McGill Law Journal
Revue de droit de McGill

THE BOUNDARIES OF CORPORATE LAW AND TRUST LAW: AN ANALYSIS OF *LOCKING V. MCCOWAN*

Anita Anand and *Edward Iacobucci*

Volume 62, Number 2, December 2016

URI: https://id.erudit.org/iderudit/1040056ar
DOI: https://doi.org/10.7202/1040056ar

See table of contents

Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)
1920-6356 (digital)

Explore this journal

Cite this article

Anand, A. & Iacobucci, E. (2016). THE BOUNDARIES OF CORPORATE LAW AND TRUST LAW: AN ANALYSIS OF *LOCKING V. MCCOWAN*. *McGill Law Journal / Revue de droit de McGill*, *62*(2), 577–598. https://doi.org/10.7202/1040056ar

Article abstract

There is an increasing trend among real estate investment trusts (REITs) to employ corporate law duties in formulating the duties of trustees. We contend that this approach represents a fundamental misunderstanding of the trust versus corporate law. To illustrate this point, we examine the case of *Locking v. McCowan*, a decision that we claim underscores the conceptual uncertainty regarding the extent to which corporate law applies in the income trust context. We argue that the case takes into account the difference between trusts and corporations in certain aspects of the decision, while, in others, it blurs the distinction between the two.

In support of our argument, we note that income trusts lack a separate legal personality and are thus fundamentally different from corporations. The law governing each form therefore is not, and ought not be, identical. To apply corporate law to the interpretation of trustees' duties fails to acknowledge the absence of a distinct legal entity in the trust context, and the historically fundamental fiduciary relationship between trustees and beneficiaries (i.e., unitholders, in this context). We favour greater clarity in the drafting of the declarations of trust (DOTs) to reflect an understanding that corporate law fiduciary duties should not ground trustees' duties. Simply importing corporate law fiduciary duties into the DOT undermines the certainty on which DOTs, and thus the income trust market, should operate.

McGill Law Journal — Revue de droit de McGill

THE BOUNDARIES OF CORPORATE LAW AND TRUST LAW: AN ANALYSIS OF *LOCKING V. MCCOWAN*

*Anita Anand and Edward Iacobucci**

There is an increasing trend among real estate investment trusts (REITs) to employ corporate law duties in formulating the duties of trustees. We contend that this approach represents a fundamental misunderstanding of the trust versus corporate law. To illustrate this point, we examine the case of *Locking v. McCowan*, a decision that we claim underscores the conceptual uncertainty regarding the extent to which corporate law applies in the income trust context. We argue that the case takes into account the difference between trusts and corporations in certain aspects of the decision, while, in others, it blurs the distinction between the two.

In support of our argument, we note that income trusts lack a separate legal personality and are thus fundamentally different from corporations. The law governing each form therefore is not, and ought not be, identical. To apply corporate law to the interpretation of trustees' duties fails to acknowledge the absence of a distinct legal entity in the trust context, and the historically fundamental fiduciary relationship between trustees and beneficiaries (i.e., unitholders, in this context). We favour greater clarity in the drafting of the declarations of trust (DOTs) to reflect an understanding that corporate law fiduciary duties should not ground trustees' duties. Simply importing corporate law fiduciary duties into the DOT undermines the certainty on which DOTs, and thus the income trust market, should operate.

Il y a une tendance croissante, au sein des fiducies de placement immobilier, à utiliser des obligations de droit corporatif pour établir les obligations des fiduciaires. Nous soutenons que cette pratique trahit une mauvaise compréhension de la distinction séparant la fiducie du droit corporatif. Pour illustrer cette thèse, nous analysons le cas de *Locking c. McCowan*, une décision qui, à notre sens, révèle l'incertitude conceptuelle concernant l'étendue de l'application du droit corporatif dans le contexte des fiducies de revenu. Le jugement prend en considération les différences entre les sociétés et les fiducies sur certaines questions alors que, sur d'autres, il brouille la frontière existant entre les deux.

À l'appui de notre thèse, nous notons que les fiducies de revenu n'ont pas de personnalité juridique distincte et sont donc fondamentalement différentes des sociétés. La loi régissant chaque forme n'est donc pas, et ne devrait pas être, identique. L'application du droit des sociétés à l'interprétation des obligations des fiduciaires ne reconnaît pas l'absence d'entité juridique distincte dans le contexte de la fiducie et la relation fiduciaire historique et fondamentale entre les fiduciaires et les bénéficiaires (c'est-à-dire les porteurs de parts, dans ce contexte). Nous sommes en faveur d'une plus grande clarté dans la rédaction des déclarations de fiducie (DDF) afin de rendre compte du fait que les devoirs fiduciaires de droit corporatif ne devraient pas fonder les obligations des fiduciaires. Le simple fait de transposer des obligations fiduciaires de droit corporatif dans la DDF compromet la certitude sur laquelle les DDF, et donc le marché des fiducies de revenu, se doit de fonctionner.

* Anita Anand, J.R. Kimber Chair in Investor Protection and Corporate Governance and Professor of Law, Faculty of Law, University of Toronto. Edward Iacobucci, Dean and James M. Tory Professor of Law, Faculty of Law, University of Toronto. We thank Stephen Erlichman, Pat Koval, Stephen Pinkus, Simon Romano, Mohammad Fadel, Larissa Katz, and anonymous reviewers for their valuable comments. We also thank Dov Kagan, Krupa Kotecha, Duncan Melville, and Andrew Mihalik for their excellent research assistance in the preparation of this article funded by the Social Sciences and Humanities Research Council of Canada.

Citation: (2016) 62:2 McGill LJ 577 — Référence : (2016) 62:2 RD McGill 577

Introduction 579

I. Income Trust Governance in Context 583

II. The Case 587
A. The Officer's Duties 588
B. The Trustees' Duties 590
C. The Breach of Trust Claim 593

III. Future Directions 596

Conclusion 598

Introduction

Locking v. McCowan (*Locking*) stems from a motion to strike a proposed class action brought by unitholders against the trustees of a real estate investment trust (REIT), a form of unincorporated business entity.[1] The decision interprets the REIT's organizational document, known as a "declaration of trust" (DOT), in addressing two main issues: the scope of trustees' duties and unitholder remedies. *Locking* raises novel questions regarding the governance of income trusts. What does it mean for trustees to owe duties to a non-legal entity? Should remedies available to shareholders of a corporation be available to unitholders of income trusts?

During the relevant time period, the REIT in question—the TSX-listed Partners REIT—was governed by a board comprised of three trustees.[2] The REIT purchased three properties at the behest of its interim CEO, who failed to disclose to the trustees or unitholders that he had both a business and personal relationship with the vendor of the properties. As soon as his conflict came to light, the transaction was set aside and Partners REIT's unit price declined by more than thirty per cent. The representative plaintiff, a unitholder of the REIT, sued for the loss suffered from the decline in unit price because of this improper transaction. The plaintiff claimed, *inter alia*, that the interim CEO and the trustees had breached their fiduciary duty to unitholders and that the trustees were in breach of trust.

Justice Belobaba of the Ontario Superior Court of Justice considered whether these claims constituted viable causes of action that could form the basis of a class proceeding on the motion to strike at issue.[3] Central to the decision was his interpretation of section 10.5 of the DOT. This provi-

---

1 See *Locking v McCowan*, 2015 ONSC 4435, 258 ACWS (3d) 16 [*Locking*]. The Ontario Court of Appeal subsequently heard the case and reversed the motions judge on an issue that we do not discuss in this article, namely whether to strike the claims that some of the defendants knowingly assisted in a breach of trust (see *Locking v McCowan*, 2016 ONCA 88 at para 13, 263 ACWS (3d) 34).

2 Although only three trustees were named in this case, in the months leading up to the transaction in question, Partners REIT had six trustees. There was, however, significant turnover of trustees during the 2013–2014 fiscal years. In December 2013, all of Partners' independent trustees resigned in order to avoid a proxy battle with Mr. McCowan, the single largest unitholder in the REIT. Two new trustees, Allen Weinberg and Joseph Feldman, both named in the lawsuit, were appointed at that time. There were three further resignations by newly appointed trustees in early 2014, including by Mr. Weinberg. As of February 2016, Partners REIT had five members on its board of trustees (see Partners REIT's Management Information Circular: "Partners Real Estate Investment Trust", (19 June 2014), online: SEDAR <www.sedar.com>).

3 The judicial test applied by Justice Belobaba is "whether it is plain and obvious and beyond doubt that the ... claims have no chance of success" (*Locking*, *supra* note 1 at para 5).

sion required the trustees to "act honestly and in good faith with a view to the best interests of the Trust and ... to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."[4] The provision further provided that the duties and standard of care of the trustees "are intended to be similar to, and not to be any greater than, those imposed on a director of a corporation governed by the *Business Corporations Act* (Ontario)."[5]

Justice Belobaba held that the breach of fiduciary duty claim had no chance of success and should therefore be struck down.[6] First, he considered the fiduciary duty of the CEO, an officer but not a trustee. Justice Belobaba reasoned that the fiduciary duties of officers are similar to those of corporate officers, and relied on the decisions of the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders* (*BCE*)[7] and *Peoples Department Stores Inc. (Trustee of) v. Wise* (*Peoples*)[8] to conclude that these duties are not owed to any individual unitholder. He wrote:

> It is well established in the corporate context that an officer's duties are owed "to the corporation, *and only* to the corporation". In the context of a publicly traded income trust such as the REIT, an officer's duties are owed to the REIT itself (technically, to the trustees in their capacity as trustees of the REIT). If Mr. McCowan owed duties exclusively to the REIT and no direct duties to the unit-holders, it follows that he owed no fiduciary duties to the unit-holders.[9]

Since the CEO did not owe a fiduciary duty to unitholders, their suit against him for breaching this duty could not proceed.[10]

Second, Justice Belobaba considered the duties of the trustees. The DOT provided that the duties of the trustees are to be "similar to, and not ... greater than" those imposed on corporate directors.[11] In Justice Belobaba's estimation, to hold that the trustees owed fiduciary duties to the unitholders would be to impose duties that are greater than those imposed on directors of corporations.[12] He concluded:

> The plaintiff's allegations that trustees Weinberg, Feldman and Charlebois owe a fiduciary duty to the unit-holders would impose a

4 *Ibid* at para 33.

5 *Ibid* at para 28.

6 See *ibid* at paras 24, 26.

7 2008 SCC 69, [2008] 3 SCR 560 [*BCE*].

8 2004 SCC 68, [2004] 3 SCR 461 [*Peoples*].

9 *Locking*, *supra* note 1 at para 24 [emphasis in original, footnotes omitted].

10 See *ibid* at para 21.

11 *Ibid* at para 28.

12 See *ibid* at para 29.

> legal obligation that would be "greater than" the duties imposed on a director of an Ontario corporation and thus contrary to section 10.5 of the DOT. This is reason enough for my conclusion that it is plain and obvious that the unit-holders' breach of fiduciary duty claim against the three trustees is not a reasonable cause of action and is doomed to fail.[13]

Finally, Justice Belobaba found that the essential elements of a fiduciary duty to unitholders, including language in the DOT that would obligate the trustees to act in the best interests of unitholders as well as those of the REIT, were absent.[14] In addition, trustees could not owe duties to both the trust and its unitholders because this would present the possibility of conflicting fiduciary duties.[15]

Despite striking down the claim of fiduciary breach, Justice Belobaba allowed the breach of trust claim to proceed. The plaintiff asserted this claim in two parts, arguing that one of the trustees failed to act honestly, in good faith and in the best interests of the REIT, while the remaining two trustees did not act with the degree of care, diligence and skill of a reasonably prudent person in comparable circumstances. The trustees argued that a plain reading of the DOT—which provides that unitholders enjoy only those rights "expressly conferred" therein and any duties owed by the trustees are not to the unitholders but to the trust[16]—implies that the unitholders do not have standing to bring an action for damages. Yet, Justice Belobaba pointed to other provisions of the DOT, including one indicating that the relationship of the unitholders to the trustees is "solely that of beneficiaries to the Trust."[17] In other words, simply because the provisions relating to the fiduciary duty and the duty of care do not indicate that duties are specifically owed to unitholders does not mean that the unitholders have no rights under the DOT—they have rights as beneficiaries of the trust.

Finally, on the issue of remedies, the trustees argued that the unitholders were legally blocked from suing the trustees because of the rule

---

13 *Ibid*.

14 See *ibid* at para 30. The other elements that Justice Belobaba considered included the principles that: (i) trustees cannot owe duties to an unknown class of persons; (ii) the power of fiduciaries "must affect the legal or substantial practical interests of the beneficiary;" (iii) "trustees cannot owe fiduciary duties to both the REIT and to the unitholders because such duties may conflict;" and (iv) the breach of fiduciary duty against certain of the trustees had no chance of success because there was no allegation that these trustees acted disloyally, dishonestly or in pursuit of their own self-interest (*ibid*).

15 See *ibid* at para 29.

16 *Ibid* at para 38.

17 *Ibid* at para 40.

in *Foss v. Harbottle*,[18] which holds that individual shareholders have no cause of action for wrongs committed against the corporation. Any suit for such losses must be brought by the corporation itself (via management) or by way of a derivative action.[19] In holding that this issue should not be determined on a motion to strike,[20] Justice Belobaba appeared to agree with the plaintiff's argument that the losses stemming from the improper transaction were sustained by individual unitholders rather than the trust as a whole.[21] He further noted that whether the rule in *Foss v. Harbottle* applied to REITs (a relatively new form of business organization) raised novel and complex questions that were not fully settled at law.[22]

Underlying the judgment is conceptual uncertainty regarding the extent to which corporate law applies in the income trust context. Corporations are separate legal persons under corporate law, while, at common law, trusts are not.[23] Income trusts are "flow-through entities"; meaning that they are set up to flow out distributable cash in order to minimize tax burdens and to maximize investor returns. There are other important differences: trusts are governed by a DOT, a governance document that is specific to the trust. The terms of the DOT can (and do) vary across trusts.[24] In contrast, all corporations are subject to certain mandatory governance provisions under corporate statutes. In some parts of the judgment, Justice Belobaba seems to appreciate the absence of a separate legal entity and the difference in governance between trusts and corporations,[25] while in others, the legal ramifications of the distinction between the two are blurred (or lost).[26]

---

18 (1843), 2 Hare 461, 67 ER 189 (Ch) [*Foss* cited to Hare].

19 See *ibid* at 461. See also *Hercules Management Ltd v Ernst & Young*, [1997] 2 SCR 165 at para 59, 146 DLR (4th) 577 [*Hercules Management*], cited in *Locking*, *supra* note 1 at para 44, n 21.

20 See *Locking*, *supra* note 1 at para 47.

21 Justice Belobaba wrote:

> The plaintiff makes a compelling argument that the losses claimed herein are not about the diminution in the value of the REIT's assets. Rather, they are independent losses in unit value sustained by the class of unit-holders because of the dishonest or negligent actions of the trustees (*ibid* at para 46).

22 See *ibid* at para 47.

23 See *Salomon v Salomon & Co Ltd*, [1896] UKHL 1, [1897] AC 22 at 30; *Canada Business Corporations Act*, RSC 1985, c C-44, s 15 [*CBCA*].

24 See Anita I Anand & Edward M Iacobucci, "An Empirical Examination of the Governance Choices of Income Trusts" (2011) 8:1 J Empirical Leg Stud 147.

25 Justice Belobaba wrote:

> Both sides agree that the REIT is not a traditional trust, but it is a trust nonetheless and as set out in section 2.5(2) of the DOT, the relationship of

In this comment, we begin with the basic observation that an income trust lacks a separate legal personality and is fundamentally a different business organization from a corporation. To apply corporate law to the interpretation of trustees' duties fails to acknowledge the absence of a distinct legal entity in the trust context, and the historically fundamental fiduciary relationship between trustees and beneficiaries (i.e., unitholders, in this context). As one of the leading texts on trust law states, "The hallmark of a trust is the fiduciary relationship which the trust creates between the trustee and the beneficiary."[27] While Justice Belobaba maintained the distinction between trusts and corporations in considering the claim for breach of trust, his analysis of the claim for breach of fiduciary duty muddies the waters at times, perhaps because of the explicit wording of the DOT. The issue may, therefore, boil down to the drafting of DOTs themselves and the importance of maintaining clarity in the duties of trustees qua trustees.

Part I sets out background relating to the governance of income trusts, including empirical data regarding the framing of trustees' duties in DOTs. Part II examines the DOT in *Locking* and analyzes the court's holding with regard to the breach of fiduciary duty, breach of trust and unitholder remedies. Part III explores policy directions for the developing law in this area.

I. Income Trust Governance in Context

Central to trust law is the fundamental point that three parties are necessary for the creation of a trust: the settlor, the trustee or trustees

---

> the unit-holders to the Trustees "will be solely that of beneficiaries to the Trust..." It is therefore not plain and obvious that section 10.5 excludes unit-holders as objects of the duties owed by Feldman and Charlebois simply because the DOT does not expressly state that the Trustees owe duties to the unit-holders. That unitholders have *some* rights must be presumed from the nature of the trust relationship as defined in s. 2(5)(2) (*Locking*, *supra* note 1 at para 40 [emphasis in original]).

26 He also wrote:

> It is well established in the corporate context that an officer's duties are owed "to the corporation, *and only* to the corporation". In the context of a publicly traded income trust such as the REIT, an officer's duties are owed to the REIT itself (technically, to the trustees in their capacity as trustees of the REIT). If Mr. McCowan owed duties exclusively to the REIT and no direct duties to the unit-holders, it follows that he owed no fiduciary duties to the unit-holders (*ibid* at para 24 [emphasis in original, footnotes omitted]).

27 Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 42.

and the beneficiary or beneficiaries.[28] In the income trust context, the only beneficiaries are the unitholders,[29] and trustees must make decisions and act solely in the best interests of the unitholders. The original income trusts were designed to flow out all or substantially all of their distributable cash in order to maximize investor yields while minimizing, or even eliminating, entity-level income tax.[30] When the number of publicly-traded income trusts began to proliferate in the mid-1990s,[31] carrying with it the perceived potential of personal liability for public investors,[32] many provinces enacted statutes to guarantee limited liability to unitholders in public income trusts.[33] Apart from statutory requirements relating to trusts, trustees are free to determine the governance structure of the trust, which they do in the privately-drafted DOT. The DOT establishes the trust, describes the relationship between the trustees and the unitholders, and governs the structure and activities of the trust. The notion that parties can contract out of default trust law obligations (including their fiduciary duties) has taken hold in common law jurisdictions, including Canada (though "contracting out" was not at issue in *Locking*). Statutory laws that govern corporations, such as the *Canada Business Corporations Act*[34] (*CBCA*), or its counterparts in provincial jurisdictions, do not apply.[35]

---

28 Once the trust is settled or formed, the settlor's role is significantly reduced; he or she does not hold property and is not entitled to receive trust property.

29 See Mark R Gillen et al, *The Law of Trusts: A Contextual Approach*, 3rd ed (Toronto: Emond Montgomery, 2015) at 386.

30 See Benjamin Alarie & Edward M Iacobucci, "Tax Policy, Capital Structure and Income Trusts" (2007) 45:1 Can Bus LJ 1 at 2.

31 Income trusts generally became publicly-held listed entities in one of two ways: via an initial public offering or by conversion (see Anand & Iacobucci, *supra* note 24 at 154).

32 As Benjamin Alarie and Edward Iacobucci point out, however, income trust structures often rely on corporate or limited liability entities that operate the business in question, which themselves would protect unitholders from personal liability (see Alarie & Iacobucci, *supra* note 30 at 13–17).

33 See, for example, the *Income Trusts Liability Act*, SA 2004, c I-1.5 in Alberta and the *Trusts Beneficiaries' Liability Act, 2004*, SO 2004, c 29, Schedule A in Ontario, both passed in 2004. Given reliance on limited partnerships and corporations within the income trust structure (e.g., the publicly traded income trust may own shares in a private operating corporation), it is not clear that these statutes were necessary to establish limited liability for unitholders (see e.g. Alarie & Iacobucci, *supra* note 30 at 13–17). The statutes do cover public investment trusts. Note that income trusts are subject to securities laws given that units of income trusts are treated as "securities" and therefore subject to disclosure and other rules. Such obligations do not impact the governance choices of the trust, which remains in the DOT.

34 *Supra* note 23.

35 Though as we will see, many DOTs explicitly refer to, and even incorporate by reference, certain provisions of the corporate statute.

Prior to examining the *Locking* decision itself, it is useful to gain context for our discussion by considering the extent to which DOTs generally tend to rely on or mimic corporate law, and the areas in which they do so. In an empirical study based on data relating to income trusts in 2005, we examined the DOTs of 187 income trusts listed on the Toronto Stock Exchange.[36] We found that DOTs mimic corporate statutes in some areas, such as notice provisions for meetings. In other areas, such as remedial provisions, DOTs depart significantly from the corporate statute. In other words, it is not a forgone conclusion that DOTs will in all cases mimic the corporate statute and, indeed, our research shows that often they do not. To understand the governance of a trust, reference to its DOT is essential, and indeed governance structures will be particular to each trust; certainly, no default terms contained in corporate statutes are applicable.[37] We also found that governance terms turn in significant part on the nature of the income trust's industry.[38] We repeated this study as of 31 December 2014, with income trusts that remained publicly-listed on the TSX (totaling sixty-three in number) and found continued similarities (and many of the same differences) as between trusts' DOTs and the corporate statute.[39]

In both the 2005 and 2014 data sets, the duties of trustees comprise one area in which the terms of DOTs vary when compared not only to corporate statutes, but also across DOTs. Some DOTs mimic corporate statutes, providing that trustees owe their duties "to the trust" while others provide that trustees owe their duty to both the trust and unitholders, what we refer to here as a "dual duty".[40] Only one trust in the 2014 data set provided that trustees owe their duties to the unitholders alone. The

---

36 See Anand & Iacobucci, *supra* note 24.

37 See *ibid* at 148.

38 See *ibid* at 165–69.

39 Data is on file with the authors.

40 To be clear, the fiduciary duty required by the corporate statute states: "Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall ... act honestly and in good faith with a view to the best interests of the corporation" (*Business Corporations Act*, RSO 1990, c B-16, s 134(1)(a)). See also *CBCA*, *supra* note 23, s 122(1)(a). We note that a dual duty is the law in Delaware: see *Bodell v General Gas & Electric Corporation*, 140 A 264 at 268 (Del Sup Ct 1927), which was the first decision to espouse the idea that directors of a Delaware corporation owe a fiduciary duty to stockholders. The Delaware Supreme Court later refined the business judgment rule in *Aronson v Lewis* and held that the presumption in favour of directors is that they act in the best interests of the company and stockholders (473 A (2d) 805 at 812 (Del Sup Ct 1984)).

following chart, which reflects both datasets, sets forth the breakdown of those to whom trustees owe duties.[41]

	2005[42]	**2014**
Trust Only	64 (38.1%)	16 (25.4%)
Unitholders Only	24 (14.3%)	1 (1.6%)
Trust & Unitholders	80 (47.6%)	46 (73.0%)

The income trusts in our 2005 study were primarily business trusts as opposed to REITs. Isolating the nineteen REITs from 2005, we found that 16.7 per cent of REITs defined the duties of trustees as owed "to the trust" and 83.3 per cent of REITs defined these duties as being owed to "the trust and unitholders," which is consistent with the results from 2014 where the sample was dominated by REITs. In other words, the majority of REITs have consistently provided that trustees owe dual duties, although, as will be discussed in Part II, the DOT in *Locking* provided that trustees owe their fiduciary duties to the trust alone—placing it in the minority of income trusts on the TSX.

Another relevant aspect of our empirical research was the increasing number of references to the *CBCA* and *Ontario Business Corporations Act*[43] (*OBCA*) in DOTs over time. The more recent the trust is, the more likely it is that the DOT will contain a reference to the *CBCA* or the *OBCA*. These results suggest that trustees, and those drafting DOTs on their behalf, increasingly seek to ensure consistency between the DOT and the governing corporate law.

On the issue of remedies, DOTs do not typically mimic the shareholder remedies contained in corporate statutes.[44] In both our 2005 and 2014 studies, we found significant dissimilarities between unitholder

---

41 Shortly after the data was collected for our 2005 study, the federal government introduced amendments to taxation law that made it less attractive for non-REIT income trusts to form this structure, thereby explaining the smaller number of income trusts overall in the 2014 data set.

42 We were able to locate only 168 out of the 187 DOTs studied in 2005.

43 *Supra* note 42.

44 Since completing our 2014 study, we are aware of a handful of income trusts, including RioCan Real Estate Investment Trust, which have taken steps towards incorporating a number of amendments to its DOT including a unitholder oppression remedy, dissent and appraisal rights and unitholder proposals (see RioCan Real Estate Investment Trust, "Management Information Circular and Notice of Annual and Special Meeting of Unitholders", (17 June 2015) at 23–24, online: SEDAR <www.sedar.com>).

remedies set out in DOTs and the remedies provided to shareholders under the *CBCA*. In particular, none of the DOTs studied provided unitholders a right to launch a derivative action or a possible oppression remedy. The one notable change between 2005 and 2014 was that two thirds of trusts in the later period provided an appraisal remedy to unitholders similar to that provided in corporate statutes, a marked increase from our 2005 study, where less than ten per cent of DOTs contained such a remedy for unitholders.[45] The absence of remedies in DOTs heightens the importance of remedies available at common law, which is why *Foss v. Harbottle* is so relevant to this case, as discussed in Part II, below.

To summarize, while in some ways DOTs resemble corporate law statutes, in other ways there are differences—indeed, some profound differences. Although over time DOTs generally appear to be moving in the direction of corporate statutes, significant departures remain common. It would be a mistake to conclude that the architects of income trusts in practice take it as self-evident that income trusts should share the legal structure of a corporation.

II. The Case

With this understanding of the way in which duties of trustees are framed across DOTs, we can now understand the *Locking* case in context. The DOT at issue stated that the trustees owed their fiduciary duties to the REIT and that these duties are akin to those owed by directors under the *OBCA*. The DOT specifically stated:

> The Trustees, in exercising the powers and authority conferred upon them hereunder, shall act honestly and in good faith with a view to the *best interests of the Trust* and shall exercise that degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. A Trustee will not be liable in carrying out his or her duties under this Declaration of Trust except in cases where the Trustee fails to act honestly and in good faith with a view to the *best interests of the Trust* or to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The duties and standard of care of the Trustees provided as aforesaid are intended to be similar to, and not to be any greater than, those imposed on a director of a corporation governed by the *Business Corporations Act* (Ontario).[46]

[45] One lawyer with whom we spoke mentioned that a reason for the absence of remedies is that they could give rise to monetary damages, which in turn could disrupt securities distributions. In addition, remedial actions brought by unitholders could lead to legal costs and plaintiff-side spurious litigation that could reduce distributions.

[46] *Locking*, *supra* note 1 at para 15 [emphasis added].

The DOT thus fell in the group of trusts that states that trustees' duties are owed to the business entity rather than the entity and unitholders (or unitholders alone). The DOT appears to have been drafted in order to mimic the duties contained in corporate statutes, as indicated in the last line of the excerpt. Of course, a trust is not a legal entity but a legal relationship among individuals, as will be discussed further below.

As noted above, Justice Belobaba rejected the claims for breach of fiduciary duty. First, drawing an analogy with corporate law, he concluded that officers of the trust owe duties to the trust—period—and not to its unitholders. Second, since the DOT provided that the trustees' duties did not exceed those of corporate directors under statute, and since corporate directors owe duties only to the corporation, the trustees did not owe duties beyond those owed to the trust. Finally, Justice Belobaba relied on various trust law principles, including the principle that a fiduciary duty cannot be owed to two parties simultaneously where those duties may conflict, to reject the fiduciary duty claims. We turn now to discuss some striking features of this reasoning.

A. The Officer's Duties

As a starting point in considering the claim against the CEO, it is noteworthy that the DOT did not articulate precisely the nature of the fiduciary duties of the officer. Justice Belobaba reviewed the DOT's definition of an officer, and then moved quickly to conclude that the duties of the officer in this context were analogous to those of a corporate officer. As *Peoples* and *BCE* make clear, such officers owe a duty to the corporation alone—not to any individual group of stakeholder, including shareholders. Justice Belobaba reasoned, therefore, that the officer in the present case did not owe a fiduciary duty to the unitholders, but to the trust alone.[47]

This analysis raises important questions from both a functional and a formal perspective. From a functional perspective, the case law on corporate fiduciary duties in Canada has created significant uncertainty and indeterminacy.[48] The Supreme Court of Canada has held very clearly that corporate directors owe duties to the corporation and to the corporation alone, and not to any particular stakeholder individually. Indeed, the Court indicated that where the interests of the corporation and stakeholders conflict, the duty is owed only to the corporation. This is a profoundly puzzling formulation of the duty. It is a duty that, as the Court outlined in *BCE*, requires corporate directors and officers to consider the

---

47 See *ibid* at paras 23–24.

48 See Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48:2 Can Bus LJ 232.

interests of a legal fiction over those of its flesh-and-blood stakeholders. While it is very difficult to know what the best interests of a legal fiction could possibly mean, it is also unclear why the interests of a legal fiction should prevail over those of *actual* persons. To be clear, there may be debate about the priorities that corporate fiduciaries should assign to different classes of stakeholders—certainly, the classical conception, and the one that clearly prevails in United Kingdom law, is that ultimately shareholders have primacy—but what should not be debatable is that the interests of human beings should trump the interests of a legal fiction.

In this context, Justice Belobaba's approach to the fiduciary duties in *Locking*, where there was no provision in the DOT requiring him to adhere to corporate law principles, is of debatable wisdom. While the officer in an income trust clearly owes a fiduciary duty, it is not at all clear that importing the indeterminacy of the corporate model to the income trust space is appropriate from a functional perspective.

From a formal perspective, the curiousness of Justice Belobaba's approach is compounded by the fundamentally different formal structure of the income trust context to that of corporate law. *BCE* and *Peoples* are open to criticism for taking form much too seriously as a matter of substance: while it is true that the corporation has a legal personality, it is not a human being and is not susceptible of having interests to protect that are similar to those of its stakeholders. Nevertheless, these cases held that corporate fiduciaries must act in the interests of a legal form. In the trust context, there is no formal legal entity, which renders it especially suspect to require the officers of an income trust to owe their duties only to the trust and not to the unitholders or other stakeholders, or both.

To say that trustees owe a duty to the trust rather than to unitholders is to assume that somehow the trust has objectives and goals distinct from its unitholders. The trust has no separate legal existence and is merely a legal relationship among its beneficiaries (unitholders), and its trustees. Justice Belobaba is clearly cognizant of the salient point that the REIT is not a separate legal entity. For example, he notes parenthetically that, technically, the CEO's duties to the trust are really duties to the trustees in their capacity as trustees of the REIT.[49] In the same manner, the trustees are themselves obliged to act in the best interests of the unitholders as beneficiaries of the trust.

The functional criticisms of the *BCE* decision are also well-known: it is meaningless to say that directors owe their duties to the "corporation".[50]

---

49 See *Locking*, *supra* note 1 at para 24.

50 See Iacobucci, *supra* note 48 at 235–36; Jeffrey G MacIntosh, "*BCE* and the Peoples' Corporate Law: Learning to Live on Quicksand" (2009) 48:2 Can Bus LJ 255 at 256.

The corporation is a legal fiction and framing directors' duties in this way provides no clarity regarding how and to whom specifically directors' duties are owed. [51] But in the corporate law context, the corporation is a separate legal person. It is difficult to discern directors' duties but it is at least arguable, in light of corporate statutes, that corporate fiduciaries owe their duties to a legal entity. In the trust context, however, there is no entity to whom an officer or trustee could owe such a duty. Courts, as well as lawyers who draft DOTs and emphasize a duty to the trust, seem to overlook this crucial point.[52]

B. The Trustees' Duties

The DOT in *Locking* elaborated on the fiduciary duties of the REIT's trustees. It stated that the trustees owed their duties *primarily* to the trust and to the trust alone. As noted above, this is a relatively uncommon formulation of the duties in DOTs, which often provide instead that the duties are owed to the unitholders, or to the trust and its unitholders. We contend that it would be incorrect on the basis of such provisions in a DOT to infer that trustees owe a duty to the trust and the trust *alone*. We have discussed the problems with this conception, both as a formal and a substantive matter, and in the present case, we would have preferred that the court interpret the duty to the trust as meaning a duty to the beneficiaries of the trust, the unitholders.[53] This was not the case in *Locking*, however, as the duty was held to be analogous to that owed by corporate directors.

Rather than resting his analysis solely on the simple language of the DOT to conclude that the duty was owed only to the trust, just as *BCE* and *Peoples* relied on the simple language of the corporate statute to conclude that the duty was owed only to the corporation, Justice Belobaba al-

---

[51] See Iacobucci, *supra* note 48 at 233–41.

[52] Taking up precisely this point, Justice Cullity states:

> I am aware from my own experience in practice, and more recently, that—presumably as a matter of convenience—trusts are quite commonly named by corporate and commercial lawyers as parties to agreements and as the owners of shares and of other property in share certificates and other legal documents ... However objectionable in principle, the practice of treating trusts as if they had legal personality—or at least as if references to them by names such as those used in this case refer to the trustees—appears to be endemic and it has rarely received judicial criticism (*Foo v Yakimetz*, 2002 CanLII 2662 at para 72, 117 ACWS (3d) 413 (Ont Sup Ct)).

[53] Indeed, such an interpretation, given the designation of the unitholders as beneficiaries of the trust, is even more natural than the historical, and also not unnatural, understanding of a duty to the company as a duty to shareholders (see e.g. Iacobucci, *supra* note 48 at 235).

so referred to other language in the DOT. In particular, he observed that the DOT specified that the duties of trustees would be similar to, and not greater than, the duties owed by directors under the *OBCA*.[54] Justice Belobaba reasoned that under business corporate law statutes, directors owe their duties only to the corporation, not any stakeholders; therefore, in the present case, extending the duties to the unitholders would go beyond the corporate duties—which would be inconsistent with the DOT's provision that the trustees' duties would be no greater than corporate directors' duties.

This reasoning, in our view, is inconsistent with the most natural understanding of the DOT in this case. There has been, and continues to be, controversy and debate over the substantive content of directors' duties, independent of the question of to whom the duties are owed. For example, the historical question of whether directors were to be judged according to their subjective experience and knowledge was answered in *Peoples*, which held that the duties are, instead, objective.[55] Similarly, there was debate historically about whether any kind of self-dealing transaction involving a conflict of interest between director and corporation could ever be permitted, although modern statutes clarify the process for legitimizing such transactions (disclosure, disinterested voting, and so on).[56] As these examples suggest, on both the duty of care and the duty of loyalty, one can imagine a spectrum of stringency. It is natural to interpret Partner REIT's DOT as making clear that the duties of trustees in the REIT go no further on the spectrum of stringency than corporate law does with respect to corporate directors' duties.

Yet, it is odd to describe a duty to both unitholders and to the trust as being "greater" than a duty to the trust alone. There may be a question of who is permitted to sue to enforce the duty, but expanding this class does

---

54 Justice Belobaba said:

> Section 10.5 of the DOT, which deals with the duties of the trustees, provides that "the duties and standard of care of the Trustees provided as aforesaid are intended to be similar to, and not to be any greater than, those imposed on a director of a corporation governed by the *Business Corporations Act* (Ontario)." The case law under both the federal and provincial corporation statutes is clear, however, that the director of a corporation owes a fiduciary duty to the corporation only and not to its shareholders (*Locking*, *supra* note 1 at para 28).

55 See Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971) vol 1 at para 242; *Peoples*, *supra* note 8 at para 63.

56 See e.g. *Aberdeen Railway Company v Blaikie Brothers*, (1854) 1 Macq 461, [1843–60] All ER 249 (HL (Scot))*; Transvaal Lands Co v New Belgium*, [1914] 2 Ch 488, 31 TLR 1; *CBCA*, *supra* note 23, s 120.

not naturally suggest that the duty is more onerous in content— only that the chances of enforcement are greater. Consider an analogy to negligence. A stricter duty would require the potential tortfeasor to take greater care, but it is not clear that owing a duty to more people would imply a "greater" duty. If negligence resulting in an accident could cause a total of $100 in damage, it would be a stricter duty to require the would-be injurer to take precautions that cost $60 than to take precautions that cost $50, but the fact that two people could sue for a collective $100 in damages should negligence arise does not, in our view, imply a greater duty than if only one person could sue for $100. Similarly, a rule that states that a trustee could never deal with a trust is stricter than a rule that allows a disinterested vote of trustees to approve a deal between a trust and its trustee, but permitting both the trustees and the beneficiaries to sue for breach of such a rule does not give rise to a greater duty than where only trustees are permitted to sue. Justice Belobaba's understanding of the role of the DOT's requirement that the duties not exceed those in the *CBCA* fails to account for this point and is thus counterintuitive to us.

Drawing on trust law, Justice Belobaba employed a series of additional principles (i.e., over and above the wording of the DOT) asserted by the defendants.[57] Trustees cannot owe duties to an unknown class of persons, and the units of Partners REIT change hands every day on the secondary market; the trustees therefore cannot owe a duty specifically to beneficiaries since they would constitute an unknown class. The applicability of this principle to this case is questionable, however, given that Partners REIT is a discretionary trust and the principle cited by Justice Belobaba applies only to fixed trusts.[58] Specifically, in a fixed trust, it must be possible to draw up a complete list of beneficiaries (i.e., ascertain the class) before the objects can be considered to be sufficiently certain. For a discretionary trust, the standard is lower: trustees are merely required to have the ability to say with certainty that any given individual is or is not a member of the class.[59]

---

57 See *supra* note 14.

58 Justice Belobaba asserted that trustees cannot owe duties to an unknown class of persons, a legal principle discussed in *McPhail v Doulton*, [1970] UKHL 1, [1971] AC 424 at 456. That assertion is not really correct in this context, however, as it is only true in regards to fixed trusts. For discretionary trusts, all that is necessary is that "it can be said with certainty that any given individual is or is not a member of the class" (*ibid*). Note that a "discretionary trust" is a trust in which the trustees are given a power (distinct from a duty) to distribute funds to beneficiaries. This discretion has historically been applied to permit trustees to distribute either the income or capital of the trust, or both (see Waters, Gillen & Smith, *supra* note 27 at 571–72).

59 See Waters, Gillen & Smith, *supra* note 27 at 105–08.

In addition, Justice Belobaba observed that trustees cannot owe fiduciary duties to both the REIT and the unitholders because such duties may conflict, and trustees cannot be placed in a position where they are faced with such a conflict.[60] This reasoning resonates with one of the most puzzling passages in *BCE*, where the Supreme Court of Canada described the potential for conflicts between the corporation and its stakeholders.[61] The approach in *BCE* is difficult to understand given the impossibility of knowing how the interests of a legal fiction, a corporation, could be in conflict with the interests of human stakeholders. Conflicts between stakeholders are easily imaginable, but a conflict between the corporation and stakeholders as a group is meaningless. In the present context, the idea of a conflict between the "trust" (which is not even formally a legal person) and the trust's beneficiaries (the human beings for whose benefit the trust was created and exists) is perhaps even more perplexing. Once it is concluded that the trust does not have interests, the possibility of a conflict between it and its trustees becomes irrelevant. Again, in our view, the court too readily imports already dubious corporate law principles into the setting of a REIT, a context which renders the application of these principles even more questionable.

C. The Breach of Trust Claim

After dismissing the breach of fiduciary claim, Justice Belobaba permitted the breach of trust claim to proceed. He observed that, "The DOT is essentially a contractual agreement between the trustees and the unitholders."[62] He stated that

> even if the three trustees do not owe fiduciary duties to unit-holders, they are nonetheless obliged ... to act honestly and in good faith with a view to the best interests of the Trust and ... to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[63]

Justice Belobaba's focus thus ostensibly turned from the trustees' non-obligation to unitholders to their explicit obligation to act in the best interests of the trust and the trust alone, pursuant to the DOT. Yet the two

---

60 See *Locking*, *supra* note 1 at para 30. See also *Rose v Rose* (1914), 32 OLR 481, 22 DLR 572 (Ont CA). This case involved an estate trustee (also one of the sons of the testator) who acquired shares in a trust company, thus resulting in the devaluation of the estate. It was held by the Ontario Court of Appeal that the situation created the possibility of conflict and was therefore untenable on the part of the trustee.

61 See *BCE*, *supra* note 7 at para 81; Iacobucci, *supra* note 48 at 236.

62 *Locking*, *supra* note 1 at para 9.

63 *Ibid* at para 33.

concepts are intertwined because of the way in which the DOT was drafted.

The trustees argued that the DOT provided that unitholders' rights are limited to those that are "expressly conferred" by or "specifically set forth" in the DOT.[64] Justice Belobaba, however, pointed to provisions of the DOT providing that the trustees are "liable to the Trust *or any unitholders*" if they breach their obligations by acting dishonestly or negligently.[65] Further, he specified that both parties agreed with respect to subsection 2.5(2) of the DOT that the relationship of the unitholders to the trustees is "solely that of beneficiaries to the Trust."[66] Thus, the DOT itself is ambiguous; stating on one hand that the trustees' duties are owed to a non-entity and that their duties are akin to those contained in Ontario's corporate statute, but, on the other hand, that the trustees owe their duties solely to the unitholders as beneficiaries.

To be sure, the DOT is itself confusing and not artfully drafted: it sets out a duty to the trust, and not to unitholders, when such a duty has no obvious content. But there is also, in our view, a lack of clarity in Justice Belobaba's judgment. His attempt to bifurcate the fiduciary analysis from the trust analysis is unpersuasive: just as corporate fiduciary duties are established by statute in modern Canadian corporate law, the duties in the present case are defined by the DOT. If the duties defined in the DOT effectively gave rise to a breach for which the unitholders can sue in this case, then it would be odd that the unitholders could not sue directly for breach of fiduciary duty.

Locking asked the important question of whether unitholders could sue the trustees for breach of trust. Justice Belobaba rejected the defendants' argument that *Foss v. Harbottle* precludes a direct suit by unitholders. Recall that *Foss v. Harbottle* holds that individual shareholders have no cause of action in law for wrongs done to the corporation.[67] Rather, individuals acting on behalf of the corporation, such as management, must bring such an action. This rule respects the notion that the corporation is a separate legal entity, and therefore no cause of action vests in the shareholder for losses incurred by the corporation.[68]

---

64 *Ibid* at para 38.

65 *Ibid* at para 38 [emphasis in original].

66 *Ibid* at para 40.

67 See *Hercules Management*, *supra* note 19 at para 59, citing *Foss*, *supra* note 18.

68 See *Prudential Assurance Co Ltd v Newman Industries Ltd and others* (1981), [1982] Ch 204 at 224, [1982] 1 All ER 354 (Eng CA), citing *Foss*, *supra* note 18.

Justice Belobaba was convinced that, since the business entity at issue was a REIT rather than a corporation, novel and unique issues that are unsettled at law were raised. We have sympathy for this view but question why Justice Belobaba did not see fit to raise the same point on the issue of the duties of trustees—the REIT is a unique business entity and the law is not yet settled in this area either. It makes sense for complex issues—all complex issues—to be heard and decided at trial rather than dismissed on a motion to strike. Moreover, the point is an important one to be judicially decided given that our empirical analysis revealed that almost all TSX-listed trusts provide no remedial rights to unitholders. In our 2005 study, we found that no DOTs contained an oppression remedy or derivative action,[69] though we have since found that a handful of others have done so.

In our view, the rule in *Foss v. Harbottle* should not apply to income trusts unless the DOT establishes clearly that it does. A corporation has a legal personality, and thus has standing to sue (this is one of the hallmarks and most significant features of legal personality).[70] Of course, natural persons are required to act on the corporation's behalf, and in modern Canadian corporate law, the rules that determine who manages the corporation are by and large set out in statutes. If there is harm to the legal person that is the corporation, then it makes sense that the corporation would have standing to object, which in turn requires those responsible for its management to cause the corporation to sue. Corporate officers and the board are presumptively responsible for commencing litigation on behalf of the corporation, although modern statutes create derivative action procedures that allow shareholders to do so in certain circumstances.

In the trust context, in contrast, the trust does not have legal personality. This renders an understanding of a duty to a non-entity problematic, as we have discussed, and also implies that it cannot have legal standing to object to certain conduct. That is, the formal logic of *Foss v. Harbottle* cannot apply in the present context. The question is whether other arguments, perhaps functional ones, would justify its application. We are hard-pressed to see these arguments. It would be peculiar, as a functional matter, to outline what amounts to fiduciary obligations in the DOT, but then not allow the parties who benefit from these duties (unitholders) from suing to enforce them. And as a formal matter, as Justice-Belobaba stated, the DOT forms a kind of contract with unitholders,[71]

---

69 See Anand & Iacobucci, *supra* note 24 at 160.

70 See Edward M Iacobucci & George G Triantis, "Economic and Legal Boundaries of Firms" (2007) 93:3 Va L Rev 515 at 518.

71 See *Locking*, *supra* note 1 at para 9.

which seems, all things being equal, to confer upon them standing to enforce its terms.

We are unpersuaded by one argument that the plaintiffs advanced in *Locking*, and that Justice Belobaba held was worthy of trial. The plaintiffs claimed that the unitholders in the present case were not suing for harms to the trust, but rather for their personal losses in the diminution in value of their units caused by wrongdoing. This reasoning does not distinguish the present context from the situation in *Foss v. Harbottle*. If a director engaged in self-dealing with a corporation, it is clearly possible that this would have a negative impact on the value of shares. But *Foss v. Harbottle* held that this does not imply that shareholders have a personal right to sue; rather, their harm derives from the harm to the corporation, and it is the corporation that must sue.[72] Of course, it might be said that there cannot be harm to a trust because the trust does not exist, and hence unitholders can sue, but this is the distinct argument that was outlined above.

III. Future Directions

There is confusion about the relationship between the corporate form and income trusts, with some describing an income trust as a hybrid, or "quasi-corporate" investment vehicle.[73] Income trusts are indeed trusts in the traditional sense, with settlors, trustees and beneficiaries. Nevertheless, income trusts behave in many ways like a corporation, given that they can be listed on the stock exchange and are obliged to comply with the same disclosure obligations that apply to all public corporations. In addition, income trusts have investors who purchase their securities (units) on the secondary market. They are not, however, subject to corporate law and their governance is set forth in a DOT, not in corporate statutes. Yet DOTs are often drafted to mimic corporate law, and even incorporate certain sections of corporate statutes through specific reference. In this context, it is unsurprising that ambiguity and confusion arise with respect to the distinctions between income trusts and corporations.

As part of our research for this case comment, we spoke with senior practitioners who have drafted DOTs and were involved in the listing of income trusts on public markets. Some of these practitioners suggested that the drafting of DOTs seems to have occurred in an ad hoc manner.

---

72 See *Foss*, *supra* note 18 at 492–93.

73 See *Rio Tinto Canadian Investments Ltd v Bone*, [2001] OJ No 2440 (QL) at paras 15–16, 106 ACWS (3d) 443 (Ont Sup Ct), aff'd 41 ETR (2d) 283, 107 ACWS (3d) 1130 (Ont CA) (where Justice Farley refers to the trust being "modeled" upon a corporate enterprise and it being "quasi-corporate").

One lawyer explained that the original trust indentures were often modelled on bond indentures but as the income trust era unfolded, institutional investors began asking for more corporate-like rights and remedies for unitholders, such as oppression, derivative actions, and dissent remedies, and lawyers began to respond accordingly in their drafting of DOTs. Another lawyer suggested that the drafting may have occurred without thought given to the legal differences between trusts and corporations.

In light of the variation in the range of terms employed in DOTs and the lack of conceptual clarity relating to the legal implications of using certain terms, it is unsurprising that there have been efforts to develop a model, or uniform, set of provisions. For example, the Canadian Coalition for Good Governance (CCGG), whose members manage three trillion dollars in assets on behalf of Canadian pension funds, mutual fund unitholders, and other investors, has released two versions of a model income-trust DOT. In both versions, the CCGG recommends that unitholders have the same rights and remedies as shareholders of public companies "to the extent legally possible given the differences in legal form," including dissent and appraisal rights, and access to the oppression remedy. It also recommends that trustees owe a duty of care to *both* the trust and the unitholders.[74]

The CCGG's model DOT bears similarity to the REALpac *Canadian REIT Handbook* which states that "the duties of trustees of a REIT mirror the duties of directors of a public corporation."[75] The original edition of the *Canadian REIT Handbook*, in turn, refers to a policy (which is no longer in force) of the Ontario Securities Commission regarding public REITs which stated that "the declaration of trust shall include an undertaking to exercise the powers and discharge the duties of his office honestly, in good faith and in the best interests *of the issuer*."[76] Yet, the force of the provision seems to be undermined somewhat by a subsequent provision in the

---

74 Canadian Coalition of Good Governance, "Model Declaration of Trust Provisions" (10 December 2007), online: CCGG <www.ccgg.ca/site/ccgg/assets/pdf/Covering_Memo_and_CCGG_s_Draft_Model_Declaration_of_Trust_Provisions.pdf>; Canadian Coalition of Good Governance, "Model Declaration of Trust Provisions" (November 2015) at 1, online: CCGG <www.ccgg.ca/site/ccgg/assets/pdf/finalized_model_dot_policy__merged__.pdf>.

75 Goodmans LLP, *The Canadian REIT Handbook*, (Toronto: REALpac, 2010) (loose-leaf updated 2014) at para 702 [*Canadian REIT Handbook*]. The Real Property Association of Canada, or REALpac, is a Canadian industry association for owners and managers of investment real estate whose organizations each hold assets in excess of $100 million. Its members include some of Canada's largest REITs, including RioCan REIT, H & R REIT, Boardwalk REIT and Allied Properties REIT. Partners REIT is also a member of REALpac.

76 McCarthy Tétrault, *Annotated Ontario Securities Legislation*, 25th ed (Toronto: CCH Canadian Limited, 2006) at 2531 [emphasis added].

Canadian REIT Handbook which states that "[t]rustees commit a breach of trust if they violate any duty that they owe as trustees *to the beneficiaries*."[77] Breach of fiduciary duty and breach of trust claims may be separate legal concepts, but they both give rise to practical difficulties when interpreting DOTs.

Model DOTs that contain a dual duty can lead to confusing legal interpretations and outcomes. In particular, if the terms of a DOT are litigated, the approach to be taken by the relevant court will be uncertain to the parties. Indeed, as the foregoing analysis suggests, we are unable to determine some key principles for which *Locking* stands and the bases on which it would be used as precedent given the lack of conceptual clarity in the case. We further question the usefulness of model DOTs and "handbooks" that do not reflect a full understanding of the legal principles underpinning trusts, as opposed to corporations. To the extent that those drafting DOTs rely on these documents, they can also contribute to ambiguity regarding the appropriate legal principles at play in the DOT.

Conclusion

Locking illustrates a struggle in case law and in the drafting of DOTs in attempting to find an appropriate balance between the principles of trust law as they apply to a corporate-like (or business) entity. Our data sets show a trend among REITs, which increasingly employ corporate law duties in formulating the duties of trustees—an approach that finds some support in the *Locking* judgment. Yet, this approach represents a fundamental misunderstanding of the law that, in our view, should be avoided. We favour greater clarity in the drafting of DOTs, which should reflect an understanding that corporate law fiduciary duties, particularly as understood in *BCE*, should not ground trustees' duties. The responsibility ultimately rests with lawyers who draft DOTs and with judges who interpret them when litigation arises. Clarity in drafting DOTs is fundamental to protecting investors' rights not only when the trust initially goes public but also when its units trade in the secondary market. Simply importing corporate law fiduciary duties into the DOT undermines the certainty on which DOTs, and thus the income trust market generally, should operate.

---

77 *Canadian REIT Handbook*, *supra* note 75 at para 2.60702 [emphasis added].