

CORPORATE SOCIAL RESPONSIBILITY: A CANADA—U.S. COMPARATIVE ANALYSIS

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I. INTRODUCTION

THE TRADITIONAL CONCEPT OF THE CORPORATION is that its single purpose is shareholder wealth maximization. Any other form of corporate altruism plays no role in the traditional corporation unless it directly relates to an increase in the company's profits. This article examines the corporate law structure of the United States and Canada to determine if there is a legal obligation for a corporation to be "socially responsible" by acting in the best interest of non-shareholders. I begin by introducing the concept of corporate social responsibility, and then present the legal theory underlying corporate social responsibility. I then compare and contrast the corporate law structure found in the United States and Canada to reveal if corporate law mandates corporate social responsibility.¹

Corporate social responsibility is a debate about whether corporations should have a wider responsibility to stakeholders, other than shareholders, such as customers, consumers, and employees.² Corporate social responsibility has been defined as spending corporate funds, at the discretion of corporate management, on doing "good works" for the community or as refraining from

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¹ In Canada, this topic of debate is categorized under the title "corporate governance," while in the United States, it is referred to as "corporate social responsibility." "Corporate governance" is a broad term that deals with the nature and extent of directors' and managers' responsibilities to the company itself and to shareholders. See C.M. Slaughter, "Corporate Social Responsibility: A New Perspective" (1997) 18 *The Company Lawyer* 313 at 313.

² *Ibid.*

doing “bad works.”³ It has also been described as denoting the “obligations and inclinations, if any, of corporations organized for profit, voluntarily to pursue social goals that conflict with their presumptive shareholder desire to maximize profit.”⁴

The traditional view of the corporate form of business is that shareholder interests are the primary and sole concern of the directors.⁵ In a corporation, shareholders contribute capital to the corporation and are viewed as its “owners.” Shareholders elect directors to run the daily affairs of the corporation. Directors manage the corporation, and because of the discretion given to them to manage a corporation, the directors in turn owe fiduciary duties to the corporation.⁶ The traditional view of corporate law is that corporate law’s objective is to formulate legal structures that will maximize shareholder wealth.⁷ The claims of stakeholders whose interests may be adversely affected by this are disregarded.⁸ Professor Berle of Harvard Law School reiterated the shareholder primacy view when he stated that:

³ B.J. McCabe, “Are Corporations Socially Responsible? Is Corporate Social Responsibility Desirable?” (1992) 4 Bond L. R. 1 at 2.

⁴ *Ibid.*

⁵ As early as 1883 in the decision of *Hutton v. West Cork Railway Company* (1883), 23 Ch. 654 at 673, Bowen J. illustrated the traditional shareholder primacy norm when he stated that “[t]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.” In the United States, the classic statement on corporate social responsibility is articulated in *Dodge v. Ford Motor Co.*, 204 Mich. 459; 170 N.W. 668 at 684 (Mich. Sup. Ct. 1919). The majority shareholder, Henry Ford, wanted the company to retain profits in order to lower the price of automobiles and thus make them accessible to a greater number of people. The Dodge brothers (minority shareholders), challenged this decision. The court was critical of Mr. Ford’s efforts to use the company to further social goals:

A business corporation is organized and carried on primarily for the profit of the stockholders ... [t]he discretion of directors ... does not extend ... to the non-distribution of profits among stockholders in order to devote them to other purposes ... it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefitting others ...

⁶ McCabe, *supra* note 3 at 4.

⁷ D. Millon, “Communitarians, Contractarians, and the Crisis in Corporate Law” (1993) 50 Wash. & Lee L. Rev. 1373 at 1374.

⁸ *Ibid.* Professor Millon further clarifies this point by further stating that “nonshareholder interests, if entitled to any legal protection at all, are for other, noncorporate law legal regimes.”

[A]ll powers granted to a corporation or to the management of a corporation ... are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.⁹

Professor Dodd, also of Harvard Law School, disagreed with Professor Berle and by so doing, sparked a debate on the topic of corporate social responsibility. Professor Dodd argued in favour of corporate social responsibility, believing that managerial powers were held in trust for the entire community, and not just for shareholders:

[P]ublic opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function...¹⁰

Professor Berle responded that one could not abandon the shareholder primacy view “until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.”¹¹ This classic debate reflects the two underlying corporate legal theories in the corporate social responsibility controversy: the contractarian and communitarian theories.

Shareholder primacy is the traditional view of contractarians and has been corporate law’s governing norm for most of the 20th century.¹² Communitarians believe that this norm should be reformed to include non-shareholder constituents.

Contractarians do not believe in corporate social responsibility. They view the corporation simply as a nexus of contracts, or a series of bargains between management, shareholders, employees, creditors, and other stakeholders.¹³ The respective rights and duties of the parties to the contracts are defined either through *ad hoc* bargaining—for example, collective bargaining agreements—or through acceptance of standard form provisions—for example, corporate statutes.¹⁴ Stakeholders are then left to negotiate with shareholders—through their agents—*ex ante* for protection from the social costs of shareholder wealth

⁹ A.A. Berle, “Corporate Powers as Powers in Trust” (1931) 44 Harv. L. Rev. 1049 at 1049.

¹⁰ E.M. Dodd, “For Whom Are Corporate Managers Trustees?” (1932) 45 Harv. L. Rev. 1145 at 1148.

¹¹ A.A. Berle, “For Whom Corporate Managers Are Trustees: A Note” (1932) 45 Harv. L. Rev. 1365 at 1367.

¹² Millon, *supra* note 7 at 1374.

¹³ W.S.W. Leung, “The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests” (1997) 30 Colum. J.L. & Soc. Probs. 587 at 592.

¹⁴ D. Millon, “Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security” (1998) 146 U. Pa. L. Rev. 975 at 977.

maximization.¹⁵ Thus, stakeholders may negotiate and pay for protection of their interests. For example, contractarians argue that employees can negotiate job security if they desire it.¹⁶ In the contractarian view, considering and improving any non-shareholder interest is illegitimate because it interferes with private bargaining.¹⁷ This individualistic stance reveals that contractarians are opposed to legal rules that prescribe authority over corporate relationships.

In contrast, communitarians believe that corporations have a duty to stakeholders in addition to duties mandated to shareholders. Communitarians view the corporation as a community of interrelated, interdependent constituencies.¹⁸ The corporation is regarded as a community of interests embracing more than just shareholders and managers. Corporations are viewed as "powerful institutions whose conduct has substantial public implications."¹⁹ Consequently, communitarians believe that corporate law activity must confront the harmful effects on stakeholders that shareholder wealth maximization produces. Specifically, communitarians are concerned with the non-shareholder vulnerability to the social costs of shareholder primacy. Communitarians view social responsibility as encompassing many areas including general charitable giving, contributions toward the community and the environment, behaviour toward employees and suppliers, and behaviour toward consumers.²⁰

Advocates of corporate social responsibility support ensuring proper legal structures to solve this vulnerability. Communitarians are skeptical of the practicality of using contracts to solve this vulnerability for several reasons.²¹ First, some kinds of harmful conduct may be difficult to foresee and specify adequately in contract provisions. Second, it may be difficult practically to coordinate bargaining efforts between similarly situated stakeholders.

The ideological differences between contractarians and communitarians reflect a profound difference in the normative world view.²² Contractarians believe that individuals should be free to make their own choices about how to live with minimum legal interference. Articulated simply, communitarians be-

¹⁵ *Ibid.* at 978.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 979.

¹⁸ *Ibid.* at 976. Professor Millon comments that the term "communitarian" seems to have originated as a pejorative designation created by defenders of the shareholder primacy status quo.

¹⁹ Millon, *supra* note 7 at 1379.

²⁰ Slaughter, *supra* note 1.

²¹ Millon, *supra* note 7 at 1379.

²² *Ibid.* at 1382.

lieve that because individuals are members of a community, they therefore owe obligations to each other that exist independently of contract:

[I]nsisting on the market's sufficiency for the sake of individual liberty therefore ignores those civic obligations that flow from the social aspect of human existence. To communitarians, life chances should not depend entirely on accidents of birth and bargaining power: people are entitled to more out of life than what they can pay for.²³

An analysis of the corporate law framework found in the United States and Canada will reveal which ideology best exemplifies the current corporate climate in each respective country.

II. CORPORATE LAW FRAMEWORK

A. United States

Currently in the United States, individual states are responsible for delineating the rights and duties of businesses that choose to incorporate within their jurisdiction. A federal business corporations statute does not exist in the United States. This has led to a charter market competition among the individual states; that is, a competition to entice incorporators to incorporate in a particular state.²⁴ This competition has been referred to as "a race to the bottom," where individual states are viewed as competing to provide managers of corporations with special benefits.²⁵ To remedy this problem, it has been suggested that a federal corporate law regime should be enacted to level the playing field.²⁶ The charter market competition has also been referred to as a "race to the top" where the market ensures efficient administration, eliminating the need for a federal business corporations law.²⁷

The state of Delaware incorporates most of the public companies in the United States.²⁸ The pre-eminent corporate statute is the *General Corporation*

²³ *Ibid.* at 1383.

²⁴ R.J. Daniels & E. J. Waitzer, "Challenges to the Citadel: A Brief Overview of Recent Trends in Canadian Corporate Governance" (1994) 23 *Can. Bus. L.J.* 23 at 28.

²⁵ W.W. Bratton, "Corporate Law's Race to Nowhere in Particular" (1994) 44 *U.T.L.J.* 401 at 401.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ K.G. Ottenbreit & J. E. Walker, "Learning From the Delaware Experience: A Comparison of the Canada Business Corporations Act and the Delaware General Corporation Law" (1998) 29 *Can. Bus. L.J.* 364 at 366. Approximately 60% of the United States companies that comprise the Fortune 500 are incorporated in Delaware.

Law of the State of Delaware ("DGCL").²⁹ Delaware's highly specialized legislature and Court of Chancery create a vast body of corporate judicial precedents that serve as a model for the rest of the United States.³⁰ Delaware continues to retain separate jurisdictions for law and equity, and the Court of Chancery's equitable jurisdiction allows timely resolution of corporate disputes containing an equitable content, including claims of breach of fiduciary duty.³¹

The DGCL is based on an "enabling/board of directors" model which gives management considerable flexibility in running the affairs of a corporation.³² In the United States, the Delaware Supreme Court has held that the board of directors has the ultimate responsibility for managing the affairs of the corporation and owes fiduciary duties of care and loyalty to the corporation and its shareholders.³³ However, the courts moderate the fiduciary duty by means of the business judgment rule.³⁴ Under this rule, the courts defer to the directors' expertise with respect to corporate business decisions and will not attempt to second guess those decisions. The specialized judiciary in Delaware interprets the business judgment of directors, and consequently a strong body of case law has developed in Delaware interpreting the business judgment rule. The onset of the hostile corporate takeover phenomenon of the 1980's, however, led to a renewed interest in corporate social responsibility.

In the 1980's, the United States experienced an unprecedented number of hostile takeovers and as a result the Delaware Supreme Court reviewed the directors' fiduciary duties to shareholders and to stakeholders in the takeover setting.

At the start of the takeover phenomenon, courts applied the business judgment rule to hostile takeovers in the same way they applied the rule to ordinary

²⁹ Del. Code Ann. (West 1996) [hereinafter DGCL].

³⁰ See M.B. Trofimenko & C.S. Mulholland, "Delaware, U.S.A.: Home, Sweet Corporate Home" (1995) 1 Can. Inter. Lawyer 218 at 219. The influence of Delaware is strong. For example, the state of Nevada enacted corporate law similar to that found in Delaware. Several state courts look to the decisions of the Delaware Supreme Court and the Court of Chancery when interpreting statutes in their own jurisdiction. The Chancellors that adjudicate in the Chancery Court are experts in corporate law, and their many detailed decisions create a high degree of predictability that help attract corporations to Delaware.

³¹ Ottenbreit & Walker, *supra* note 28 at 384.

³² *Ibid.* Under this model, the DGCL encourages parties to structure their own affairs and contract without government interference.

³³ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A. 2d 173 (Del. Sup. Ct. 1986) [hereinafter *Revlon*].

³⁴ H.F. Jordaan, "A Comparative Analysis of Corporate Fiduciary Law: Why Delaware Should Look Beyond the United States in Formulating a Standard of Care" (1997) 31 Int'l Lawyer 133 at 139.

business transactions.³⁵ However over time, courts modified the application of the rule to fit the hostile takeover setting. The two Delaware Supreme Court cases that modified the business judgment rule are *Unocal Corporation v. Mesa Petroleum Co.*³⁶ and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*³⁷

In *Unocal*, the court stated that a corporation's decision to take a defensive measure to a hostile takeover may include an analysis of the impact on "constituencies" other than shareholders—*i.e.*, creditors, customers, employees and perhaps even the community generally.³⁸ The court in *Revlon* then modified *Unocal* by holding that "a board may have regard for various constituencies ... provided there are rationally related benefits accruing to the stockholders."³⁹ The current law in Delaware is that the shareholder primacy norm prevails in that directors may generally act only to benefit shareholders; however if shareholder and stakeholder interest's conflict, then the interests of shareholders must receive priority.⁴⁰

In contrast to Delaware's response to hostile takeovers, other states responded to hostile takeovers by enacting "anti-takeover statutes," often at the request of managers hoping to protect their control of corporations. One type of anti-takeover statute adopted by state is called a "constituency statute."⁴¹ Constituency statutes set out whose interests a corporate board of directors may consider in making decisions, and they may be permissive or mandatory in nature. Approximately half of the states have adopted permissive constituency statutes, and one has adopted a mandatory constituency statute.⁴²

³⁵ M.A. O'Connor, "Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers" (1991) 69 N.C. L. Rev. 1189 at 1224.

³⁶ 493 A.2d 946 (Del. Sup. Ct. 1985) [hereinafter *Unocal*].

³⁷ *Revlon*, *supra* note 33.

³⁸ *Unocal*, *supra* note 36 at 955.

³⁹ *Revlon*, *supra* note 33 at 182.

⁴⁰ Leung, *supra* note 13 at 613.

⁴¹ *Ibid.* at 614. These statutes are also commonly referred to as "other constituency statutes."

⁴² *Ibid.* at 613. Leung comments that the state of Connecticut enacted a mandatory constituency statute, which mandates that corporate boards must consider the interests of other constituents (including employees, customers, creditors, suppliers, community and societal interests). Conn. Gen. Stat. Ann. 33-313(e) (West 1996). However this mandatory directive (section 33-313(e)) has been repealed effective January 1, 1997; see 1994, P.A. 94-186, s.83, eff. Jan. 1, 1997; 1996, P.A. 96-271, s.61, eff. Jan. 1, 1997. This suggests that any trend toward mandatory stakeholder protection has been curbed.

The permissive statutes vary in the amount of discretion granted to boards to consider non-shareholder interests.⁴³ Some limit the discretion to situations involving changes of control and substantial sales of corporate assets while others grant the discretion within the general duties of a director. For example, the Indiana constituency statute states that:

A director may, in considering the best interests of a corporation, consider the effects of any action on shareholders, employees, suppliers, and customers of the corporation, and communities in which offices or other facilities of the corporation are located, and any other factors the director considers pertinent.⁴⁴

The enactment of constituency statutes in the United States can therefore be regarded as a departure from the shareholder wealth maximization norm.

Whether the development of constituency statutes adequately protects non-shareholder constituents, however, is questionable. These statutes are criticized as ineffective or counterproductive for the advancement of non-shareholder interests for the following five reasons.⁴⁵ First, the permissive nature of the permissive statutes means that the consideration of stakeholder interests is discretionary. Consequently directors can easily ignore their interests. Second, these statutes are not enforceable. There is no remedy for a failure to consider stakeholder interests. Third, the term "stakeholder" is not clearly defined. General terms such as "customers" or "community" are ambiguous and there is no guidance to define them. Fourth, these statutes may be abused by boards seeking to entrench themselves. Directors may hide behind vague duties to conflicting groups to serve their own interests; too much discretion is conferred without assigning any corresponding responsibility.⁴⁶ Almost any corporate action can be justified as in the interest of some constituency.⁴⁷ Fifth, the legislation does not explain why directors should have responsibilities to various constituencies, nor does it provide standards for assigning relative weights to the constituents.

It is clear that constituency statutes have succeeded in rekindling the corporate social responsibility debate. Advocates for corporate social responsibility would argue that these statutes assuredly do have the potential for providing a measure of relief for some stakeholders. They may be used as a basis for judicial intervention on the theory that because they:

⁴³ *Ibid.* at 614.

⁴⁴ Ind. Code Ann. 23-1-35-1 (d) (Michie 1995).

⁴⁵ *Ibid.* at 617–619.

⁴⁶ *Ibid.*

⁴⁷ J.W. Singer, "Jobs and Justice: Rethinking the Stakeholder Debate" (1993) 43 U.T. L. J. 475 at 500.

[A]fter the basic foundations of corporate law ... provide courts with the inherent legitimacy of legislative approval by explicitly acknowledging non-shareholder interests in the corporation ... and signify a broad social consensus to acknowledge the non-contractual expectations of various non-shareholder constituents."⁴⁸

Although constituency statutes may indeed at first glance suggest a new direction for the corporation, they have in fact not succeeded in eradicating the traditional shareholder wealth maximization norm in the United States. They have failed to change the corporate law framework into one that mandates legally enforceable stakeholder interests in corporate decision making.

In the 1990's, the concept of corporate welfare in the United States received widespread publicity and as a result the concept of corporate social responsibility was again a subject of debate. "Corporate welfare" has been defined as "any action by local, state, or federal government that gives a corporation or an entire industry a benefit not offered to others" in order to create jobs.⁴⁹ Examples of benefits are subsidies, grants, loans, tax breaks, or government service. Proliferation of corporate welfare has given the judiciary another opportunity to prioritize the interest of shareholders and stakeholders.

In the case of *Charter Township of Ypsilanti v. General Motors Corporation*,⁵⁰ the General Motors Corporation ("General Motors") operated two plants in Ypsilanti, Michigan. In 1984, General Motors requested a 12 year, 50 percent abatement of personal property taxes on the corporation's \$175 million dollar investment in the production of a new car. In 1988, General Motors requested the same abatement terms for a \$75 million investment to build a new vehicle, the Chevrolet Caprice. Public hearings were held and General Motors' requests were approved. The authority to do so came from a Michigan statute that authorizes municipalities to establish industrial development districts to encourage the creation and maintenance of jobs in the state.⁵¹ The statute provides for exemptions for businesses that meet the requirements of the statute.

In 1991 General Motors announced that it would consolidate the work being done in Willow Run with a plant at Arlington, Texas, resulting in job losses in Michigan. The reasons given for this decision were the company's record losses and the low sales figures for the Caprice. The township, county, and state jointly sued General Motors for breach of contract created by the tax abatement

⁴⁸ O'Connor, *supra* note 35 at 1231-2.

⁴⁹ D.L. Barlett & J.B. Steele, "Corporate Welfare" *Time Magazine* 152:19 (November 9, 1998) 30 at 32. The term "economic development" is often associated with the corporate welfare topic.

⁵⁰ 1993 WL 132385 (Mich. Circ. Ct. 1993), 201 Mich. App. 128, 506 N.W.2d 556 (Mich. Ct. App. 1993) [hereinafter *Ypsilanti* cited to Mich. App.].

⁵¹ M.C.L. s. 207.559(2)(e); M.S.A. s. 7.800(9)(2)(e).

statute, breach of contract created by conduct, promissory estoppel, unjust enrichment, and misrepresentation.

The trial court held in favour of the township, a victory for the employee-stakeholder. The court found that the tax abatement statute did not create a contract between the township and the corporation. However, he did find that the corporation was bound by promissory estoppel to retain production of the Caprice line in Willow Run, as long as the company produced the model. This finding was based on the Willow Run plant manager's statement made at the public hearing for the tax abatement. The plant manager, and thus by extension the corporation, stated that "upon completion of this project and favorable market demand ... [General Motors would] continue production and maintain continuous employment for our employees."⁵²

On appeal by General Motors, the Michigan Court of Appeals reversed the trial decision and allowed the appeal. It was reversed on the basis that the trial judge was clearly erroneous in finding that a promise was made by General Motors to keep Caprice production at Willow Run. Clulo, J. decided in favour of General Motors for the following reasons. First, the mere solicitation of a tax abatement cannot be evidence of a promise. Second, representations of job creation and retention are a statutory prerequisite. Third, the fact that a manufacturer uses "hyperbole and puffery" in seeking an advantage or concession does not necessarily create a promise. The court thus concluded that it has never been held that an abatement carries a promise of continued employment.

In spite of the constituency statutes which opened the door to stakeholder rights in corporate decision making in the United States, this case reflects the state of current corporate law in the United States: the contractarian view prevails and the shareholder primacy norm continues to reign supreme in corporate law.

B. Canada

By contrast to the United States, Canada's corporate law structure features a federal business corporations statute, the *Canada Business Corporations Act* ("CBCA"),⁵³ in addition to provincial corporate statutes.⁵⁴ A comparable leading corporate jurisdiction such as Delaware does not exist in Canada. Corpora-

⁵² *Ypsilanti*, *supra* note 50 at 133.

⁵³ R.S.C. 1985, c. C-44 [hereinafter CBCA]. This statute was modeled on American precedents, and therefore the content is similar: see Daniels & Waitzer, *supra* note 24 at 28, footnote 21.

⁵⁴ Ottenbreit & Walker, *supra* note 28 at 374. Ottenbreit and Walker state that one reason to incorporate in a provincial statute instead of the CBCA is to avoid "the additional layer of regulation, especially in such areas as insider reporting and insider trading, takeover bids and going-private transactions."

tions do not race to the top, nor to the bottom, in Canada; provincial charter competition does not exist as vigorously as it does at the state level in the United States.⁵⁵

Canada does not have a specialized judiciary in corporate law comparable to Delaware. Canada's lack of specialization in corporate law produces many effects, mostly negative:

The predictable effect of weak specialization is underdeveloped corporate law infrastructure, strikingly manifested in the lack of specialized corporate/commercial courts, scant judicial precedent, shallow legislative interest in corporate/commercial matters and sluggish rates of legislative innovation.⁵⁶

One of the most important differences between the American corporate law structure and the Canadian corporate law structure is the implicit corporate model upon which the DGCL and the CBCA are predicated. The DGCL is based on an "enabling/board of directors model" and the CBCA is based on a "minimum standards/shareholder based model."⁵⁷ Under the CBCA's shareholder based model, substantive regulation and corporate structure are viewed as the best means of controlling corporate conduct.⁵⁸ This differs from the DGCL model where directors are afforded more discretion in their conduct.

Another significant difference between American corporate law structure and Canadian corporate law structure is that under Canadian law is that a majority shareholder is not considered to be a fiduciary toward the minority shareholder.⁵⁹ This is a significant departure from the law in the United States, where it is clear that a majority shareholder owes a fiduciary obligation to minority

⁵⁵ Bratton, *supra* note 25 at 407. Bratton explains the absence of a provincial charter competition as being due to many factors, among them: a lack of incentive to compete, authority-sharing arrangements among the provinces; the corporate governance authority of provincial securities administrators, and the Supreme Court of Canada's jurisdictional authority over the provinces. See also R.J. Daniels, "Should Provinces Compete? The Case for a Competitive Corporate Law Market" (1991) 36 McGill L.J. 130.

⁵⁶ Daniels & Waitzer, *supra* note 24 at 29. The CBCA is amended on an *ad hoc* basis, whereas the DGCL is amended annually, which supports the conclusion that corporate law reform is sluggish in Canada: see Ottenbreit & Walker, *supra* note 28 at 375.

⁵⁷ Ottenbreit & Walker, *supra* note 28 at 369.

⁵⁸ *Ibid.* Currently, the CBCA requires a majority of directors of a CBCA corporation to be Canadian residents. Recent proposed amendments to the CBCA reveal a relaxation of the corporate director residency requirements: see Bill S-19, *An Act to amend the Canada Business Corporations Act and the Canada Cooperatives Act and to amend other Acts in consequence*, 2d Sess., 36th Parl., 2000 (2d reading 6 April 2000).

⁵⁹ *Brant Investments Ltd. v. KeepRite Inc.* (1991), 80 D.L.R. (4th) 161 at 171 (Ont. C.A.).

shareholders.⁶⁰ It was this lack of a clearly developed fiduciary obligation from majority to minority shareholders in Canada that prompted the adoption of the “oppression remedy” in s. 241 of the CBCA.⁶¹

The oppression remedy allows “complainants”—defined in s. 238(d) of the CBCA as shareholders and various non-shareholders—to bring an action against a corporation on the basis that action taken in respect of a corporation or its affiliates oppresses, unfairly disregards or is unfairly prejudicial towards a security holder, creditor, director, or officer.⁶² No parallel section exists in the DGCL. This deviation illustrates that in contrast to the DGCL, the Canadian policy choice takes into account both shareholder and stakeholder rights.⁶³ Further, Professor DeMott argues that the oppression remedy in s. 241 of the CBCA “expressly recognizes the interests of non-shareholders as interests appropriately vindicated through oppression legislation.”⁶⁴ There are no constituency statutes in Canada parallel to the anti-takeover statutes in the United States.

The degree of deference accorded decisions of securities regulators signifies another difference between the corporate law framework. Securities regulation in the United States occurs at both the federal and state levels, and there is a clear separation between corporate law and securities law.⁶⁵ In Canada, securities law and corporate law have become “inexorably intertwined.”⁶⁶ In Canada,

⁶⁰ D.A. DeMott, “Oppressed But Not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Shareholders and Other Corporate Constituents” (1993) 56 *Law and Contemp. Probs.* 181 at 183. See also Jordaan, *supra* note 34 at 160, where it is suggested that the conservatism of Canadian judges and the lingering influence of English law explain why Canadian courts have not imposed a fiduciary obligation on majority shareholders.

⁶¹ Daniels & Waitzer, *supra* note 24 at 32.

⁶² Ottenbreit & Walker, *supra* note 28 at 374. The focus on the Canadian oppression remedy is on a concept of “fairness” which is undefined in the CBCA.

⁶³ *Ibid.* at 375. In the United States the closest parallel is the derivative action in the traditional breach of fiduciary context.

⁶⁴ DeMott, *supra* note 60 at 185, 220, 221. Professor DeMott argues that the consequences of the Canadian oppression remedy are that it affords a statutory basis within corporate law for the litigation of claims that are treated as matters for private contract in the United States; it leads to fuller and duller lines of demarcation than does analysis using contractual or fiduciary norms and in essence because it frustrates attempts to define entitlements in advance; and it reflects an egalitarian norm that equates shareholder interests with those of non-shareholder constituents.

⁶⁵ P. Moyer, “The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States” (1997) 55 *U.T. Fac. L. Rev.* 43 at 48.

⁶⁶ *Ibid.* at 46.

much less discretion is left in the hands of private parties and their legal advisors, instead, administrative directives are relied upon to a greater extent in Canada.⁶⁷ The regulatory framework of the CBCA and the provincial securities laws reveals an overlap of regulation that does not exist to the same degree in the United States.⁶⁸ The well publicized takeover attempt of the Canadian national airline "Air Canada" in 1999 illustrates the prominent role given to government in Canada to define the parameters of conduct and illustrate the tension between shareholder and stakeholder interests.

In 1999 two major national airlines operated in Canada: Air Canada ("Air Canada") and Canadian International Airlines Ltd. ("Canadian Airlines"). The Canadian federal government's airline policy in the last decade has been to ensure that the two national airlines survived, and this objective was carried out in the form of "corporate welfare": government debt forgiveness, tax rebates, loan guarantees, and selective allocation of landing rights.⁶⁹

All airlines operating in Canada are subject to a 25% foreign ownership restriction.⁷⁰ Air Canada was privatised in 1988 and is subject to the *Air Canada Public Participation Act*, which disallows any one person or persons acting together from owning or controlling more than 10 per cent of the voting shares ("10 per cent rule").⁷¹

⁶⁷ DeMott, *supra* note 60 at 210. The discretion of the securities administrator is relied upon in Canada whereas in the United States, the court is relied upon. For a detailed analysis comparing securities regulation in the two countries see DeMott, *ibid.* at 210-212.

⁶⁸ Ottenbreit & Walker, *supra* note 28 at 368.

⁶⁹ M. Ingram, "Airline Mess is Smoke and Mirrors" *The Globe and Mail* (2 November 1999) B2. Ingram states that these are examples of the Canadian federal government's misguided attempts to maintain competition between the two national airlines, and the result is "to have one airline barely making ends meet and the other stumbling from bailout to bailout".

⁷⁰ See also the *Canada Transportation Act* S.C. 1996, c. 10. Proposed amendments to this Act can be located at Bill C-26, *An Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act, and the Air Canada Public Participation Act and to amend another act in consequence*, 2d Sess., 36th Parl., 2000 (as passed by the House of Commons, May 15, 2000).

⁷¹ R.S.C. 1985 (4th Supp.), c. 35, s. 6(1)(a). Amendments to this Act have increased the limit to 15%: see Bill C-26, *ibid.*, The Parliamentary debates prior to the enactment of the *Air Canada Public Participation Act* illustrate the government's objective: "We want as a Government to make sure that the shares are widely held, that they do not fall into the hands of a small group of people, and that they stay in Canadian hands. This legislation specifies restrictions on the ownership of the shares, and I think that makes sense. No one can own more than 10 per cent of the shares. Total non-resident ownership is being restricted to no more than 25 percent of issued voting shares ..." House of Commons Debates (13 July 1988) at 17516 (Jim Hawkes).

Concerned with the ongoing precarious financial position of Canadian Airlines, the federal government of Canada on 13 August 1999 issued an order pursuant to s. 47 of the *Canada Transportation Act*⁷² suspending the operation of the *Competition Act*⁷³ for 90 days. This order allowed Air Canada and Canadian Airlines to legally negotiate a restructuring of the airline industry for a period of 90 days without being subject to a merger review during that time period.

On 24 August 1999, Canadian buyout specialist Onex Corporation ("Onex"), through its corporate vehicle Airline Industry Revitalization Co. Inc. ("AirCo"), announced a plan to takeover Air Canada and merge it with Canadian Airlines.⁷⁴

AirCo requisitioned the directors of Air Canada to call a Special Meeting of the shareholders no later than 8 November 1999 to consider its offer.⁷⁵ Air Canada refused, forcing AirCo to obtain a court order to enforce its request.⁷⁶

On 20 September 1999 Air Canada's Board of Directors recommended rejection of AirCo's offer and commenced injunction proceedings before the Quebec Superior Court (Civil Division).⁷⁷ Air Canada sought a declaration that AirCo's offer was illegal because, if AirCo's bid was successful, then AirCo would own more than ten per cent of the shares in contravention of the *Air Canada Public Participation Act* ten per cent rule. AirCo's acquisition mechanism involved purchasing all Air Canada common shares; converting the deposited shares into Class "B" shares with no right to elect directors; electing a new Board of Directors chosen by AirCo; and converting the deposited shares into Special Class "B" Voting Shares, which would not have voting rights to elect directors, but which would then be convertible back into common shares with no restrictions on voting rights.⁷⁸

AirCo argued that their offer would not contravene the ten per cent rule because the Special Class "B" shares would never be converted back into common shares in excess of the ten per cent rule unless and until Parliament raised

⁷² S.C. 1996, c. 10, s. 47.

⁷³ R.S.C. 1985, c. C-34.

⁷⁴ Canadian Airlines and its U.S. partner AMR Corp., supported the Onex bid. AMR Corp., the parent of American Airlines.

⁷⁵ [1999] Q.J. No. 4880 at para. 8 (Q.S.C. Civ. Div.) online: QL (Q.J.), [1999] R.J.Q. 2912 [hereinafter cited to Q.L.].

⁷⁶ *Airline Industry Revitalization Co. v. Air Canada* (1999), 178 D.L.R. (4th) 740, [1999] O.J. No. 3581 (Ont. Sup. Ct.) online: QL (O.J.) [hereinafter *Air Canada*]. The court held that the requisition met the requirements of section 143 of the *Canada Business Corporations Act* and that AirCo was entitled to call the requisition meeting.

⁷⁷ *Air Canada, ibid.*

⁷⁸ *Ibid.* at para. 56.

the ten percent limit.⁷⁹ AirCo was relying on Parliament to lift the ten per cent rule, although its offer was not conditional upon it.⁸⁰ Air Canada argued that AirCo's offer was nonetheless illegal because it enabled it to accomplish what s. 6(1)(a) of the *Air Canada Public Participation Act* prohibits.⁸¹

While the court deliberated the merits of the arguments, the progression of the hostile takeover attempt was revealed in the Canadian print media in a public display unprecedented in Canada. Numerous successive full page advertisements placed by Air Canada and Onex in the Canadian national newspapers revealed the strategy behind the attacks and counter-attacks in the race to attract shareholders.⁸²

Air Canada's defence included a well advertised counter-offer,⁸³ a poison pill,⁸⁴ and an accusation that Onex was betraying Canada as a "corporate mercenary willing to sell control of Canadian Airlines to the United States."⁸⁵ Polling results indicated that more than a majority of respondents believed that Onex was a U.S. company, prompting Onex to place a full page advertisement identifying itself as one of the ten largest companies in the country "owned and run by Canadians and headquartered in Canada."⁸⁶

⁷⁹ *Ibid.* at para. 58.

⁸⁰ *Ibid.* at para. 66.

⁸¹ *Ibid.* at para. 59.

⁸² J. McNish, S. McCarthy, "Battle For the Skies one of the Most Expensive" *The Globe and Mail* (6 November 1999) B11. The total estimated cost of the advertisements was \$20 million, a "phenomenal" amount spent over ten weeks. The two sides are expected to pay more than \$100 million in takeover attempt/defence related fees, more than the value of Canadian Airlines itself (\$92 million) at that time.

⁸³ Air Canada's counter-offer bid included a partial share repurchase at \$16 per share and an offer to buy Canadian Airlines at \$2 per share.

⁸⁴ Air Canada agreed to pay Star Alliance a \$250 million penalty if it quite the partnership within one year. Star Alliance is a partnership composed of Air Canada, Germany's Deutsche Lufthansa AG and UAL Corp. of Illinois, parent of United Airlines. See A. Willis, J. McNish, O. Bertin, S. McCarthy, "Onex Plays Trump Card With New Bid" *The Globe and Mail* (29 October 1999) A1.

⁸⁵ Ingram, *supra* note 69. See also S. McCarthy "Air Canada Argues Canadian Control Could Be Lost" (28 October 1999) B6: McCarthy reveals that AMR Corp., parent of American Airlines Inc., owns 33% of Canadian with 25% voting rights. McCarthy argues that this gives American Airlines Inc. *de facto* control of Canadian Airlines, and in effect waters down the definition of Canadian control. American Airlines provided most of the financing for Onex's takeover offer.

⁸⁶ H. Winsor, "Airline War Slips into Controlled Spin" *The Globe and Mail* (27 October 1999) A4. The appeal to Canadian nationalism was pervasive in the advertisement cam-

Attempting to deflect criticism that its hostile takeover offer contained too much American influence, on 28 October 1999, Onex increased its offer by increasing the cash component for Air Canada⁸⁷ and limiting American Airlines' ownership role in the Canadian industry.⁸⁸ Onex also promised increased Canadian content in the form of more home-grown wines, movies, and meals.⁸⁹

On 5 November 1999, two days before its offer expired, Onex abruptly withdrew its takeover offer upon learning the court decision on the legality of its offer. The court held that AirCo's offer was illegal under the *Air Canada Public Participation Act* ten per cent restriction because the object of the offer violated section 6(1)(a) of the *Air Canada Public Participation Act*. In reaching his decision, Mr. Justice Andre Wery stated that Onex would have achieved what the *Air Canada Public Participation Act* had wanted to prohibit: A single shareholder, AirCo, would have bought its way into electing Air Canada's Board of Directors.⁹⁰

The failed takeover attempt of Air Canada illustrates the following points. First, the shareholder primacy norm still exists in Canada: it was clearly relied upon by Air Canada,⁹¹ and by the court⁹² in reaching its decision. Second, it

paign by both sides. For example, maple leaves prominently displayed by Air Canada and Onex in a majority of the advertisements.

⁸⁷ Onex raised its original bid from \$1.8 billion to \$2.1 billion, increasing its offer per share from \$8.25 to \$13.

⁸⁸ The new bid also drastically cut back the role of American Airlines, as corroborated by a letter written by AMR Corp. chairman Donald Carty on October 27, 1999 to Onex, and published in the *Globe and Mail* newspaper: "As you are well aware, American Airlines has been surprised by the way in which our willingness to help facilitate the Onex bid to create a new Air Canada has been so grossly misrepresented and misperceived. We - and you - have stated repeatedly that American has no interest in controlling a foreign airline, yet that allegation continues to be an enormous distraction in the debate over your plan to restructure Canada's aviation industry. We trust this decision to divest our equity stake in the new Air Canada and forgo representation on its board of directors will remove what has clearly been a red herring and will quell further distortions and distractions about our intentions. *The Globe and Mail* (29 October 1999) B7.

⁸⁹ Willis, *supra* note 84.

⁹⁰ *Air Canada*, *supra* note 76 at para. 78. Subsequently Air Canada did purchase Canadian Airlines resulting in one national airline, Air Canada.

⁹¹ D. Walton, "CEO Concedes that Onex Might Win" *The Globe and Mail* (29 October 1999) B7. Before a Senate committee, Robert Milton, Air Canada CEO, stated there will be no deal that is detrimental to Air Canada's shareholders.

⁹² Mr. Justice Andre Wery stated that "[t]his intervention is not an attempt to mingle in corporate affairs which normally are better dealt with in the boardrooms of Canadian corporations; rather it aims at making sure for the protection of the shareholders that Airco's (Onex's) offer is handled within the confines of existing laws". See *supra* note 75.

depicts how, in Professor DeMott's words, "Canada features a prominent role for organs of government—legislative and administrative—in defining and enforcing rules for private parties' conduct."⁹³ The role played by the federal government in this case⁹⁴ in its attempt to protect stakeholder interests—consumers, employees of the airline industry—underscores Professor DeMott's conclusion.

III. CONCLUSION

THE CONCERN OVER STAKEHOLDER RIGHTS reflects the perception that corporate power is currently unprecedented in terms of its influence over employees, communities, and even governments. Corporate social responsibility is the concept that directors of corporations should be mandated to consider the interests of stakeholders in addition to the interests of their own shareholders when making corporate decisions. This reflects an evolution away from the traditional corporate law shareholder primacy norm.

In the United States, the traditional corporate law standard of shareholder wealth maximization continues to be the governing principle, reflecting the contractarian theory. Individual state constituency statutes, enacted as a response to hostile takeovers in the 1980's, are an explicit recognition of non-shareholder interests by state legislatures. However they have failed to create a mandatory obligation to consider stakeholder interests in corporate law.

Canada, in contrast, also reflects the shareholder primacy norm in corporate law; however the regulatory framework goes much further in promoting non-shareholder interests than is the case in the United States.

⁹³ DeMott, *supra* note 60 at 222.

⁹⁴ By the term "role" I refer primarily to the corporate welfare in sustaining two airlines, and the suspension of the competition laws. The print media was critical of the role the government played. Accusations of political insider dealings between the federal government and Onex were levied because Onex sought assurances from the federal government that the 10 per cent rule would be lifted before it launched its takeover attempt. See J. McNish, S. McCarthy, "Onex Asked Ottawa for Assurances on Rules" *The Globe and Mail* (28 October 1999) A1. Further, journalist Andrew Coyne summarized the government's role in this case: [Alluding to the landmark Microsoft monopoly court proceedings ongoing in the United States at the same time, Coyne noted that] "this is the difference between the United States and Canada. In the United States, the government uses the law to prevent powerful monopolies from abusing the public. In Canada, the government changes the law to assist powerful monopolies in abusing the public. That is, unless the courts stop them." See A. Coyne, "Lessons from Onex" *National Post* (8 November 1999) A15.

