote 27, per Lord Russell, at p. 389.
176 *Zwicker, supra*, footnote 26, per Kellock J., at p. 269 (D.L.R.).
177 *Peso, supra*, footnote 28, per Norris J.A., at pp. 139-140.
178 See Beck, *op. cit.*, footnote 17, p. 572.
180 Ibid.
181 Ibid., p. 566.
Regal, the company owned theatres and the directors took up shares in the subsidiary which was used to acquire the lease in a new theatre. In both cases the directors, in the course of acting as such, took for themselves opportunities with respect to which they had a duty to use their best efforts to acquire for the company.

Professor Gower finds trouble with his own argument, however, because the directors in Regal had used information which came to them as directors and, on the authority of Phipps, such information may be regarded as the company's property. As such, it belongs in equity to the company and the shareholders cannot make gifts of company property through ratification. While not resolving this difficulty, Professor Gower says that it might not have been improper to allow the shareholders in Regal to ratify as the directors had not profited at the company's expense as they had in Cook.

As has been said above, Regal is not similar to Cook because the information which came to the directors is company property. It is similar because in both cases the directors in the course of acting for the company personally acquired property which it was their duty to acquire for it. An “information as property” analysis of the corporate opportunity cases can only further confuse an already troubled area of the law. If Regal and Cook, as has been submitted, are not distinguishable in terms of a corporate property analysis, then the bona fides of the directors in Regal becomes the distinguishing factor. One can readily agree with Gower that in a Regal type situation there may be no impropriety in allowing the directors to keep their profits. It must be recognized, however, that to do so would put the courts in the position of judging directors bona fides at the ratification stage, a judgment they have refused to make, and have protested they are incapable of making at the initial stage of deciding if there has been a breach of duty. If what Lord Wright said in Regal with respect to the difficulty and dangers of attempting to judge bona fides is valid, and it has been submitted that with respect to complex corporate transactions it unquestionably is, then ratification should not be allowed on the basis of the directors' bona fides. This would result in a rule that, in most cases, the directors may not take up an opportunity in which the company was interested but decided, for whatever reason, not to take up itself. This is a minor restriction that would impose little hardship on a director while at the same time preventing conflict of interest situations. To argue that such a restriction places too high an obligation on directors and puts them in a difficult position is to argue that

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182 Ibid.
183 Supra, footnote 27, at p. 392.
directors become such because of the opportunity to exploit corporate advantages. Cases like *Peso* and *Regal*, where the directors who were charged with the financial management of the company personally took up corporate opportunities after deciding that the company was financially unable to purchase itself, argue for the safety of such a rule. 184

In a recent case, *Bamford v. Bamford*, 185 the English Court of Appeal held that the exercise of directors’ duties for a “collateral purpose” was ratifiable by the shareholders. Prior to the decision of Buckley J., in *Hogg v. Cramphorn* 186 it had been the law that such an exercise, as for instance the issue of shares to prevent a takeover bid, which was the case in both *Hogg* and *Bamford*, was *ultra vires* the directors and incapable of ratification. 187 In the course of his judgment in *Bamford*, Harman L.J., said, in effect, that a *mala fide* exercise of powers by the directors is ratifiable by the shareholders 188 and relied on Lord Russell’s dicta in *Regal*. 189 With respect there was nothing in Lord Russell’s judg-

184 The American courts are divided on whether there may be shareholder ratification of directors’ frauds. A majority of the states do not allow ratification. Two cases which contain an excellent discussion of the problem are *Claman v. Robertson* (1955), 128 N. E. 2d 429 (S.C. Ohio), and *Mayer v. Adams* (1958), 141 A. 2d 458 (S.C. Del.). The matter is complicated in the United States by federal and state rules of procedure which require a demand upon the company, which may mean a demand upon the shareholders, to bring suit in the company’s name where breach of fiduciary duty is alleged before a derivative suit may be brought. Does refusal by the shareholders to bring suit amount to ratification of the breach? If it does, is demand still necessary in those jurisdictions where ratification is not allowed? If it does not, may a shareholder bring a derivative suit after the demand has been rejected by the shareholders? See generally, Note, Shareholder Ratification of Directors’ Fraudulent Acts (1939-40), 33 Harv. L. Rev. 1368; Leavell, The Shareholders as Judges of Alleged Wrongs by Directors (1960-61), 35 Tulane L. Rev. 331; Comment, Shareholder Validation of Directors’ Frauds; The Non-Ratification v. The Business Judgment Rule (1963-64), 58 N.W.U.L. Rev. 807; Note, The Non-ratification Rule and the Demand Requirement: The Case for Limited Judicial Review (1963), 63 Col. L. Rev. 1086; Note, Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit (1959-60), 73 Harv. L. Rev. 746. The courts are also not clear on what constitutes a non-ratifiable act. The line is drawn, as usual, between void and voidable acts, with the distinction being that the grosser cases of breach of duty are classified as void and therefore incapable of ratification. Gifts of corporate assets to the directors are invariably considered to be void acts. Thus almost all corporate opportunity cases would not be capable of ratification.


186 Ibid.


188 *Bamford*, supra, footnote 185, at p. 972.

189 *Supra*, footnote 27, per Lord Russell, at p. 389.
ment which sanctioned the ratification of directors' *mala fides*. Moreover, *mala fides* in *Bamford* was used in the sense of "not for a proper corporate purpose" not in the sense of "for the directors personal interests at the expense of the company". Ratification of acts for a "collateral purpose" should be confined to an improper exercise of directors' powers. There is no warrant, on the facts of *Bamford*, for extending ratification to a breach of fiduciary duty which involves the taking of a corporate opportunity.

Although it is suggested that the ratification rule of *Hogg* and *Bamford* is not applicable to corporate opportunity cases, the rulings in those cases as to the voting of the directors' shares are particularly important if ratification is to be allowed (although it is submitted it ought not to be) in situations like *Regal* and *Peso* where the courts are satisfied as to the directors' *bona fides*. In *Hogg*, the directors were ordered not to vote the shares they had improperly issued to themselves, but were not restrained from voting their original shares. In *Bamford*, the holders of the newly issued shares voluntarily refrained from voting. The learning of *North West Transportation v. Beatty* is that a director may use his votes *qua* shareholder to ratify a contract with the company in which he is interested. Whatever the merits of this rule, there is no reason why it should be applied to cases where the taking of a corporate opportunity is being sanctioned. The courts should insist that the directors' acts be approved by a majority of disinterested shareholders. Nor should the directors be allowed to solicit proxies in support of the ratification. Any director who is truly acting *bona fide* should not object to, and has nothing to fear from, the votes of his fellow, disinterested shareholders. The denial of his shareholder vote to a director would be no more than the application to corporate affairs of the commandment that no man should be seen to be a judge in his own cause.

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190 *Supra*, footnote 168.
191 *Supra*, footnote 61.