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DEBUNKING THE “END OF HISTORY” THESIS FOR CORPORATE LAW

LEONARD I. ROTMAN*

Abstract: In their article, “The End of History for Corporate Law,” Henry Hansmann and Reinier Kraakman proclaimed the triumph of the shareholder primacy norm over competing progressive theories of the corporation. This Article debunks Hansmann and Kraakman’s “end of history” thesis on both U.S. and Canadian corporate law grounds. A critical examination of high-profile U.S. corporate law jurisprudence indicates that the shareholder primacy norm cannot be supported, even by cases such as *Dodge v. Ford* and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, which exist at the foundation of shareholder primacy arguments. Further, Canadian corporate law jurisprudence and the structure of Canadian corporate law statutes reveal the complete lack of support for shareholder primacy arguments north of the forty-ninth parallel, further impeding Hansmann and Kraakman’s claim. This state of affairs demonstrates that Hansmann and Kraakman’s “end of history” thesis is, at best, premature and, at worst, incorrect.

INTRODUCTION

In their provocative article, *The End of History for Corporate Law*, Hansmann and Kraakman asserted that as a result of their view of the profound dominance of the shareholder primacy model of corporate governance, society had witnessed the “end of history” for corporate law.¹ They boldly proclaimed that “[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured,”² echoing Bainbridge’s earlier claim that “[o]ver the last few

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¹ Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439, 468 (2001).

² *Id.* at 468.

decades, law and economics scholars have mounted a largely successful hostile takeover of the corporate legal academy.”³

Hansmann and Kraakman contended that the triumph of the shareholder primacy model was part of a worldwide convergence toward a unitary vision of corporate purpose premised upon a shareholder-centered ideology.⁴ Their view was that progressive notions of corporate governance had failed to sustain a serious threat to the shareholder primacy model.⁵ This “failure” effectively ended the struggle for dominance between these competing approaches to corporate governance, a struggle that may be traced back to the debate between Adolf Berle of Columbia University and Merrick Dodd of Harvard in the 1930s.⁶ The primary implication of this “end of history” caused by the hostile takeover of the corporate legal academy was that the shareholder primacy model had supplanted alternative theories of the corporation that did not ascribe to the former’s characterization of corporate governance.

Hansmann and Kraakman’s assertion of the end of history for corporate law, which provided a particular perspective on the function of corporate management, was published in the same year that Enron collapsed and left large-scale corporate scandals in its wake.⁷ By asserting

³ See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 857, 859 (1997) (“The law and economics movement remains the most successful example of intellectual arbitrage in the history of corporate jurisprudence.”).

⁴ See Hansmann & Kraakman, *supra* note 1, at 443.

⁵ *Id.* at 439–40, 443–44, 454 (discussing how the shareholder-oriented model of the corporate form is more commonly accepted than alternative models such as the manager-oriented, labor-oriented, and state-oriented models).

⁶ See A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1074 (1931); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1366–69 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?* 45 HARV. L. REV. 1145, 1162–63 (1932); E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 206–07 (1935). The crash of the stock market in 1929 no doubt influenced this debate. See William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 101–04 (2008) (offering a different perspective on the Berle-Dodd debate, resituating texts in “historical and intellectual context”).

⁷ The use of the term “management” here denotes both directors and officers. Although there is little uniformity in the obligations of directors and officers under U.S. corporate statutes, Canadian corporate statutes hold directors and officers to virtually the same obligations regarding duties of care and fiduciary obligations. See *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009); see also Lyman P.Q. Johnson & David Millon, *Recalling why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1600–01 (2005). Further, in spite of the differences that exist among various U.S. state corporate statutes and between these U.S. state statutes and Canadian corporate statutes, it appears that officers are now being held to standards more akin to those of directors in U.S. law. See *Gant-*

that the end of history for corporate law had arrived, Hansmann and Kraakman attempted to subsume the lengthy and vigorous debate over the role of the corporation and the place of corporate management to their own vision of the corporate world.⁸ They articulated their thesis without substantive evidence indicating the triumph of the shareholder primacy model over competing progressive visions of corporate activity.⁹ In so doing, they ignored the very real conclusion that, in 2001, many of the issues that plagued corporate law were the same as those that had hampered it years before.¹⁰

In 1934, then-Yale law professor and future U.S. Supreme Court Justice William O. Douglas wrote a scathing attack on corporate management for its misuse, non-use, and abuse of corporate powers. The following passage captures the essence of his critique:

[T]he criticism [levied at corporate practices] has been symptomatic of indignation and disapproval of many different abuses and malpractices disclosed in recent years [including] . . . secret loans to officers and directors, undisclosed profit-sharing plans, timely contracts unduly favorable to affiliated interests, dividend policies based on false estimates, manipulations of credit resources and capital structures to the detriment of minority interests, pool operations, and trading in securities of the company by virtue of inside information, to mention only a few. These are not peculiar to recent times. They are forms of business activity long known to the law. . . . [B]usiness, and its legal advisors, have shown great ineptitude in appreciating and appraising the social importance and significance of many of their activities.¹¹

Such descriptions are now commonplace in the post-Enron era. Yet, Douglas’s seventy-five-year-old critique clearly and crisply indicates that some of the most pressing issues in contemporary corporate law involving the actions of management are not new, but are merely recent incarnations of long-disputed matters.¹² These matters continue to

ler, 965 A.2d at 708–09; Johnson & Millon, *supra*, at 1600–01; Usha Rodrigues, *From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level*, 61 FLA. L. REV. 1, 9 (2009).

⁸ See Hansmann & Kraakman, *supra* note 1, at 449–68.

⁹ See *id.*

¹⁰ See *id.*

¹¹ William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1306 (1934).

¹² See *id.*

arise precisely because of the ongoing debate over the proper characterization of the function of corporate governance.

As vigorously as Hansmann and Kraakman have propounded their view of the dominance of the shareholder primacy model, other prominent commentators have opposed this assertion and continue to do so.¹³ The latter have promoted a broader vision of corporate management's duties that includes not only shareholders, but also bondholders, creditors, employees, and communities. Indeed, a recently published tête-à-tête between Greenfield and Smith intentionally harkens back to the Berle-Dodd debate.¹⁴ The continuation of this debate shows that the end of history for corporate law has not yet been reached—at least not in the manner or with the result Hansmann and Kraakman postulated.

This Article debunks the “end of history” thesis Hansmann and Kraakman espouse and provides a critical and comparative assessment of the foundational basis of their claim. In the process of addressing their claim, this Article engages both domestic and Canadian corporate jurisprudence. The scholarly and jurisprudential discussion about corporate purpose has been a largely U.S.-driven phenomenon to date. Two recent decisions of the Canadian Supreme Court should change this outlook, however. *Peoples Department Stores Inc. v. Wise* (“Peoples”)¹⁵ and *BCE Inc. v. 1976 Debentureholders* (“BCE Inc.”)¹⁶ will have a profound impact on the appropriate characterization of contemporary corporate governance and the “end of history” claim.

¹³ See LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY 3 (2001); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 300–01 (1999); Lynne L. Dallas, *Corporate Ethics in the Healthcare Marketplace*, 3 SEATTLE J. SOC. JUST. 213, 217 (2004); Kent Greenfield & D. Gordon Smith, *Debate: Saving the World with Corporate Law?*, 57 EMORY L.J. 947, 965–66 (2008) (discussing Professor Greenfield's rejection of shareholder primacy); Lyman Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713, 1716–17 (1993); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1376–77 (1993).

¹⁴ Greenfield & Smith, *supra* note 13, at 948–1010.

¹⁵ See [2004] 3 S.C.R. 461, 477, 482–83 (Can.) (standing for the position that directors of a corporation owe a fiduciary duty to the corporation itself, not to individual stakeholders (such as creditors), whose interests are protected by the honest and good faith obedience to the fiduciary duties owed to the corporation itself).

¹⁶ [2008] 3 S.C.R. 560, 597–98 (Can.).

I. BACKGROUND

A. *The “Beginning of History”: Historical Understanding of Corporate Personality*

Academic commentators in various jurisdictions consistently articulate that management owes duties to “the corporation.”¹⁷ This understanding is, however, merely a preliminary point of agreement.¹⁸ It is accepted that managers owe duties to the “corporation.” It is far less clear, however, how this managerial responsibility impacts corporate stakeholders. Are duties owed to the corporation as an entity with interests independent of those of its constituents?¹⁹ Alternatively, is the

¹⁷ ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 201 (Transaction Publishers 1991) (1932) (“[A]ny fair statement of the law would have to be based on the theory that the fiduciary duties of the director were limited to the corporation.”); PAUL L. DAVIES WITH DANIEL D. PRENTICE, *GOWER’S PRINCIPLES OF MODERN COMPANY LAW* 599 (6th ed. 1997) (“[T]he fiduciary duties are owed to the company and to the company alone.”); JOHN GLOVER, *COMMERCIAL EQUITY: FIDUCIARY RELATIONSHIPS* 187 (1995) (“[T]he company ‘as a whole’ is unquestionably a proper beneficiary of its directors’ fiduciary obligations.”) (quoting *Re Horsley & Weight Ltd.* [1982] Ch. 442, 453–54 (U.K.)); BRUCE WELLING, *CORPORATE LAW IN CANADA: THE GOVERNING PRINCIPLES* 377–78 (3d ed. 2006) (“It is absolutely clear in Canadian law that the person to whom corporate managers owe their duty is the corporation: not the shareholders, not the creditors, not the general public, but the corporate entity itself. There is no authority contrary to this well-entrenched principle.”).

¹⁸ While directors and officers are not the only corporate actors who have been found to owe fiduciary duties in corporate fiduciary jurisprudence, they have been the primary focus. Indeed, corporate jurisprudence contains many examples of shareholders’ fiduciary duties, particularly duties of majority shareholders to minority shareholders. Two of the most notorious of these are *Pepper v. Linton*, 308 U.S. 295 (1939) and *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955). The rationale for holding majority shareholders to fiduciary duties to minority shareholders is expressed in *Southern Pacific Co. v. Bogart*, 250 U.S. 483, 487–88 (1919) (“The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors.”). In opposition to domestic jurisprudence, shareholder fiduciary duty arguments are not as prevalent in Canada or in the United Kingdom. See Jeffrey G. MacIntosh et al., *The Puzzle of Shareholder Fiduciary Duties*, 19 CAN. BUS. L.J. 86, 86 (1991) (“In England and Canada the courts have in the main clung steadfastly to the notion that controlling shareholders owe no fiduciary duties, either to the company, or to fellow shareholders.”). In this Article, the Canada Business Corporations Act (CBCA), R.S.C., ch. C-44 (1985), will be used to represent all Canadian “division of powers” corporations statutes. The CBCA is the predominant model referring to the statutory division of corporate powers between management and various stakeholders. This structure differs from the “contractarian” model adopted from the United Kingdom that had previously existed in most Canadian jurisdictions. The “contractarian” model regarded shareholders as the fountain of corporate power and dictated that management possessed only those powers shareholders delegated to it.

¹⁹ Constituents include shareholders, bondholders, creditors, and employees, for example.

corporation to be regarded as an aggregate of these constituents, or as a representation of only some of these parties? This is where agreement among corporate scholars and jurists ends, resulting in one of the most contentious issues in contemporary corporate law.

The debate over whose interests corporate management must serve has existed almost as long as the modern corporation itself. One of the first cases to consider this issue was *Charitable Corporation v. Sutton*,²⁰ in which the directors of a charitable organization were held liable for breach of trust by failing to adequately monitor the charity. In *Sutton*, the English Court of Chancery held that management owed duties to the corporate entity.²¹ In more modern corporate law, this same principle is readily observed across jurisdictions, in such cases as *Carpenter v. Danforth* in the United States,²² *Percival v. Wright* in the United Kingdom,²³ and *Clarkson v. Davies* in Canada.²⁴ There is little, if any, contemporary debate over the corporation's existence as a legal person separate and apart from the personality of its shareholders.²⁵

²⁰ See (1742) 26 Eng. Rep. 642, 642–45 (Ch.) (U.K.) (holding the directors' liability for the loss was based on their failure to monitor the charity, which in turn was partially responsible for a significant loss to the charity arising from fraud).

²¹ *Id.*

²² See 52 Barb. 581, 584 (N.Y. App. Div. 1868). The prominent precursor to *Carpenter v. Danforth* is the decision in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). In *Woodward*, Chief Justice Marshall gave the following description of the corporation as an artificial entity:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. . . . Among the most important are immortality, and, if the expression be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual.

Id. at 636.

²³ (1902) 2 Ch. 421, 421 (U.K.).

²⁴ [1923] 1 D.L.R. 113, 120 (Can.) (originating out of the Ontario courts).

²⁵ A.V. Dicey articulated this principle in *The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century*, 17 HARV. L. REV. 511, 513 (1904). Dicey stated:

When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted.

Id. Within the realm of corporate law, this notion is most famously discussed in *Salomon v. Salomon*, [1897] A.C. 22, 38 (H.L.) (U.K.); see also Dodd, *For Whom Are Corporate Managers Trustees?*, *supra* note 6, at 1160.

Prominent examples of judicial interpretation regarding the effects of the statutory creation of corporations are the U.S. Supreme Court’s decision in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*,²⁶ and the English House of Lords’ decision in *Salomon v. Salomon*.²⁷ The implications of the statements made by the two courts are remarkably similar. The U.S. Supreme Court stated in *Letson*:

A corporation created by a state . . . though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state.²⁸

Meanwhile, in *Salomon*, the House of Lords stated that “once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself . . .”²⁹

How does this historical understanding of corporate personality mesh with Hansmann and Kraakman’s “end of history” thesis? Is the corporation merely a funnel through which profit maximization for shareholders is the ultimate goal? Alternatively, are shareholders merely one of a number of stakeholder groups whose interests must be accounted for in the conduct of corporate management? These questions must be addressed before the application of corporate management’s duties can be meaningfully considered.

²⁶ See 43 U.S. 497, 558 (1844).

²⁷ See [1897] A.C. at 22. Even prior to *Salomon*, the notion that the separate legal existence of the corporation from that of its stakeholders was said to reside at the “root” of corporate law in *Farrar v. Farrars*, [1888] Ch.D. 395, 409–10 (U.K.).

²⁸ *Letson*, 43 U.S. at 555. The Court further stated that “a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person . . . capable of being treated as a citizen of that state, as much as a natural person.” *Id.* at 558. This judgment overturned the aggregate theory of the corporation established in *Bank of the United States v. Deveaux*, where Chief Justice Marshall said “[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporate aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States . . .” 9 U.S. 61, 86 (1809). The Court continued:

[A corporate] name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character . . . and the individual against whom the suit may be instituted.

Id. at 87.

²⁹ *Salomon*, [1897] A.C. at 30.

B. *The Berle-Dodd Debate*

With deference to the significant contributions of others,³⁰ the debate between Adolf Berle and Merrick Dodd initiated a longstanding discourse between shareholder primacy theorists and communitarians in legal literature concerning corporate duties.³¹ Berle and Dodd, like others,³² framed their discussion in fiduciary terms.³³ Nevertheless, it is readily observed that their characterizations of the goals of management's responsibilities differ. In Berle's view, the exclusive beneficiaries of these duties are the shareholders.³⁴ Thus, "all powers granted to a corporation or to the management of a corporation, or to any group within the corporation . . . are necessarily and at all times exercisable

³⁰ See ERNEST FREUND, *THE LEGAL NATURE OF CORPORATIONS* 7–14 (1897); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 673 (1926); Wesley N. Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 *COLUM. L. REV.* 285, 319–20 (1909); Harold J. Laski, *The Personality of Associations*, 29 *HARV. L. REV.* 404, 423–26 (1915–16); Alfred W. Machen, Jr., *Corporate Personality*, 24 *HARV. L. REV.* 253, 262–67 (1911); Max Radin, *The Endless Problem of Corporate Personality*, 32 *COLUM. L. REV.* 643, 662–67 (1932); Paul Vinogradoff, *Juridical Persons*, 24 *COLUM. L. REV.* 594, 604 (1924); I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 *COLUM. L. REV.* 496, 517–18 (1912).

³¹ See generally Berle, *Corporate Powers as Powers in Trust*, *supra* note 6, at 1049; Berle, *For Whom Corporate Managers Are Trustees: A Note*, *supra* note 6, at 1365; Dodd, *For Whom Are Corporate Managers Trustees?*, *supra* note 6, at 1146–47; Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, *supra* note 6, at 194. For an interesting and in-depth discussion of the Berle-Dodd debate, see Bratton & Wachter, *supra* note 6, at 122–35; C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 *U. KAN. L. REV.* 77, 82–99 (2002). On a related point, see also David Millon, *Theories of the Corporation*, 1990 *DUKE L.J.* 201, 216–25 (discussing Dodd's theory that the natural entity model provided a basis for corporate social responsibility and Berle and Means rejection of the natural entity in favor of a shareholder-centered privatized conception of corporate law).

³² See, e.g., Douglas, *supra* note 11, at 1306; I. Beverly Lake, *The Use for Personal Profit of Knowledge Gained While a Director*, 9 *MISS. L.J.* 427, 427–28 (1937); Chester Rohrlach, *The New Deal in Corporation Law*, 35 *COLUM. L. REV.* 1167, 1192 (1935); Chester Rohrlach & Edith Rohrlach, *Psychological Foundations for the Fiduciary Concept in Corporation Law*, 38 *COLUM. L. REV.* 432, 432–34 (1938); Note, *Clash of Personal and Corporate Interest as Affecting Business Activities of Officers and Directors*, 84 *U. PA. L. REV.* 1008, 1008–09 (1935–36); Note, *The Director of a Corporation as a Fiduciary*, 20 *IOWA L. REV.* 808, 808–12 (1935).

³³ Berle, *Corporate Powers as Powers in Trust*, *supra* note 6, at 1049 ("[I]n every case, corporate action must be . . . tested . . . by equitable rules somewhat analogous to those which apply in favor of a *cestui que trust* to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary."); Dodd, *For Whom Are Corporate Managers Trustees?*, *supra* note 6, at 1147 n.6 ("That directors are fiduciaries for their corporations is indisputable.").

³⁴ Berle, *For Whom Corporate Managers Are Trustees: A Note*, *supra* note 6, at 1365 ("Historically, and as a matter of law, corporate managements have been required to run their affairs in the interests of their security holders.").

only for the ratable benefit of all the shareholders as their interest appears.”³⁵ Dodd disagreed with this assessment.³⁶ He contended that corporations have a much larger constituency to whom their duties are owed, including, *inter alia*, shareholder interests,³⁷ the interests of corporate employees,³⁸ and broader social goals.³⁹ The rationale for this broader constituency was premised upon his assertion that corporate managers “are guardians of all the interests which the corporation affects and not merely servants of its absentee owners.”⁴⁰

Although in later years Berle conceded that Dodd’s broader vision of the scope of the responsibilities of commercial enterprise—as well as that of management’s duties—had prevailed over his own,⁴¹ the debate over their formerly entrenched positions persisted. The debate between Berle and Dodd foreshadowed the contemporary controversy as to the proper beneficiaries of management’s duties. This modern-day debate pits shareholder primacy model advocates against progressives championing a broader constituency to whom management’s duties are owed.⁴² This “broader constituency” may include any or all of

³⁵ Berle, *Corporate Powers as Powers in Trust*, *supra* note 6, at 1049.

³⁶ Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, *supra* note 6, at 205 (“The proposition that the sole function of business organizations is to produce the maximum profit for absentee owners is not only one which cannot, in the nature of things, appeal strongly as a code of professional ethics to the managers; it is also one which no longer appeals strongly to the community as a social policy.”).

³⁷ Berle, *For Whom Are Corporate Managers Trustees?*, *supra* note 6, at 1152 (“It may, however, be forcibly urged that all these and other past, present, and possible future limitations on the pursuit of stockholder profit in no way alter the theory that the sole function of directors and other corporate managers is to seek to obtain the maximum amount of profits for the stockholders as owners of the enterprise.”).

³⁸ *Id.* at 1151–52. Berle asserts that “managers . . . may easily come to feel as strong a community of interest with their fellow workers as with a group of investors whose only connection with the enterprise is that they or their predecessors in title invested money in it . . .” *Id.* at 1157.

³⁹ *Id.* at 1153–57, 1161.

⁴⁰ *Id.* at 1157. Berle explains:

If we think of [the corporation] as an institution which differs in the nature of things from the individuals who compose it[,] . . . [the corporation] is affected not only by the laws which regulate business but by the attitude of public and business opinion as to the social obligations of business.

Id. at 1161.

⁴¹ See ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 169 (9th prtg. 1954); Adolf A. Berle, *Corporate Decision Making and Social Control*, 24 *BUS. LAW.* 149, 150 (1968); see also A.A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 *DEL. J. CORP. L.* 33, 37 n.14 (1991); Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 *J. CORP. L.* 333, 335 (2002).

⁴² See Kent Greenfield, *New Principles for Corporate Law*, 1 *HASTINGS BUS. L.J.* 89, 91 (2005) (“For most people honestly wrestling with issues of corporate governance, however,

shareholders, bondholders, general creditors, employees, and social interests at large.⁴³

Despite the fact that the foundational debate over corporate purpose has ebbed and flowed over the years, shareholder primacy theorists and progressives have continued to jockey for position and influence. This struggle is evidenced through the writings of an ever-changing list of corporate law commentators, statutory reforms, and jurisprudential developments.⁴⁴ Thus, the classic Berle and Dodd debate over corporate governance remains alive and well. Even Hansmann, in revisiting *The End of History for Corporate Law* some eight years later, admitted that the paper “was written to capture, a bit provocatively, a particular perspective in a debate on convergence in corporate law that was just then gathering steam.”⁴⁵ Hansmann conceded that “[t]here will probably never be perfect homogeneity in the approaches taken to these issues.”⁴⁶ Arguably, the same conclusion is equally appro-

shareholder primacy is not the foundational assumption but rather one of the potential conclusions. . . . [O]ther potential conclusions exist as well.”).

⁴³ See generally PROGRESSIVE CORPORATE LAW 37–59 (Lawrence Mitchell ed., 1995) (discussing various challenges to the prevailing shareholder primacy and shareholder wealth maximization views). Although a discussion of corporate social responsibility is beyond the scope of this Article, it directly affects the fiduciary characterization of corporate bodies and the obligations that result from that characterization. The idea that private corporations have responsibilities to the public at large, for example, has a direct impact on corporations’ duties of disclosure and their method of reporting their financial affairs, as well as the level of detail that ought to be required. Indeed, as Justice J.T. Walsh suggests, recent corporate scandals, such as the collapse of energy giant Enron Corp. as a result of faulty or misleading financial reporting, “may cause us to reexamine our traditional notions of the public responsibility of private corporations and, in particular, to whom corporate directors owe a fiduciary duty of disclosure.” Walsh, *supra* note 41, at 339.

⁴⁴ See MITCHELL, *supra* note 13, at 3; Blair & Stout, *supra* note 13, at 300–01; Dallas, *supra* note 13, at 217; Greenfield & Smith, *supra* note 13, at 965–66; Johnson, *supra* note 13, at 1716–17 (1993); Millon, *supra* note 13, at 1376–77.

⁴⁵ Henry Hansmann, *How Close Is the End of History?*, 31 J. CORP. L. 745, 745, 749 (2006) (stating that one’s faith in reaching the end of history for corporate law may be closely tied to one’s faith in achieving Fukuyama’s original *End of History* in politics). Curiously, Hansmann’s commentary could be seen to parallel that expressed in FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992), which served as the inspiration for the title of Hansmann and Kraakman’s article, *The End of History for Corporate Law*. See Hansmann & Kraakman, *supra* note 1, at 439. FRANCIS FUKUYAMA, *OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION* (2002), qualifies Fukuyama’s original “end of history” thesis, much like Hansmann may be seen to have qualified the strength of the original “end of history for corporate law” prediction that he and Kraakman made in 2001. Hansmann & Kraakman, *supra* note 1, at 439.

⁴⁶ Hansmann, *supra* note 45, at 750.

priate to Hansmann and Kraakman’s assertion of the end of history for corporate law itself.⁴⁷

II. ANALYSIS

A. Debunking U.S. Corporate Law Foundations of the “End of History” Thesis

Despite claims of the “end of history” of corporate law or assertions that U.S. corporate law was the subject of a successful hostile takeover by shareholder primacy theory, it is not clear that U.S. law wholly ascribes to the shareholder primacy norm. Blair and Stout have shown that “a series of mid- and late-twentieth-century cases . . . have allowed directors to sacrifice shareholders’ profits to stakeholders’ interests when necessary for the best interests of ‘the corporation.’”⁴⁸ As evidenced in the cases that follow, U.S. corporate law jurisprudence would appear to be far more muted in its support of shareholder primacy and shareholder wealth-maximization arguments than Hansmann and Kraakman or Bainbridge have suggested.

1. *Dodge v. Ford* (1919):⁴⁹ More than Meets the Eye

A closer examination of the landmark 1919 *Dodge v. Ford Motor Co.* case,⁵⁰ which has long been associated with the idea of shareholder primacy, indicates that the decision shares more in common with pro-

⁴⁷ See *id.* (“[I]t might be said that this leaves most of the important and interesting debates within corporate law today untouched by our thesis. And, admittedly, that’s not an unreasonable thing to say.”).

⁴⁸ *Cheff v. Mathes*, 199 A.2d 548, 556 (Del. 1964); *Credit Lyonnais Bank Nederland, N.V. v. Pathe Comm. Corp.*, 1991 WL 277613, at *2–4 (Del. Ch. 1991) (avoiding risky undertakings benefitting shareholders at creditors’ expense); *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969) (sanctioning directors’ decision to use corporate funds for charitable purposes); *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (rejecting business strategies to increase profits having potential detrimental effects on local community); Blair & Stout, *supra* note 13, at 303–04 (1999) (citing *Paramount Comm., Inc. v. Time Inc.*, 571 A.2d 1140, 1142 (Del. 1989) (warding off hostile takeover bids at a premium to insulate employee or community interests). Blair and Stout contend that not only do these examples demonstrate that “modern corporate law does not adhere to the norm of shareholder primacy,” but “case law interpreting the business judgment rule often explicitly authorizes directors to sacrifice shareholders’ interests to protect other constituencies.” Blair & Stout, *supra* note 13, at 303; see also Greenfield, *supra* note 42, at 114–17, (citing *Prod. Res. Group LLC v. NCT Group, Inc.*, 863 A.2d 772, 787 (Del. Ch. 2004) (noting that “directors are not required to put aside any consideration of other constituencies . . . when deciding how to manage the firm”).

⁴⁹ 170 N.W. 668, 684 (Mich. 1919).

⁵⁰ *Id.*

gressive analyses of corporate law than with Hansmann and Kraakman's "end of history" claim. In particular, the noted *Dodge v. Ford* judgment, long considered to be the beacon for shareholder primacy advocates,⁵¹ is not as absolutely dedicated to the advancement of shareholder wealth maximization as observers have generally posited. *Dodge v. Ford* is far more complicated and nuanced than most corporate law scholars have tended to suggest.⁵² Thus, although even noted progressive scholars have conceded that the judgment in *Dodge v. Ford* ran roughshod over broader notions of stakeholder protection as the basis of corporate function,⁵³ a thorough analysis suggests that they may well have given their concessions too freely.

In *Dodge v. Ford*, the Dodge brothers, holders of 10% of the shares of Ford Motor Co. (FMC), commenced a lawsuit against FMC's management for its failure to distribute an appropriate amount of FMC's earnings to its shareholders.⁵⁴ At the time, FMC was a hugely successful enterprise.⁵⁵ It held property and receivables in the amount of some \$78 million as of July 1916, as well as \$54 million in cash or cash equivalents.⁵⁶ In addition, FMC had paid some \$41 million in special dividends to its shareholders between December 1911 and October 1915, on top of the \$1.2 million that it paid annually in regular dividends.⁵⁷

In November 1916, FMC declared a special dividend of \$2 million.⁵⁸ FMC's board of directors subsequently decided to cease paying such large special dividends to shareholders and instead use the bulk of FMC's profits for other purposes.⁵⁹ The directors sought to use some of FMC's profits to construct a smelter and steel manufacturing plant to produce steel for car production, as well as to create a new, state-of-the-art manufacturing facility.⁶⁰ Moreover, FMC's directors decided to con-

⁵¹ See, e.g., Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–24 (1993).

⁵² See 170 N.W. at 685.

⁵³ See e.g., Millon, *supra* note 31, at 223–25.

⁵⁴ *Dodge*, 170 N.W. at 673.

⁵⁵ *Id.* at 670. For the year ending July 31, 1916, FMC profits were just shy of \$60 million, and its accumulated profits were approximately \$174 million. *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Dodge*, 170 N.W. at 670. This included construction of FMC's Rouge River manufacturing facility, which would eventually produce 4,000 cars a day, would employ over 100,000 workers, and would be "the largest manufacturing facility built until then or since." M. Todd Henderson, *Everything Old Is New Again: Lessons from Dodge v. Ford Motor Company* 30 (Univ. of Chi. Law & Econ., Olin Working Paper No. 373, 2007), available at <http://ssrn.com/abstract=1070284>.

tinue the corporation’s longstanding policy of manufacturing cars at a lower cost by reducing the unit price of its vehicles from \$440 to \$360.⁶¹

The Dodge brothers regarded these plans as designed “to continue the corporation henceforth as a semi-eleemosynary [charitable] institution and not as a business institution.”⁶² They sought a special dividend of not less than 75% of FMC’s accumulated cash surplus,⁶³ injunctions to prevent the construction of the smelter and manufacturing facilities, and the reduction in the per-unit cost of Ford cars.⁶⁴

Henry Ford, chairman and founder of FMC, as well as the owner of 58% of FMC shares, maintained that FMC had a responsibility to benefit the general public, and that the plans were consistent with that responsibility.⁶⁵ When questioned about his stance at trial, Ford maintained that FMC took into consideration a wide range of stakeholder interests, not only the interests of its shareholders.⁶⁶ During the proceedings, when asked for what purpose besides profit-making FMC was organized, Ford replied, “[FMC is] [o]rganized to do as much good as we can, everywhere, for everybody concerned . . . [a]nd incidentally to make money.”⁶⁷ Ultimately, the Dodge brothers’ suit was successful at trial.⁶⁸ The trial court ordered the declaration of a dividend in excess of \$19 million and granted an injunction to halt construction of new manufacturing and smelting facilities.⁶⁹ The decision to reduce the price of Ford vehicles was upheld.⁷⁰

On appeal, the Michigan Supreme Court determined that FMC’s plan and spending

[did] not call for and [was] not intended to produce immediately a more profitable business but a less profitable one; not only less profitable than formerly but less profitable than it

⁶¹ The per-unit cost of Ford vehicles had decreased from an initial cost in excess of \$900 to a cost of \$440 in July, 1916, with a plan to further reduce it to \$360 beginning August 1, 1916. *Dodge*, 170 N.W. at 670.

⁶² *Id.* at 683.

⁶³ *Id.* at 673.

⁶⁴ *Id.*

⁶⁵ *See id.* at 684.

⁶⁶ *See id.*

⁶⁷ Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors’ Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 436 (2002) (quoting Henry Ford).

⁶⁹ *See Dodge*, 170 N.W. at 677.

⁷⁰ *See id.* at 677–78.

[was] admitted it might [have been] made. The apparent immediate effect [would] be to diminish the value of shares and the returns to shareholders.⁷¹

The court further found that “certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company”⁷²

Notwithstanding the FMC board’s determination that the best interests of the corporation were served by eliminating the large special dividends and reinvesting profits in the business, the court stated that “[t]here should [have been] no confusion (of which there was evidence) of the duties which Mr. Ford conceive[d] that he and the stockholders owe[d] to the general public and the duties which in law he and his codirectors owe[d] to protesting, minority shareholders.”⁷³ The court then famously distilled its vision of the essential purpose of the for-profit corporation:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.⁷⁴

The court also held that courts may interfere with business decisions where profit maximization is not the primary motivation of directors.⁷⁵

These conclusions have been used to support the notion that *Dodge v. Ford* is properly viewed as supporting the shareholder primacy model of corporate governance.⁷⁶ If this was all that the Michigan Su-

⁷¹ *Id.* at 683.

⁷² *Id.* at 684.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Dodge*, 170 N.W. at 684. The court explained:

[I]t 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 benefiting others, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.

Id.

⁷⁶ *See id.*

preme Court had said, then such a conclusion would be logical.⁷⁷ The court did not stop there, however. While it ordered the payment of significant dividends against the wishes of FMC's directors,⁷⁸ it also vacated the injunction imposed by the trial court on the construction of FMC's new manufacturing and smelting facilities. Further, the court did not enjoin the corporation's plan to lower the price of its vehicles from \$440 to \$360, even though that action would have reduced FMC's sales figures by a minimum of \$48 million in the first year alone.⁷⁹ As the court explained, "[i]t is recognized that plans must often be made for a long future, for expected competition, for a continuing as well as immediately profitable venture."⁸⁰

The decision of FMC's board to invest in infrastructure development and to reduce the price of its vehicles cannot be properly assessed outside of the context in which those decisions were made.⁸¹ FMC had faced significantly increased competition during the period in question. The previously volatile automobile manufacturing industry that had been characterized by numerous small, independent operators who generally manufactured modest numbers of vehicles had become dominated by larger and more sophisticated corporations. The Dodge brothers themselves began manufacturing their own complete automobiles in 1914 in competition with FMC. General Motors Corporation (GMC) was formed in 1908 by the merging of the Buick and Oldsmobile companies, expanded in 1909 by adding the Oakland Motor Company (later Pontiac) and Cadillac, and was merged with the Chevrolet Motor Company in 1916.⁸² Consequently, it was prudent for the directors of FMC to seek to entrench or improve FMC's position in the automotive market, as well as to attempt to impede competitors' inroads into their market share, which would reduce FMC's long-term profitability.⁸³ Thus, in order to sustain the level of profits earned prior to

⁷⁷ See *id.* at 683.

⁷⁸ *Id.* (doing so on the basis that the board's refusal to pay special dividends "appear[ed] to be not an exercise of discretion on the part of the directors, but an arbitrary refusal to do what the circumstances required to be done").

⁷⁹ See *id.* at 683–85 (basing estimates on FMC's annual production capacity of 600,000 cars, not reflecting increase in manufacturing capacity anticipated by \$24 million infrastructure enhancement plan).

⁸⁰ *Id.* at 684.

⁸¹ *Dodge*, 170 N.W. at 683–84.

⁸² General Motors, Corporate Information, History, <http://www.gm.com/corporate/about/history> (last visited Apr. 25, 2010).

⁸³ *Dodge*, 170 N.W. at 684; see also Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 602 (1992) (suggesting that "[h]ad Ford testified to a desire to restrain the Dodges' competition, rather

1916 and the market position of the company, FMC's board of directors looked beyond the immediate satisfaction of its shareholders.⁸⁴

In addition to the infrastructure improvements and price reductions designed to ensure FMC's competitiveness, the benefits that FMC conferred on other stakeholders, such as employees and the public at large, were not entirely selfless, but ultimately enured to FMC's benefit.⁸⁵ Such actions were, therefore, consistent with the fulfillment of directors' fiduciary duties owed to their corporations.⁸⁶ Increased wages for employees, notably in the form of the "five-dollar-day," brought more potential customers for Ford vehicles,⁸⁷ especially when the loyalty and pride of employees—particularly extant in the automotive sector—is considered. Similarly, reducing the price of Ford vehicles allowed more people to purchase Ford cars.⁸⁸ Although this strategy might have resulted in less profit per vehicle, it was designed to create greater long-term profitability because of the larger volume of vehicles sold and the reduction in the costs of production envisaged by FMC's infrastructure plan.⁸⁹

By not requiring FMC to abandon its infrastructure improvement and vehicle cost reduction plans, even though the former considerably reduced firm cash reserves and the latter had the effect of significantly reducing profits, the court deferred to the business judgment exercised by FMC's board.⁹⁰ In doing so, the court effectively sanctioned its ability to not only look beyond immediate shareholder interests, but to ignore those interests in favor of broader objectives.⁹¹ Therefore, *Dodge v. Ford* is

than to his expressed altruism, the case might not have been about corporate purpose at all, but about directorial self-dealing").

⁸⁴ See *Dodge*, 170 N.W. at 684.

⁸⁵ See *id.* at 683.

⁸⁶ See *id.* at 683–84.

⁸⁷ The company's financial statement for the fiscal year ending July 31, 1916 showed 36,626 employees earning at least five dollars a day. *Id.* at 670. To put this into perspective, the five-dollar-a-day wage more than doubled the previous wage when the one-hour reduction in the length of the work day is factored into the equation. See MICH. DEP'T OF NATURAL RES. & ENV'T, THE ASSEMBLY LINE AND THE \$5 DAY, BACKGROUND READING (2003), <http://www.michigan.gov/dnr> (search article title; follow hyperlink). At the time that Ford introduced its five-dollar-day in 1914, the average daily wage of factory workers was one dollar a day. See THE MUSEUM OF AM. HERITAGE, A SENSE OF WONDER: THE 1915 SAN FRANCISCO WORLD'S FAIR, JUNE 7, 2002–SEPT. 22, 2002 (2003), <http://www.moah.org/exhibits/archives/1915>.

⁸⁸ See *Dodge*, 170 N.W. at 683.

⁸⁹ See *id.* at 683–84.

⁹⁰ *Id.* at 684.

⁹¹ See *id.* In any event, it is difficult to accept that shareholders' interests were being ignored when they had received some \$41 million in special dividends between December

inconsistent with the shareholder primacy norm that it is generally said to represent.⁹² Indeed, although *Dodge v. Ford* is often juxtaposed against cases such as *Shlensky v. Wrigley*,⁹³ which emphasize broader, communitarian interests, the decision is, in fact, more consistent with the view articulated in *Shlensky* than it is with the pro-shareholder primacy model.

2. *Shlensky v. Wrigley* (1968): Shareholder Primacy Strikes Out

*Shlensky v. Wrigley*⁹⁴ represents another prominent case that rejects the shareholder primacy model of corporate governance.⁹⁵ Shlensky was a minority shareholder of the Chicago National League Ball Club, Inc. (CNLBC), which operated the Chicago Cubs professional baseball team.⁹⁶ He sued the directors of CNLBC for refusing to install lights in Wrigley Field, the Cubs’ home ballpark, in order to allow for night baseball games.⁹⁷ From 1961 to 1965, the Cubs had sustained operating losses from their baseball operations.⁹⁸ Shlensky maintained that the

1911 and October 1915, and their long-term interests, which were intricately tied with those of FMC, were being attended to via the infrastructure improvement plan. *See id.* at 670.

⁹² *See id.* at 684; *see also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 775 (2005) (“So even *Dodge*, the high-water mark for the supposed duty to profit-maximize, indicates that no such enforceable duty exists. Nor does there appear to be any other case that has ever actually restrained a management decision to sacrifice corporate profits in the public interest.”); Henderson, *supra* note 60, at 34 (“The *Dodge* case is often misread or mistaught as setting a legal rule of shareholder wealth maximization. This was not and is not the law.”); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 166 (2008) (“*Dodge v. Ford* is indeed bad law, at least when cited for the proposition that the corporate purpose is, or should be, maximizing shareholder wealth. *Dodge v. Ford* is a mistake, a judicial ‘sport,’ a doctrinal oddity largely irrelevant to corporate law and corporate practice.”).

⁹³ *Prod. Res. Group*, 863 A.2d at 787; *Theodora*, 257 A.2d at 398; *Shlensky*, 237 N.E.2d 776, 780–81 (Ill. App. Ct. 1968); *Dodge*, 170 N.W. at 684; Blair & Stout, *supra* note 13, at 303.

⁹⁴ 237 N.E.2d at 776.

⁹⁵ *Id.* at 780–81.

⁹⁶ *Id.* at 777.

⁹⁷ *Id.* At the time of the *Shlensky* decision, Wrigley Field was the only stadium in Major League Baseball that was not equipped for night games, having remained so long after all other teams had outfitted their ballparks for night baseball. Baseball Almanac, Famous First Night Games, <http://www.baseball-almanac.com/firsts/first10.shtml> (last visited Apr. 25, 2010). Night baseball was first played in 1935 in Cincinnati’s Crosley Field and was played in every major league ballpark by the late 1960s, with subsequent expansion teams beginning night baseball immediately upon joining Major League Baseball. *See id.*

⁹⁸ *Shlensky*, 237 N.E.2d at 777.

lack of night baseball games diminished the value of the company and its shares by reducing its profitability.⁹⁹

Shlensky alleged that Philip K. Wrigley, President of CNLBC and holder of approximately 80% of its shares, had admitted that he was unconcerned whether the Cubs would become more profitable if they played night games.¹⁰⁰ Wrigley's reluctance to retrofit his ballpark with lights was said to have stemmed from his belief "that baseball [was] a 'daytime sport' and that the installation of lights and night baseball games w[ould] have a deteriorating effect upon the surrounding neighborhood."¹⁰¹ Shlensky charged that the other directors of CNLBC acquiesced in the policy Wrigley had dictated, that the policy clearly concerned matters other than maximizing shareholder value, and that the directors' "arbitrary and capricious acts constitute[d] mismanagement and waste of corporate assets."¹⁰²

The Illinois Court of Appeal rejected Shlensky's allegations and determined that the directors' decision to not play night games was, in fact, consistent with their duties owed to CNLBC.¹⁰³ The court concluded that the directors need not have the corporation engage in the most immediately profitable course of action, but could base their decisions on the longer-term interests of the corporation and its shareholders.¹⁰⁴ The court agreed with the defendant's claim that the scheduling of night games could result in the deterioration of the surrounding neighborhood, which might reduce the long-term profitability of the corporation and detrimentally affect share value.¹⁰⁵ In dismissing the suit, the court deferred to the directors' exercise of their business judgment. As the court stated:

⁹⁹ *Id.* This lack of profitability is arguably not solely attributable to the absence of night baseball, but also to the fact that the Cubs finished seventh twice, eighth twice, and ninth once between 1961 and 1965. *Id.*

¹⁰⁰ *Id.* at 778.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 780.

¹⁰⁴ *Shlensky*, 237 N.E.2d at 780.

¹⁰⁵ *Id.* Interestingly, in 1988, lights were installed at Wrigley Field, and night baseball is now a regular event at the stadium. Not only has the surrounding neighborhood not deteriorated as a result, but it has experienced a resurgence with the addition of new businesses tapping into the increased attendance generated by the ballpark. Peak attendance at Wrigley Field before the introduction of night baseball came in 1985, when 2,161,534 fans attended baseball games. In the first full year of night baseball in 1989, 2,491,942 fans were in attendance, while attendance since 1998 has consistently been in excess of 2.6 million (and in excess of the National League's average attendance), reaching a peak of 3.3 million in the 2008 season. Baseball Almanac, Chicago Cubs Attendance Records, <http://www.baseball-almanac.com/teams/cubsatte.shtml> (last visited Apr. 25, 2010).

[W]e do not mean to say that we have decided that the decision of the directors was a correct one. That is beyond our jurisdiction and ability. We are merely saying that the decision is one properly before directors and the motives alleged . . . showed no fraud, illegality or conflict of interest in their making of that decision.¹⁰⁶

The court’s words thus served as yet another clear invalidation of the shareholder primacy model.

3. U.S. Corporate Law Jurisprudence in the 1980s: A Shaky Foundation for the “End of History Claim”

a. *Unocal v. Mesa Petroleum Corp.* (1985):¹⁰⁷ *The “Corporate Enterprise” Above All*

The shareholder primacy model did not achieve much traction, if any, in U.S. corporate law jurisprudence in the 1980s. For example, 1985 yielded one of the clearest examples of the subordination or rejection of the model. The landmark case *Unocal v. Mesa Petroleum Co.* concerned the actions of Unocal’s board of directors in resisting a hostile takeover bid by Mesa.¹⁰⁸ Unocal’s board alleged that this bid would have been detrimental to the corporation.¹⁰⁹ The Delaware Supreme Court explicitly recognized the potential for a conflict of interest where a sitting board was in a position to thwart a takeover bid.¹¹⁰ In such a circumstance, directors might be tempted to resist a takeover bid solely to maintain their incumbency.¹¹¹ Directors’ ability to resist a takeover bid through defensive tactics designed to solidify their positions created at least the possibility that directors might choose to favor their own interests over those of a corporation’s shareholders and over those of other stakeholders.¹¹²

As the potential for this type of action posed a significant risk to stakeholder—and especially shareholder—interests, the *Unocal* court held that the actions of directors in opposing a hostile takeover would be subjected to an increased level of scrutiny beyond the more relaxed

¹⁰⁶ *Shlensky*, 237 N.E.2d at 780.

¹⁰⁷ 493 A.2d 946 (Del. 1985).

¹⁰⁸ *Id.* at 955–56.

¹⁰⁹ *Id.* at 953.

¹¹⁰ *Id.* at 955.

¹¹¹ *Id.*

¹¹² *See id.*; *see also* *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995).

business judgment standard.¹¹³ Directors in such circumstances would be required to demonstrate that their actions were precipitated by their belief that a threat to the corporation as an entity existed, and that their defensive tactics were reasonable in relation to the perceived threat.¹¹⁴

This response by the *Unocal* court marked a significant departure from existing Delaware jurisprudence, which tended to defer to directors' exercise of business judgment.¹¹⁵ In the process of protecting against directorial self-interest, the *Unocal* decision created an entirely different effect by sanctioning the idea that a board of directors had to consider the impact of a takeover bid on "the corporate enterprise."¹¹⁶ In particular, the court determined that, in the context of ascertaining whether a threat to a corporation existed, which was necessary in order to claim the protection of the business judgment rule in resisting a hostile takeover bid, directors could consider "the impact on . . . creditors, customers, employees, and perhaps even the community generally."¹¹⁷ This conclusion, although perhaps necessary to curb director conflicts of interest, subordinates the shareholder primacy model to the constituency model of the corporate form.¹¹⁸

b. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* (1986):¹¹⁹ *Demonstrating the Limitations of the Shareholder Primacy Model*

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,¹²⁰ like *Dodge v. Ford*, appears to be a case that affirms the shareholder primacy model.¹²¹ Nevertheless, a closer inspection of the case reveals its limitations for supporting shareholder primacy in a manner similar to *Dodge*.¹²²

In *Revlon*, the corporation's directors engaged in defensive tactics to forestall a hostile takeover bid and instead negotiated the sale of the company to a friendly buyer at a lower price.¹²³ Part of the rationale for choosing the friendly bid was a desire to protect certain creditors' in-

¹¹³ *Unocal*, 493 A.2d at 954.

¹¹⁴ *Id.* at 955.

¹¹⁵ Mitchell, *supra* note 83, at 611 ("The *Unocal* court . . . follow[ed] a conceptual approach quite at odds with the acknowledged formalism of Delaware corporate jurisprudence.").

¹¹⁶ *Unocal*, 493 A.2d at 955–56.

¹¹⁷ *Id.* at 955.

¹¹⁸ *Id.*

¹¹⁹ 506 A.2d 173 (Del. 1986).

¹²⁰ *Id.*

¹²¹ *Id.* at 182; *Dodge*, 170 N.W. at 684.

¹²² See *Revlon*, 506 A.2d at 180–83; *Dodge*, 170 N.W. at 684.

¹²³ See *Revlon*, 506 A.2d at 176–79.

terests.¹²⁴ The Delaware Supreme Court held that the directors had wrongfully engaged in selective dealing to stave off the hostile bidder when “obtaining the highest price for the benefit of the stockholders should have been the central theme guiding director action.”¹²⁵ The court determined that once the break-up of Revlon was inevitable,

[t]he duty of the board . . . changed from the preservation of Revlon as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit. . . . The directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.¹²⁶

Subsequently, the directors were found to have breached their duties of care to the shareholders for failing to maximize the value of their share holdings.¹²⁷

This shift in director duties became known as “*Revlon* duties.”¹²⁸ Thus, where the break-up of a company becomes inevitable, the directors’ duties,¹²⁹ which are normally owed to the corporation, shift to its shareholders and become focused on the sole purpose of maximizing shareholder value.¹³⁰ The holding in *Revlon* was subsequently clarified by the Delaware Supreme Court in *Paramount Communications, Inc. v. Time Inc.*¹³¹ and *Paramount Communications, Inc. v. QVC Network*.¹³² Nev-

¹²⁴ *Id.* Additionally, the white knight in *Revlon* had agreed to allow the incumbent management to operate the company, subject to its agreement to sell off certain divisions and to remain capable of servicing its debts. *Id.* at 178–79.

¹²⁵ *Id.* at 182.

¹²⁶ *Id.*

¹²⁷ *Id.* at 185.

¹²⁸ *See id.* at 182.

¹²⁹ Curiously, although the Delaware Supreme Court held that the Revlon directors had breached their duties of care to the shareholders, the Delaware Court of Chancery had found that the directors had breached their duties of loyalty. *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.*, 501 A.2d 1239, 1250 (Del. Ch. 1985). Even in the Supreme Court’s judgment, it confused the matter, first stating that the Court of Chancery had found that the directors had breached their duties of care and subsequently characterizing the Chancery Court’s finding as one of a breach of duty of loyalty. *Revlon*, 506 A.2d at 175–76, 179. The Delaware Supreme Court’s haphazard characterization seems to be the simple result of carelessness rather than having any substantive reason. *See id.*

¹³⁰ *Revlon*, 506 A.2d at 182.

¹³¹ *See* 571 A.2d 1140, 1150 (Del. 1989). The court determined that there were generally two circumstances that resulted in *Revlon*-type duties, both of which focused on the break-up of the target: when “a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company” or when “in response to a bidder’s offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company.” *Id.*

ertheless, dissecting the logic of the shift required by the *Revlon* duties reveals that the shift is inconsistent with the shareholder primacy model of corporate governance.¹³³ The *Revlon* duty shift required that the fiduciary duty of directors become a duty to maximize shareholder value.¹³⁴ Shareholder primacy theory interprets the normal operation of directors' fiduciary duties as being primarily aimed at benefitting shareholders.¹³⁵ Yet, if the duty in *Revlon* results in a shift in directors' focus toward shareholder interests from that which it usually is, the indication is that the duties owed under non-*Revlon* circumstances (*i.e.* "normal" or "usual" circumstances) would *not* be directed toward the shareholders' benefit.¹³⁶ In this sense, *Revlon* appears inconsistent with the shareholder primacy model.¹³⁷

If directors' usual fiduciary duty is not owed to shareholders, as a logical construction of the *Revlon* judgment would indicate, then the judgment is both inconsistent with shareholder primacy theory and brings Hansmann and Kraakman's assertion of the "end of history" for corporate law into question.¹³⁸ It also provides an interesting twist on Stout's contention that "*Revlon* thus defines the one context in which Delaware law mandates shareholder primacy."¹³⁹ Using the logic above, Stout's contention would dictate that shareholder primacy is only mandated when there is a required shift in directors' fiduciary duties, as the *Revlon* precedent requires.¹⁴⁰ Although this outcome is not consistent

¹³² 637 A.2d 34, 46 (Del. 1994). In this case, the Delaware Supreme Court stated that it was not necessary for an inevitable break-up of the corporation to occur before *Revlon*-type duties were triggered; the key to the application of those duties was the pending sale of corporate control. *Id.* at 37. Thus, the court concluded that directors owed fiduciary duties to maximize shareholder value where a corporation engaged in a transaction that either caused a change in corporate control or resulted in the break-up of the corporation. *Id.* at 47–48.

¹³³ Although the existence of *Revlon* duties may have been weakened by subsequent developments, this does not affect the impact of those shifting duties on Hansmann and Kraakman's assertion of the triumph of the shareholder primacy model. See, e.g., Sean J. Griffiths, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 66–67 (2005); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 85 S. CAL. L. REV. 1189, 1204 (2002).

¹³⁴ *Revlon*, 506 A.2d at 182.

¹³⁵ Berle, *Corporate Powers as Powers in Trusts*, *supra* note 6, at 1049.

¹³⁶ See *Revlon*, 506 A.2d at 182.

¹³⁷ See *id.*; Berle, *Corporate Powers as Powers in Trusts*, *supra* note 6, at 1049.

¹³⁸ See *Revlon*, 506 A.2d at 182; Berle, *Corporate Powers as Powers in Trusts*, *supra* note 6, at 1049; Hansmann & Kraakman, *supra* note 1, at 468.

¹³⁹ Stout, *supra* note 133, at 1204.

¹⁴⁰ See *id.*

with Stout’s original meaning, she would likely find it a preferable basis for arguing against shareholder primacy theory.¹⁴¹

c. *Paramount Communications, Inc. v. Time Inc.* (1989):¹⁴² *Reaffirming the Primacy of the Corporate Entity*

The 1989 case *Paramount Communications, Inc. v. Time Inc.* further questions the legitimacy of Hansmann and Kraakman’s shareholder primacy claim.¹⁴³ In that case, Time Inc. (Time), which had already approved a merger with Warner Communications Inc. (Warner), became the target of a surprise takeover bid by Paramount Communications, Inc. (Paramount).¹⁴⁴ Time resisted Paramount’s bid on the basis that it posed a threat to Time’s control over its own destiny and long-term welfare.¹⁴⁵ Time’s management contended that the merger with Warner would allow Time to retain its control and culture. It acknowledged, however, that the deal would result in Time’s shareholders becoming minority shareholders in the newly-merged company and would saddle the company with significant debt.¹⁴⁶ The Delaware Supreme Court accepted Time’s arguments and denied Paramount’s request for an injunction to halt Time’s merger with Warner.¹⁴⁷

The judgment in *Paramount* allowed Time’s directors to refuse to put Paramount’s tender offer to a shareholder vote, even though the offer would have maximized shareholder value, because Time’s directors deemed the sale to Paramount to be against Time’s best interests.¹⁴⁸ Time’s management asserted that the sale of Time to Paramount would have meant the sacrifice of Time’s control over its future, as well as the distinct “Time Culture” of “journalistic integrity” that had been built up within the corporation’s operations.¹⁴⁹

The most important element of *Paramount*, for present purposes, is the court’s acceptance that the interests of the Time Corporation as an entity, or the interests of the corporation’s employees, are to be regarded as paramount over the interests of any particular corporate

¹⁴¹ *See id.*

¹⁴² 571 A.2d at 1140.

¹⁴³ *See id.* at 1150.

¹⁴⁴ *Id.* at 1146–47.

¹⁴⁵ *Id.* at 1148.

¹⁴⁶ *Id.* at 1153.

¹⁴⁷ *Id.* at 1154–55.

¹⁴⁸ *Paramount*, 571 A.2d at 1148.

¹⁴⁹ *Id.*

stakeholder, including shareholders.¹⁵⁰ In this sense, the judgment is inconsistent with the position Hansmann and Kraakman advanced.¹⁵¹ As Professor Allen has stated, *Paramount* “might be interpreted as constituting implicit judicial acknowledgement of the social entity conception [of the corporation],” as clearly as *Dodge* reflects the alternative property conception of the corporation.¹⁵²

B. Canadian Corporate Law and the “End of History” Claim

I. A Comparison of U.S. and Canadian Characterizations of Corporate Governance

In comparing U.S. and Canadian characterizations of corporate governance, some obvious distinctions between the jurisdictions ought to be noted. First, share ownership in Canadian corporations has historically been far more concentrated than that existing in U.S. corporations. Second, the duties and restrictions imposed on Canadian corporate management appear more onerous than those established by U.S. law. It might be said that the breadth of management’s duties in Canada is justified because of a greater need to prevent Canadian corporate management from having its duties to the corporation be corrupted or improperly influenced by more concentrated voting rights or financial might. There are other potential explanations of this situation, however.

Despite the fact that greater concentrations of share ownership could justify the broader and more onerous regulation of Canadian corporate management activity, this increased oversight could also be explained by another significant distinction: the more pervasive governmental regulation of private relations in Canada than what generally exists in the United States. The enhanced scrutiny given to private interactions by Canadian governmental bodies has profound effects on Canadian corporate law. Additionally, increased concentrations of financial power and influence in Canada could lead to the existence of greater conflicts of interest,¹⁵³ which could also rationalize the need for

¹⁵⁰ *Id.* at 1154–55.

¹⁵¹ See Hansmann & Kraakmann, *supra* note 1, at 468.

¹⁵² *Dodge*, 170 N.W. at 684–85; William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 276 (1992).

¹⁵³ Indeed, fewer investors and lenders could easily translate into more incestuous relations in the Canadian corporate realm than those existing in the United States. Historically, this has been the norm; however, increased globalization potentially results in reduced concentrations of investment and more widespread financial dealings between

stronger regulation of corporate management.¹⁵⁴ Although these matters will not be discussed directly herein, they provide a context for appreciating the comparisons that do appear below.

As indicated above, it is unclear why explicit discussion of corporate purpose was far less noticeable in Canadian corporate law than it was in the United States until quite recently. This situation changed, however, with the Canadian Supreme Court’s judgment in *Peoples Department Stores Inc. v. Wise*.¹⁵⁵ *Peoples* was the first modern Canadian case to expressly discuss management’s duties in corporate governance. It also generated a wealth of commentary, the breadth of which was as new to Canadian law as the character of the *Peoples* decision itself.¹⁵⁶ The Canadian Supreme Court’s subsequent decision in *BCE Inc. v. 1976 Debentureholders*¹⁵⁷ provided an opportunity for the court to clarify and amplify some of the principles that it had established in *Peoples*.

Before venturing into a discussion of the *Peoples* and *BCE Inc.* cases, a preliminary note on Canadian corporate law is appropriate. Canadian corporate law shares certain commonalities with U.S. law, but draws upon both British and U.S. corporate principles, which it combines with some unique innovations of its own. Unlike U.S. corporate law, Canadian corporate law falls under both federal and provincial jurisdiction.¹⁵⁸ Additionally, unlike the United States, where the state of Dela-

Canadian corporations, institutional investors, and lenders (subject, of course, to any restrictions on corporate share ownership that may exist via governmental regulation, as for example in the situation that exists with regard to Canadian chartered banks).

¹⁵⁴ See Deborah A. DeMott, *Oppressed but Not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Shareholders and Other Corporate Constituents*, 56 LAW & CONTEMP. PROBS. 181, 221–22 (2002).

¹⁵⁵ See [2004] 3 S.C.R. 461, 477, 489–93 (Can.).

¹⁵⁶ See generally Catherine Francis, *Peoples Department Stores Inc. v. Wise: The Expanded Scope of Directors’ and Officers’ Fiduciary Duties and Duties of Care*, 41 CAN. BUS. L.J. 175 (2005); Wayne D. Gray, *A Solicitor’s Perspective on Peoples v. Wise*, 41 CAN. BUS. L.J. 184 (2005); Wayne D. Gray, *Peoples v. Wise and Dylex: Identifying Shareholder Interests Upon or Near Corporate Insolvency—Stasis or Pragmatism?*, 39 CAN. BUS. L.J. 242 (2003); Warren Grover, *The Tangled Web of the Wise Case*, 41 CAN. BUS. L.J. 200 (2005); Mohamed F. Khimji, *Peoples v. Wise—Conflating Directors’ Duties, Oppression, and Stakeholder Protection*, 39 U.B.C. L. REV. 209 (2006); Ian B. Lee, *Peoples Department Stores v. Wise and “The Best Interests of the Corporation,”* 41 CAN. BUS. L.J. 212 (2005); Darcy L. MacPherson, *The Supreme Court Restates Directors’ Fiduciary Duty—A Comment on Peoples Department Stores v. Wise*, 43 ALTA. L. REV. 383 (2005); Stephane Rousseau, *Directors’ Duty of Care After Peoples: Would It Be Wise to Start Worrying About Liability?*, 41 CAN. BUS. L.J. 223 (2005); Jacob S. Ziegel, *The Peoples Judgment and the Supreme Court’s Role in Private Law Cases*, 41 CAN. BUS. L.J. 236 (2005).

¹⁵⁷ See *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, 584–85 (Can.).

¹⁵⁸ See Constitution Act, 1867, 30 & 31 Vict., Ch. 3 (U.K.), as reprinted in R.S.C., No. 5, §§ 91, 92(11) (Appendix II 1985); *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 174–75 (Can.). See generally Leonard I. Rotman, *Constitutional Interpretation: The Appli-*

ware is readily acknowledged as the primary source of domestic corporate law,¹⁵⁹ there is no undisputed jurisdictional leader in Canadian corporate law. For this reason, corporate law decisions of the Canadian Supreme Court, although few and far between, hold particular prominence in Canadian corporate law.

The *Peoples* and *BCE Inc.* judgments advance the broader understanding of corporate purpose and the function of corporate management that is suggested by the structure of most Canadian corporate law statutes. This is particularly evidenced by the physical and conceptual separation of management's fiduciary duties from its duty of care, the broader range of individuals granted standing to bring derivative actions on behalf of corporations in Canada than in the United States, and the existence of a statutory oppression remedy that provides significant relief for a broad range of aggrieved corporate stakeholders.

2. Rejection of the Shareholder Primacy Model in Canadian Supreme Court Jurisprudence

a. *Peoples Department Stores Inc. v. Wise* (2004):¹⁶⁰ *Management Owes Fiduciary Duties to the Corporation*

The *Peoples* case concerned corporate management's duties to creditors upon or in the vicinity of corporate insolvency. Unlike the jurisprudence in other countries, including Australia,¹⁶¹ New Zealand,¹⁶² the United Kingdom,¹⁶³ and the United States,¹⁶⁴ all of which had sanctioned the notion that management held fiduciary duties to creditors

ability and Operability of Legislation, in CONSTITUTIONAL LAW: CASES, COMMENTARY, AND PRINCIPLES 155, 157–67 (Leonard I. Rotman et al. eds., 2008) (describing the concurrency of federal and provincial jurisdiction known as the “Double Aspect Doctrine” and illustrating its applicability to business owners).

¹⁵⁹ See Ronald J. Gibson, *Globalizing Corporate Governance: Convergence of Form or Function*, 40 AM. J. COMP. L. 329, 350 (2001); Griffiths, *supra* note 133, at 3.

¹⁶⁰ *Peoples*, [2004] 3 S.C.R. at 461.

¹⁶¹ See, e.g., *Spies v. R.* (2000) 201 C.L.R. 603, 637; *Walker v. Wimborne* (1976) 137 C.L.R. 1, 10; *Kinsela v. Russell Proprietary Ltd.* (1986) 4 N.S.W.L.R. 722, 730.

¹⁶² See, e.g., *H. Timber Prot. Ltd. v. Hickson Int'l Pub. Ltd.*, [1995] 2 N.Z.L.R. 8, 13 (C.A.); *Nicholson v. Permakraft (N.Z.) Ltd.*, [1985] 1 N.Z.L.R. 242, 249 (C.A.); *Hilton Int'l Ltd. v. Hilton*, [1989] 1 N.Z.L.R. 442, 475–76 (H.C.).

¹⁶³ See, e.g., *Winkworth v. Edward Baron Dev. Co.*, (1987) 1 All E.R. 114, 118 (H.L.); *Lonrho Ltd. v. Shell Petroleum Co.*, (1980) 1 W.L.R. 627, 634 (H.L.); *Liquidator of West Mercia Safetywear Ltd. v. Dodd*, (1988) 4 B.C.C. 30, 31–32 (C.A.); *Re Horsley & Weight Ltd.*, [1982] Ch. 442, 454 (U.K.).

¹⁶⁴ See, e.g., *Credit Lyonnais*, 1991 WL 277613, at *33–34.

when a corporation was near insolvency,¹⁶⁵ Canadian law remained unsettled on the issue when the *Peoples* action commenced.¹⁶⁶

In the *Peoples* case,¹⁶⁷ the Wise brothers were the sole directors of the Wise Stores department store chain. In 1992, Wise Stores purchased all of the shares in a troubled competitor chain, Peoples Department Stores Inc. (Peoples) pursuant to a highly-leveraged purchase agreement. Following its purchase of Peoples, Wise Stores sought to improve the efficiency of its expanded operations by implementing a new inventory procurement policy. Under this policy, Peoples purchased all inventory for the two chains from North American suppliers, and Wise Stores bought all inventory from international suppliers. As North American goods constituted 82% of both chains’ inventory purchases, Peoples became heavily indebted for inventory from which profits were primarily retained by Wise Stores.

Less than a year after implementing this inventory procurement policy, Peoples and Wise Stores were both petitioned into bankruptcy. Although the financing bank was paid in full and the vendor of Wise Stores suffered only a 1% loss on the purchase price, trade creditors were still owed approximately \$21.5 million. Peoples’ trustee in bankruptcy commenced an action on behalf of Peoples’ unsecured creditors

¹⁶⁵ Note, however, that the judgment of the Delaware Supreme Court in *North American Catholic Educational Programming Foundation Inc. v. Gheewalla*, altered the effects of *Credit Lyonnais*, holding that creditors held claims against corporate directors only during actual insolvency rather than during the nebulous “vicinity of insolvency,” though accepting its theme of duty shifting. *Gheewalla*, 930 A.2d 92, 101–02; *Credit Lyonnais*, 1991 WL 277613, at *33; see Henry T.C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1343 (2007).

¹⁶⁶ One of the only cases on point prior to the trial judgment in *Peoples* was *Re Trizec Corp.*, [1994] 10 W.W.R. 127, 139 (Can.), in which the Alberta Court of Queen’s Bench said:

A specific duty to shareholders becomes intermingled with a duty to creditors when the ability of a company to pay its debts becomes questionable. However, a wholesale transfer of fiduciary duty to creditors likely does not occur at the stage of proceedings where an arrangement is sought as opposed to a case where liquidation occurs.

Id. After the trial judgment in *Peoples* was released, the Ontario Superior Court of Justice released a judgment that supported the existence of management’s fiduciary duties to creditors upon or in the vicinity of insolvency. *Canbook Distrib. Corp. v. Bornis*, [1999] 45 O.R.3d 565, 574 (Can.). After the Quebec Court of Appeal reversed the trial judgment in *Peoples* and found no fiduciary duty owed by Peoples’ management to its creditors, the Ontario Superior Court of Justice again indicated that fiduciary duties could be owed by management to creditors in a manner essentially similar to what it had previously stated in *Canbook*. See *Peoples*, [2004] 3 S.C.R. at 485–86; *Dylex Ltd. v. Anderson*, [2003] 63 O.R.3d 659, 669–70 (Can.).

¹⁶⁷ See *Peoples*, [2004] 3 S.C.R. at 481.

against the Wise brothers in their capacities as directors of Peoples. The action claimed that the Wise brothers had breached their fiduciary duties and duties of care under section 122(1) of the Canada Business Corporations Act (CBCA).¹⁶⁸

In the Canadian Supreme Court's unanimous judgment, Justices Major and Deschamps held that Peoples' directors had not violated either their fiduciary duties or duties of care under section 122(1). The court took care to distinguish between these duties, however. As the court indicated, the fiduciary duty, or duty of loyalty, "require[ed] directors and officers to act honestly and in good faith with a view to the best interests of the corporation," while the duty of care imposed a duty of diligence on management in supervising and managing a corporation's affairs.¹⁶⁹ The court expressly noted that the trial judge in *Peoples* had not separately considered these duties in his judgment; moreover, it emphasized that those duties "are, in fact, distinct and are designed to secure different ends."¹⁷⁰

The court's emphasis on the distinction between management's fiduciary duties and its duty of care is reflected in most Canadian corporate law statutes. Section 122(1) of the CBCA is reflective of the structure and, for the most part, the wording of most provincial corporations statutes:

- (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
 - (a) act honestly and in good faith with a view to the best interests of the corporation; and
 - (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.¹⁷¹

This physical and conceptual separation of management's fiduciary duties and duties of care in Canadian law is a notable distinction from U.S. corporate law jurisprudence, particularly in Delaware, which has tended to conflate these duties.¹⁷²

¹⁶⁸ Canada Business Corporations Act (CBCA), R.S.C., ch. C-44 § 122(1) (1985); *Peoples*, [2004] 3 S.C.R. at 462.

¹⁶⁹ See *Peoples*, [2004] 3 S.C.R. at 476.

¹⁷⁰ *Id.* at 476-77.

¹⁷¹ CBCA § 122. Subsection 122(1)(a) is the statutory embodiment of management's fiduciary duties, while subsection 122(1)(b) outlines the duties of care owed by management. *Id.*

¹⁷² See, e.g., *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001); *McMullin v. Beran*, 765 A.2d 910, 917 (Del. 2000); *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1164 (Del. 1995); *Cede & Co. v. Technicolor, Inc.*,

Despite the fact that corporate fiduciaries owe each of these duties, not all are fiduciary duties. Although a fiduciary may owe a duty of care or a duty of good faith, those duties do not become fiduciary duties simply because a fiduciary owes them. Fiduciary duties pertain to conflicts of interest such as self-dealing, and the duty to act on behalf of one’s beneficiaries rather than in one’s own interest or on behalf of the interests of third parties. The duty of care is a tort duty under which a party is obliged to exercise the same level of care on behalf of others that would be expected of ordinarily prudent persons in the conduct of their own affairs.¹⁷³ Meanwhile, the duty of good faith is a contractual standard of honesty in the discharge of one’s obligations and is limited to the range of duties outlined in the contract.¹⁷⁴

In dismissing the creditors’ claim, the Canadian Supreme Court held that the directors are obliged to “serve the corporation selflessly, honestly and loyally,”¹⁷⁵ but it also emphasized that “[a]t all times, directors and officers owe their fiduciary obligation to the corporation.”¹⁷⁶ The court further explained that “[t]he interests of the corporation are not to be confused with the interests of creditors or those of any other stakeholders.”¹⁷⁷ The court stressed that management’s fiduciary duties do not change when a corporation is in the vicinity of insolvency.¹⁷⁸ Consequently, in assessing the nature of the claim before it,

634 A.2d 345, 361 (Del. 1993) (referencing a fiduciary “triad” comprised of the duties of care, good faith, and loyalty). Although more recent Delaware decisions have tended to retreat from the fiduciary triad formulation, they still conflate the fiduciary duties of loyalty with duties of care. *See, e.g.*, *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (describing the duty of good faith as part of the duty of loyalty). This conflation is also reflected in academic commentary. *See, e.g.*, Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 *FORDHAM L. REV.* 1769, 1771 (2007) (“Classically, courts and commentators have identified two types of fiduciary duty of corporate officers and directors: the duty of loyalty and the duty of care.”). Hill and McDonnell identify this conflation of the duties of loyalty and care as being enshrined in a number of corporate law casebooks. *Id.*; *see* JESSE H. CHOPER ET AL., *CASES AND MATERIALS ON CORPORATIONS* 74–179 (6th ed. 2004); WILLIAM A. KLEIN ET AL., *BUSINESS ASSOCIATIONS* 328–412 (6th ed. 2006); D. GORDON SMITH & CYNTHIA A. WILLIAMS, *BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES* 395–524 (2004).

¹⁷³ Although, curiously, the Revised Uniform Partnership Act expressly states that the duty of care is a fiduciary duty owed by partners. REVISED UNIF. P’SHP ACT § 404(a), 6 U.L.A. 143 (1997).

¹⁷⁴ *Id.* cmt. 4.

¹⁷⁵ *Peoples*, [2004] 3 S.C.R. at 477.

¹⁷⁶ *Id.* at 482–83.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 483. Note also the court’s comments that “that phrase [vicinity of insolvency] has not been defined; moreover, it is incapable of definition and has no legal meaning.” *Id.*

the Canadian Supreme Court suggested that the creditors ought to have sought an oppression remedy rather than relief for breach of fiduciary duty.¹⁷⁹

The Canadian Supreme Court's contention in *Peoples* that there was no need for management to owe fiduciary duties to creditors on the eve of insolvency because of the existence of the statutory oppression remedy, notwithstanding its breadth,¹⁸⁰ is neither logical nor appropriate.¹⁸¹ In many situations in law, concurrent or overlapping duties or obligations exist, as evidenced by the concurrent duties present in contract and tort. Yet, the fact that some claims may be brought in either contract or tort does not warrant the insistence that one or the other is, *a priori*, denied applicability. Matters ought not be any different for claims of a breach of fiduciary duty in the face of overlapping oppression claims.¹⁸² It is not the proper function of a court to decide

¹⁷⁹ See *id.* at 483–84. Indeed, the Canadian Supreme Court stated that “[i]f the stakeholders cannot avail themselves of the statutory fiduciary duty (the duty of loyalty, *supra*) to sue the directors for failing to take care of their interests, they have other means at their disposal.” *Id.* Specifically, the court indicated that “[t]he oppression remedy of s. 241(2) of the CBCA and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction.” *Id.* at 484. Importantly, however, the creditors in *Peoples* did not seek an oppression remedy against Peoples’ management. *Id.* at 481–82.

¹⁸⁰ *Id.* at 483. The breadth of the oppression remedy, which is considered *infra* Part II.B.3.b, has sometimes led Canadian courts to inappropriate conclusions which suggest that the oppression remedy has overtaken or absorbed other causes of action. See, e.g., *Brant Invs. Ltd. v. KeepRite Inc.*, [1991] 80 D.L.R.4th 161, 172 (Can.) (discussing the breadth of the statutory oppression remedy). The purpose of the oppression remedy is not to remove existing bases of legal or equitable claims but to provide a method for relief against oppressive conduct. Where such conduct also fits within the scope of other legal claims, such as breach of fiduciary duty, the breadth of the oppression remedy should not be understood to supersede any other appropriate basis of legal action.

¹⁸¹ *Peoples* was not the first Canadian case to have ventured down this path. See *Brant Invs.*, 80 D.L.R.4th at 172. In *Brant Investments*, the Ontario Court of Appeal held that it was “unnecessary and . . . inappropriate” to saddle directors or majority shareholders with fiduciary duties towards minority shareholders in light of the existence of the broad statutory oppression remedy. *Id.* This statement was made, at least in part, because the court held that “the evidence necessary to establish a breach of fiduciary duty would be subsumed in the broader range of evidence which would be appropriately adduced on an application under the section.” *Id.*

¹⁸² As suggested in LEONARD I. ROTMAN, FIDUCIARY LAW 503–04 (2005):

It matters not a wit to the lawful determination of a plaintiff’s claim whether that plaintiff had other causes of action available that were not pleaded; rather, what is relevant is simply whether the cause of action pleaded may be properly made out on the facts. This is clearly indicated by Viscount Haldane in *Nocton v. Lord Ashburton*:

how a plaintiff ought to frame his or her claim in an action. All a court is entrusted to do is to assess the relative merits of the claims advanced by the plaintiff once they are asserted.

To further entrench the idea that management’s duties are owed to “the corporation,” the Canadian Supreme Court in *Peoples* emphasized that “the phrase ‘the best interests of the corporation’ should be read not simply as the ‘best interests of the shareholders.’”¹⁸³ In so doing, the Supreme Court’s rejection of the shareholder primacy model is quite clear. The court placed all stakeholder interests on the same level in the context of assessing a corporation’s best interests, stating:

[I]n determining whether they are acting with a view to the best interests of the corporation, it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.¹⁸⁴

Unlike the situation with management’s fiduciary duties, the court held that its duties of care were not restricted to the corporation but could directly apply to stakeholders such as creditors.¹⁸⁵ Nonetheless, it

It did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him.

Justice La Forest acknowledges this same idea in his own judgment in *M.(K.) v. M.(H.)*, where he expressly states that “a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims.” Similarly, in *Hodgkinson v. Simms*, La Forest J. states that “the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties” For these reasons, the rationale behind the Supreme Court’s judgment in *Peoples* has no sound basis in law.

Id. (citations omitted).

¹⁸³ *Peoples*, [2004] 3 S.C.R. at 481. Although the court conceded, that, from an economic perspective, “the ‘best interests of the corporation’ means the maximization of the value of the corporation,” it held that various other factors were relevant when directors considered how to manage the corporation with a view to its best interests. *Id.* These considerations included the interests held by the various stakeholders of the corporation. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 488 (“[U]nlike the statement of the fiduciary duty in s. 122(1)(a) of the CBCA, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1)(b) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty.”).

concluded that Peoples' directors had not breached their duty of good faith to the creditors in implementing the new inventory procurement policy, as that was deemed a valid exercise of management's business judgment.

Although the *Peoples* judgment stands for the proposition that corporate management owes fiduciary duties to the corporation and not to any particular stakeholder, it articulates a rather broad vision of the stakeholders whose interests may be considered by corporate management in discharging its fiduciary duties to the corporation. Indeed, the potential stakeholder interests that are recognized as a result of the Canadian Supreme Court's analysis in *Peoples*—particularly government and the environment—are likely broader than the range of corporate stakeholders generally contemplated by most progressive scholars.

The *Peoples* case was a watershed in Canadian corporate jurisprudence as the first Supreme Court case to overtly consider and reject the shareholder primacy model in ascertaining the object of management's fiduciary duties. Nonetheless, *Peoples* did not usher in a new manner of thinking about the recipients of corporate management's fiduciary duties, whether in Canada or elsewhere.¹⁸⁶ Despite the fact that the *Peoples* case may not have carved out a new way of thinking about the beneficiaries of corporate management's duties, it did broadcast its conclusions much more broadly than had previously been communicated in Canadian corporate law.

b. *BCE Inc. v. 1976 Debentureholders* (2008):¹⁸⁷ *Management Must Respect the Interests of All Stakeholders*

In *BCE Inc.*, the Canadian Supreme Court had an opportunity to revisit its comments about corporate management's duties in *Peoples* in the context of a going-private transaction involving the leveraged buyout (LBO) of telecom giant BCE Inc. The \$52 billion transaction, at the time the largest private equity deal in history,¹⁸⁸ offered a premium of more than 40% to BCE Inc.'s common shareholders, or approxi-

¹⁸⁶ See *McClurg v. Canada*, [1990] 3 S.C.R. 1020, 1040–41 (Can.); *Teck Corp. v. Millar*, [1972] 33 D.L.R.3d 288, 314 (Can.); *Re Olympia & York Enter.*, [1986] 59 O.R.2d 254, 271 (Can.).

¹⁸⁷ [2008] 3 S.C.R. at 560.

¹⁸⁸ See Peter Lattman, *BCE Leveraged Buyout Deal Collapses*, WALL ST. J., Dec. 11, 2008, at C3. The deal ultimately collapsed as a result of an opinion delivered by accounting firm KPMG, which concluded that it could not provide a certificate of solvency for BCE Inc. as required under the terms of the deal, because of market conditions and the huge debt load that BCE would carry once it emerged from the deal. *Id.*

mately \$10 billion over the value of the shares prior to the time they were put in play. The deal would also have resulted in the assumption of \$30 billion in debt by BCE’s wholly owned subsidiary, Bell Canada.

BCE Inc. sought court approval of the LBO as required under section 192 of the CBCA.¹⁸⁹ The plan of arrangement was approved by 97.93% of BCE Inc.’s common shareholders, but opposed by certain Bell Canada debentureholders, who claimed that Bell Canada’s assumption of the \$30 billion debt would reduce the value of their bonds by an average of 20% and lower their trade value from their “investment grade” rating.¹⁹⁰ Consequently, the debentureholders sought an oppression remedy pursuant to section 241 of the CBCA. They also opposed the trial court’s approval of the arrangement under section 192 as not being “fair and reasonable” due to the negative effect on their economic interests.¹⁹¹

In determining the merits of the debentureholders’ claim, the Canadian Supreme Court examined the actions of BCE Inc.’s directors in accepting the purchase arrangement.¹⁹² As no duty of care claim arose, the court’s focus was solely on the directors’ fiduciary duty. The Supreme Court affirmed that the directors owed a fiduciary duty to “the corporation,” as it had concluded in *Peoples*, and that directors may consider the impact of corporate decisions on stakeholders other than shareholders.¹⁹³ The court held that the content of management’s duty

¹⁸⁹ CBCA § 192. Subsection 192(3) reads as follows:

Application to court for approval of arrangement—Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

Id.

¹⁹⁰ See *BCE Inc.*, [2008] 3 S.C.R. at 577. In addition, the debenture downgrade could have forced debentureholders with credit rating restrictions to sell their debentures at a loss. See *id.*

¹⁹¹ See *id.* at 578. Initially, the debentureholders also brought motions for declaratory relief under the terms of the trust indentures, although that issue was not before the Canadian Supreme Court. See *id.*

¹⁹² See *id.* at 605. For the purpose of the appeal, the Canadian Supreme Court held that it did not need to distinguish between the conduct of the directors of BCE and the directors of Bell Canada, since the same directors served on the boards of both corporations. See *id.* at 582.

¹⁹³ See *id.* at 584. The court reaffirmed its finding in *Peoples* that the stakeholders whose interests may be considered included “inter alia, shareholders, employees, creditors, consumers, governments and the environment.” See *id.* at 585.

was not limited to fostering short-term profit or increasing share value, but extended to the corporation's long-term interests.¹⁹⁴

The remainder of the judgment in *BCE Inc.* considered the application of the oppression remedy to the alternative claims asserted by the debentureholders that: (1) they expected that BCE Inc.'s management would maintain the investment grade trading value of their debentures and; (2) at a minimum, that management would consider their economic interests in maintaining the debentures' trade value.¹⁹⁵ The Supreme Court's finding is problematic, however, because it states that where directors account for the interests of stakeholders in assessing the best interests of the corporation, courts should give appropriate deference to directors' business judgment under the business judgment rule.¹⁹⁶

In opposition to conventional wisdom, the business judgment rule does not properly apply to fiduciary duties, but only to duties of care. Notwithstanding the problems associated with the conflation of directors' fiduciary duties and their duties of care in Delaware jurisprudence,¹⁹⁷ Justice Brandeis's opinion in *United Copper Securities Co. v. Amalgamated Copper Co.* is perfectly clear in stating that the business judgment rule applies only to the duties of care.¹⁹⁸ As he asserted in that case, "Courts interfere seldom to control such discretion *intra vires* the corporation, *except where directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment.*"¹⁹⁹ Thus, as stated in *Lewis v. S.L. & E.*,

¹⁹⁴ *Id.* at 584.

¹⁹⁵ *Id.* at 602. For a discussion of this aspect of the judgment, see *infra* Part II.B.3.b.

¹⁹⁶ See *BCE Inc.*, [2008] 3 S.C.R. at 585.

¹⁹⁷ See, e.g., *Emerald Partners*, 787 A.2d at 90; *McMullin*, 765 A.2d at 917; *Brincat*, 722 A.2d at 10; *Cinerama*, 663 A.2d at 1164; *Cede & Co.*, 634 A.2d at 361.

¹⁹⁸ See 244 U.S. 261, 263-64 (1917).

¹⁹⁹ *Id.* at 263-64 (emphasis added); see also Edward M. Iacobucci, *A Wise Decision? An Analysis of the Relationship Between Corporate Ownership Structure and Directors' and Officers' Duties*, 36 CAN. BUS. L.J. 337, 364-65 (2002) (stating that "[d]ifferent standards of scrutiny apply to the duty of care and to fiduciary duties, and with good reason: a deferential standard is appropriate for the duty of care, but not for fiduciary duties"); Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 DUKE L.J. 425, 437 n.39 (1993). Mitchell observes:

In the absence of fiduciary misconduct, courts refuse to inquire into the merits of a given business decision and to impose fiduciary liability regardless of the outcome of that decision under the doctrinal rubric of the business judgment rule. . . . When misconduct is characterized as a breach of the duty of care, the business judgment rule's presumption is overcome and liability is imposed on the fiduciary without further inquiry beyond the amount of damages. . . . When the fiduciary's misconduct is characterized as a breach of

Inc., “[T]he business judgment rule presupposes that the directors have no conflict of interest,” and that “[w]hen a shareholder attacks a transaction in which the directors have an interest other than as directors of the corporation, the directors may not escape review of the merits of the transaction.”²⁰⁰

As a result, courts need not defer to the actions of directors in applying their fiduciary duties but may appropriately review their decisions for consistency with fiduciary standards without offending the business judgment rule. Therefore, the purpose of the business judgment rule is not to insulate directors from liability for the exercise of their powers over the corporation, but to provide adequate deference to decisions that, as indicated in *Aronson v. Lewis*, are made “on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.”²⁰¹

Some notable points that are relevant to the nature of directors’ fiduciary duties are also observable in the part of the *BCE Inc.* judgment focusing on oppression. Initially, the court indicated that both the corporation and its shareholders are “entitled to maximize profit and share value . . . but not by treating individual stakeholders unfairly.”²⁰² The difficulty with this proposition is that both *BCE Inc.* and *Peoples* establish that stakeholders cannot claim a breach of fiduciary duty against management, since its fiduciary duties are owed only to the corporation. The court in *BCE Inc.*, however, links the notion of unfair treatment to the oppression remedy, holding that fair treatment is “the central theme running through the oppression jurisprudence.”²⁰³ Accordingly, the duty to treat stakeholders fairly, as guaranteed by the oppression remedy, may serve as a limiting factor on directors’ ability to fulfill their fiduciary duties. This situation may explain why directors, in fulfilling their fiduciary duties to the corporation, may well wish to consider the impact of their actions on other stakeholders, as indicated in both *Peoples* and *BCE Inc.*

the duty of loyalty, courts do not typically impose liability on the fiduciary automatically but rather evaluate the transaction to determine whether it is fair to the corporation.

Id.

²⁰⁰ *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 769 (2d Cir. 1980). Furthermore, as the court stated in *Peoples*, fiduciary duties and duties of care are “designed to secure different ends.” *Peoples*, [2004] 3 S.C.R. at 476–77.

²⁰¹ 473 A.2d 805, 812 (Del. 1984).

²⁰² *BCE Inc.*, [2008] 3 S.C.R. at 592.

²⁰³ *Id.*

The *BCE Inc.* judgment stresses that management must ensure that it comports itself “in accordance with [its] fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen”²⁰⁴ where it is faced with the conflicting interests of the corporation and its stakeholders. This signifies that a court, in reviewing the actions of corporate management, must inquire whether “in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation’s duties as a good corporate citizen.”²⁰⁵

The court’s requirement in *BCE Inc.* that a corporation must act as a “good corporate citizen” requires that its management consider the interests of *all* of its stakeholders, not only its shareholders. This finding is consistent with the contention made herein that the shareholder primacy model is not reflective of Canadian law’s understanding of corporate governance. Any ambiguity on this point ought to be put to rest by the court’s subsequent assertion in *BCE Inc.* that “[t]here is no principle that one set of interests—for example the interests of shareholders—should prevail over another set of interests.”²⁰⁶ The key for corporate management in Canada, then, is to balance the interests of the various constituent groups for which it is obliged to account. This is clearly inconsistent with Hansmann and Kraakman’s “end of history” thesis.

3. Rejection of the Shareholder Primacy Model in Canadian Corporate Law Statutes

In addition to the Canadian Supreme Court’s recent corporate jurisprudence in *Peoples* and *BCE Inc.*, there are other substantive reasons to suggest that the shareholder primacy model does not hold sway in Canada. Two such reasons are firmly rooted in Canadian corporate law statutes: the existence of a more generally available derivative action than that existing in the United States, as well as the presence of a wide-ranging statutory oppression remedy.

²⁰⁴ *Id.* at 607–08.

²⁰⁵ *Id.* at 598.

²⁰⁶ *Id.*

a. *The Derivative Action*

Derivative actions allow designated individuals²⁰⁷ to act in a representative capacity on behalf of a corporation for wrongs committed against it when management itself does not initiate such actions.²⁰⁸ Any award made pursuant to a derivative action accrues to the corporation, not to the individual bringing the derivative suit.²⁰⁹ Pursuant to section 240 of the CBCA, the range of potential relief available to a corporation under a derivative action is limited only by a court’s imagination, as the section allows the court the discretion to “make any order it thinks fit.”²¹⁰

The Canadian derivative action is essentially similar to derivative actions that exist under U.S. corporate law statutes, but with one notable difference. Pursuant to U.S. corporate law, only shareholders may generally bring derivative actions.²¹¹ In Canada, any person who qualifies as a “complainant” under section 238 of the CBCA may be granted leave to bring a derivative action.²¹² This important difference is relevant in assessing whether corporate governance in Canada follows a shareholder primacy model. CBCA section 239(2) defines complainants as any of the following persons:

- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates;
- (b) a director or an officer or a former director or officer of a corporation or any of its affiliates;

²⁰⁷ See CBCA § 238. Persons who are deemed to be appropriate “complainant[s]” and therefore have carriage of a derivative action are defined under the statutes that authorize such actions or under the common law, where appropriate. *Id.*

²⁰⁸ See *id.* § 239. The derivative action exists only because of the problems inherent in the notion of corporate legal personality. Corporate decisions are made on a corporation’s behalf by its management, which is bound by fiduciary duties to act in the best interests of the corporation; enforcing these fiduciary duties is difficult, however, if the only actors who can represent the corporation are the very managers who may have violated those duties. This explains why other individuals are allowed to represent the corporation’s interests via the derivative action where management fails to assume such responsibility. *Id.*

²⁰⁹ See *id.* (noting that complainant brings action “in the name and on behalf of a corporation”). Given that the derivative action is a representative action on behalf of the corporation that seeks recompense for harm done to the corporation, any proceeds awarded from the litigation logically flow to the corporation, not the complainant. See *id.* § 240.

²¹⁰ *Id.* § 240.

²¹¹ Note, however, the exception for creditors who bring such claims where corporations are insolvent, which is discussed in greater detail below.

²¹² CBCA § 238.

- (c) the Director;²¹³ or
- (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.²¹⁴

The key element in the definition of complainant is subsection (d), which, to date, has been interpreted to include creditors,²¹⁵ but which is open-ended regarding potential complainants.²¹⁶

In the United States, the assertion that only shareholders are generally able to bring derivative actions is subject to the financial condition of the corporation. Although U.S. case law extended the ability to bring derivative actions to creditors in circumstances where a corporation was “on the eve of” or “in the vicinity of” insolvency, in *Credit Lyonnais*,²¹⁷ it has now limited that action, in *North American Catholic Educational Programming Foundation Inc. v. Gheewalla*, to situations of actual insolvency.²¹⁸ Thus, in practice, those who have been able to bring derivative actions in Canada and the United States are the same individuals. A creditor in Canada, however, need not wait until a corporation is insolvent to be granted standing as a complainant. Where persons seeking leave to bring a derivative action are not shareholders, Canadian courts will assess the connection between the claimant, its interests, and the corporation’s own interests in deciding whether to grant the leave requested.²¹⁹ Consequently, the derivative action is of potentially greater applicability in Canada than it is in the United States, as any interested person who

²¹³ See *id.* § 2(1). “‘Director’ means the Director appointed under section 260,” who is essentially the registrar for the Act. See *id.* § 260.

²¹⁴ *Id.* § 239(2).

²¹⁵ See, e.g., *Dylex*, 63 O.R.3d at 667–68.

²¹⁶ See, e.g., *BCE Inc.*, [2008] 3 S.C.R. at 586 (noting that potential complainants include security holders, creditors, directors, and officers). As indicated by the CBCA, however, the range of possible complainants is much broader than this. See CBCA § 239.

²¹⁷ See *Credit Lyonnais*, 1991 WL 277613, at *33–34 *& n.55.

²¹⁸ See *Gheewalla*, 930 A.2d at 101–02. There is an important difference, however, between allowing creditors to bring derivative actions on behalf of corporations and allowing creditors to bring direct breach of fiduciary duty claims against corporate management. See, e.g., *Prod. Res. Group*, 863 A.2d at 793–95.

²¹⁹ See, e.g., *Re Daon Dev. Corp.*, [1984] 10 D.L.R.4th 216, 223 (Can.). In this case, an application by a debentureholder to be certified as a complainant in order to bring a derivative action was denied on the basis that the debentureholder was not a “proper person” under the then-applicable British Columbia statute since the applicant’s “only interest in the management of the company is the general and indirect one of wishing to see the company prosper.” See *id.* The British Columbia statute in question did not include a provision characterizing “any other person” as a complainant, though. See *First Edmonton Place v. 315888 Alba. Ltd.*, [1988] 60 Alta. L.R.2d 122, 154 (Can.). In *First Edmonton Place*, however, it was held that a creditor need not hold a direct interest in the corporation to be a “proper person” to bring a derivative action on behalf of the corporation. See *id.* at 154–57.

may demonstrate a suitable connection to the corporation’s interests may be authorized to bring a derivative suit.²²⁰

Blair and Stout have suggested that the existence of the shareholder derivative action appears to support the proposition that U.S. corporate law follows the shareholder primacy model.²²¹ Nevertheless, they contend that the practical effects of the derivative action actually support the broader interests of the firm, rather than only those of shareholders.²²² Most obviously, they note that the “requirement that damages be paid directly to the firm and not to the suing shareholders seems difficult to explain under the norm of shareholder primacy.”²²³ Allowing a greater range of persons to bring derivative actions certainly speaks more to communitarian models than to the shareholder primacy model.²²⁴

The potential for a broader range of complainants that is provided for under Canadian division of powers corporate statutes, (like the CBCA), creates an important distinction between the Canadian derivative action and its U.S. counterparts. This distinction provides another basis for suggesting that the shareholder primacy model does not hold sway in Canada. Further supporting the opposition to shareholder primacy, the CBCA clearly indicates that evidence of shareholder approval is not determinative in a court’s consideration as to whether a motion to seek leave to commence a derivative action should be allowed.²²⁵

²²⁰ See Stephanie Ben-Ishai, *A Team Production Theory of Canadian Corporate Law*, 44 ALTA. L. REV. 299, 307 (2007). While the statute allows derivative actions to be brought by any complainant, in practice, most derivative actions are brought by shareholders. *See id.*

²²¹ See Blair & Stout, *supra* note 13, at 287–88, 293.

²²² *See id.* at 293. These include: (1) the procedural hurdles and substantive limitations on the use of the derivative action; (2) the fact that relief goes to the corporation, rather than the party bringing the derivative action, and; (3) that in certain circumstances, such as in the case of an insolvent corporation or one in the vicinity of insolvency, non-shareholder stakeholders may be granted standing to bring derivative actions. *See id.* The procedural hurdles associated with the derivative action include, *inter alia*, a requirement for shareholders to first demand that directors take legal action on the corporation’s behalf before they may undertake a derivative action. *See id.* This requirement exists because corporate management, which possesses the duty to act in the corporation’s best interests, is best-positioned to bring a claim on behalf of the corporation. The exception to this rule arises in situations where a conflict of interest can be shown connecting management’s own actions, or inaction, to the harm the corporation allegedly suffered. *See id.*

²²³ *Id.* at 295.

²²⁴ Although Blair and Stout contend that the practical effects of the derivative action support a director primacy norm for U.S. corporate law, these effects do indicate a lack of support for the shareholder primacy model. *See Blair & Stout, supra* note 13, at 290–309.

²²⁵ *See* CBCA § 242(1).

The limited use to date of the derivative action in Canada does not provide conclusive proof that it cannot serve as a significant avenue for either shareholders or other complainants under Canadian law. The question of whether the derivative action is currently being effectively utilized presumably has more to do with the nature of the applications being made and the generally restrictive manner in which the courts have interpreted them, than the ineffectiveness of the action itself. Derivative action clauses in corporate law statutes, after all, are only permissive: they simply grant the ability to complainants to seek leave to bring an action, but they do not guarantee the ability to bring the action itself. That determination rests solely with the courts.

As a result of *Peoples* and *BCE Inc.*, it is now generally understood that Canadian corporate law follows a model other than shareholder primacy. For this reason, the decisions should influence the manner in which judges assess motions for leave to bring derivative action claims in Canada. Further, the decisions are likely to broaden the instances and range of non-shareholder complainants granted leave to bring those actions in that country.

b. *The Oppression Remedy*

A person who qualifies as a complainant in order to launch a derivative action under Canadian corporate statutes is also eligible to bring an action for an oppression remedy.²²⁶ Unlike the derivative action,

²²⁶ Creditors have been found to qualify as complainants under Canadian division of powers corporations statutes, such as the CBCA, and are thus able to seek an oppression remedy where corporate directors and officers act in a manner that is "oppressive or unfairly prejudicial to or that unfairly disregards [their] interests . . ." In *R. v. Sands Motor Hotel Ltd.*, a creditor was considered to be a "proper person" entitled to bring an application for relief under the oppression remedy. [1985] 36 Sask. R. 45, 48 (Can.); see also *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.*, [1999] 40 O.R.3d 563, 563 (Can.); *Levy-Russell Ltd. v. Shieldings Inc.*, [1998] 41 O.R.3d 54, 55 (Can.). In *First Edmonton Place*, the Alberta Court of Queen's Bench held that the oppression remedy "would be available if the act or conduct of the directors or management of the corporation which is complained of amounted to using the corporation as a vehicle for committing fraud upon a creditor." *First Edmonton Place*, 60 Alta. L.R.2d at 145-46. The court stated:

[T]he test of unfair prejudice or unfair disregard should encompass the following considerations: the protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor.

Id. at 146. The court did indicate, however, that these considerations were illustrative rather than exhaustive. See *id.*; see also LEONARD I. ROTMAN ET AL., CANADIAN CORPORATE

however, an oppression remedy is a personal rather than representative suit.²²⁷ As any awards made pursuant to an oppression remedy accrue to the complainant personally, one might wonder why complainants would not prefer to bring oppression claims as opposed to derivative action claims. The rationale is that important distinctions between these two forms of action exist which demonstrate that they are not interchangeable, and that the choice of action is not entirely the complainant's to make. Moreover, the ensuing discussion of the oppression remedy in Canada reinforces the conclusion that Canada has rejected the “end of history” thesis. The oppression remedy in Canadian law is a wide-ranging statutory cause of action that gives broad discretion to courts to grant a range of remedial aid to complainants whose legal and equitable interests are deemed to have been “oppressed.” In this sense, it differs from the derivative action, pursuant to which any relief that is granted is awarded to the corporation. Also, unlike the derivative action, a complainant does not require leave of the court to bring an oppression claim. A complainant may file an oppression claim via simple application, which a court may summarily consider, whereas a derivative action may only be commenced by action.²²⁸

In the United States, oppression actions may exist either by statutory authority or under the common law. Like the Canadian oppression remedy, they provide minority shareholders with a cause of action that protects them against majority control. Not all states have a statutory oppression remedy in their corporations statutes, however. For example, Delaware does not have an oppression remedy in its leading corporations statute.²²⁹ Even where statutory oppression actions do exist, they are not as broad as the Canadian variety. Some states have limited op-

LAW: CASES, NOTES & MATERIALS, 447–549 (3d ed. 2006) (discussing the elements of oppression and excerpts from case law).

²²⁷ See *Goldex Mines Ltd. v. Revill*, [1974] 7 O.R.2d. 216, 221 (Can.) (holding that a complainant may join representative and personal actions as long as the procedural requirements for each are fulfilled and the bases for the respective claims are sufficiently distinguished).

²²⁸ Although an oppression remedy may be pursued by application via the use of affidavit evidence, in practice, the issues in an oppression claim are usually sufficiently complex that a judge will require that the matter be tried by action in order to have the benefits of a full trial. See, e.g., *Deluce Holdings Inc. v. Air Canada*, [1992] 12 O.R.3d 131, 132 (Can.).

²²⁹ The lack of an oppression remedy in Delaware could, however, simply affirm the notion of the “race to the bottom,” as many commentators have suggested, given the lack of this broad-based form of stakeholder protection. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 558–59 (1933); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663, 664–66 (1974) (discussing the origins of the “race to the bottom” idea in corporate law).

pression provisions that allow for court dissolution of the corporation,²³⁰ while other states' oppression claims provide for a far wider range of relief.²³¹ Furthermore, common law oppression actions, which have been sanctioned in leading cases such as *Donahue v. Rodd Electrotype Co.*,²³² are not always available from state to state. Notably, Delaware has failed to sanction the *Donahue*-type common law oppression action.²³³ Where oppression actions do exist under U.S. statute or common law, they are generally restricted to close corporations, which involve a rather different stakeholder dynamic than widely-held corporations. This restriction on the availability of oppression actions differs from the situation in Canada, where oppression can exist within either widely-held or close corporations.²³⁴

²³⁰ See MODEL BUS. CORP. ACT § 14.30(2) (ii) (2005) (providing a similar limited form of oppression where "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent"). Upon proof of such circumstances by a shareholder, a court may dissolve the corporation. See *id.*

²³¹ See MINN. STAT. ANN. § 302A.751 (West 2004) (authorizing "any equitable relief" and specifically authorizing a buyout of a shareholder's interest); N.J. STAT. ANN. § 14A:12-7(1) (West 2003) (providing a nonexclusive list of possible relief that includes the order of a buyout and the appointment of a provisional director or custodian); Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 308 n.54 (2004). Moll further indicates that domestic courts have asserted that they are not restricted to statutory remedies for oppressive conduct, but may invoke various equitable remedies. *Id.* at 308 n.55 (citing *Brenner v. Berkowitz*, 634 A.2d 1019, 1033 (N.J. 1993) ("Importantly, courts are not limited to the statutory remedies [for oppression], but have a wide array of equitable remedies available to them.")); see also *Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387, 395-96 (Or. 1973) (listing ten "alternative remedies" for oppressive conduct). To the contrary position, however, Moll cites *Giannotti v. Hamway*, 387 S.E.2d 725, 733 (Va. 1990), which describes the dissolution remedy for oppression as "exclusive" and held that the trial court could not "fashion other . . . equitable remedies." Other commentators have also indicated the growth of domestic corporate statutory provisions for oppression as extending beyond the remedy of dissolution. See, e.g., Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 708-09 (1993) ("[I]t makes more sense to view oppression not as a ground for dissolution, but as a remedy for shareholder dissension.").

²³² See *Donahue v. Rodd Electrotype Co. of New Eng., Inc.*, 328 N.E.2d 505, 513-15 (Mass. 1975).

²³³ See *Nixon v. Blackwell*, 626 A.2d 1366, 1379 (Del. 1993). It might, however, be plausibly argued that Delaware's comparatively well-developed law of directors' duties achieves substantially the same result as the oppression remedy, insofar as the majority's acts of oppression generally require board action to implement. See REINIER R. KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 126 (2004).

²³⁴ That being said, the Canadian Supreme Court has expressly stated that "[t]he size, nature and structure of the corporation are relevant factors in assessing reasonable expectations." *BCE Inc.*, [2008] 3 S.C.R. at 595-96. The court in *BCE Inc.* also said that "[c]ourts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a large public company," and correspond-

Beck has described the oppression remedy in Canada as “beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world . . . unprecedented in its scope.”²³⁵ As with the derivative action, the range of remedies that may be imposed where oppression is found is uncircumscribed: in addition to certain enumerated remedies under section 241(3) of the CBCA, a court possesses the discretion to “make any interim or final order it thinks fit.”²³⁶

In most circumstances, an act of a corporation or its directors causes oppression. Nonetheless, the actions of shareholders or others may also cause oppression. Section 241 of the CBCA²³⁷ is illustrative of the form taken by the statutory oppression remedy in Canadian corporate law statutes, stating:

- (1) Application to court re oppression—A complainant may apply to a court for an order under this section.
- (2) Grounds—If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
 - (a) any act or omission of the corporation or any of its affiliates effects a result,
 - (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
 - (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.²³⁸

The CBCA describes who may be oppressed and provides *indicia* of oppression but does not define what it means to be “oppressed.” Ra-

ingly, “courts may accord greater latitude to the reasonableness of expectations formed in the context of a small, closely held corporation.” *Id.*

²³⁵ *Deluce Holdings*, 12 O.R.3d at 133 (citing Stanley M. Beck, *Minority Shareholder Rights in the 1980s*, in *CORPORATE LAW IN THE 80s* 311, 312 (Law Soc’y of Upper Can. ed., 1982)).

²³⁶ CBCA § 242(3); see Deborah A. DeMott, *Foreword*, 56 *LAW & CONTEMP. PROBS.* 1, 2 (1993) (describing oppression as “a protean, amoeba-like concept that resists initial definition and indeed operates, at least in the Canadian context, to discourage and even defeat ex ante specifications of entitlements”).

²³⁷ See CBCA § 242(1).

²³⁸ *Id.* § 241.

ther, this determination is left to the courts,²³⁹ which have developed a variety of criteria to assist them in this task, including the “reasonable” and “legitimate” expectations of the allegedly oppressed party.²⁴⁰ In *BCE Inc.*, the Canadian Supreme Court held that the determination of what is “reasonable” is an objective and contextual one rooted in the question: did the complainant reasonably hold the particular expectation claimed?²⁴¹ Thus, the subjective expectations of any particular stakeholder are not conclusive.²⁴² In addition, it said that not every unmet stakeholder expectation, even if reasonable, will give rise to an oppression claim under section 241, unless the conduct complained of is oppressive or unfairly prejudicial, or unfairly disregards the interests at stake.²⁴³

In *BCE Inc.*, the Canadian Supreme Court suggested the following approach to interpreting the grounds of an oppression claim:

One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard” as set out in s. 241 (2) of the CBCA.²⁴⁴

In *Arthur v. Signum Communications Ltd.*, Justice Austin set out a number of factors that indicate the presence of oppressive conduct:

- (i) lack of a valid corporate purpose for the transaction;
- (ii) failure on the part of the corporation and its controlling shareholders to take reasonable steps to simulate an arm’s length transaction;
- (iii) lack of good faith on the part of the directors of the corporation;

²³⁹ See *BCE Inc.*, [2008] 3 S.C.R. at 594–95; *Arthur v. Signum Commc’ns Ltd.*, ¶¶ 14–17, [1993] O.J. No. 1928 (Div. Ct.) (Can.), 42 A.C.W.S. (3d) 332; *First Edmonton Place*, 60 Alta. L.R.2d at 145–46; *Scottish Co-operative Wholesale Soc’y, Ltd. v. Meyer*, [1959] A.C. 324, 342, 363–64 (U.K.).

²⁴⁰ See, e.g., *Hercules Mgmt. Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 189 (Can.); *Westfair Foods Ltd. v. Watt*, [1991] 115 A.R. 34, 38 (Can.); 820099 *Ontario Inc. v. Harold E. Ballard Ltd.*, [1991] 3 B.L.R.2d 113, 122 (Can.); *Deluce Holdings*, 12 O.R.3d at 133.

²⁴¹ *BCE Inc.*, [2008] 3 S.C.R. at 595.

²⁴² *Id.* at 591.

²⁴³ *Id.* at 600. The court further indicated that the terms “oppression,” “unfair prejudice,” and “unfair disregard” are not watertight compartments, but often overlap and intermingle. *Id.* at 601.

²⁴⁴ *Id.* at 590.

- (iv) discrimination between shareholders with the effect of benefiting the majority shareholder to the exclusion or to the detriment of the minority shareholder;
- (v) lack of adequate and appropriate disclosure of material information to the minority shareholders; and
- (vi) a plan or design to eliminate the minority shareholder.²⁴⁵

In *BCE Inc.*, the Supreme Court added its own factors, drawn from existing jurisprudence, including “general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.”²⁴⁶ The Supreme Court indicated in *BCE Inc.* that the oppression remedy, although statutorily created, is equitable in nature and seeks to “ensure fairness—what is ‘just and equitable.’”²⁴⁷ Therefore, the oppression remedy provides courts with “broad, equitable jurisdiction to enforce not just what is legal but what is fair.”²⁴⁸ In making this assessment, the Supreme Court reveals in *BCE Inc.* that courts “should look at business realities, not merely narrow legalities.”²⁴⁹

The Canadian Supreme Court concluded that the debentureholders’ expectation of maintaining the investment grade trade value of their debentures was not reasonable. It found that the corporation had been put in play as a result of management exercising its duty to act in the corporation’s best interests. Further, all of the bids for BCE Inc. were leveraged and would have resulted in an increase in Bell Canada’s debt and a corresponding reduction in the trade value of the debentures. The court thus held that no evidence suggested that BCE Inc.’s management could have done anything to avoid the risk to the debentureholders, and, more importantly, the only evidence on point indicated that the risk posed to the debentureholders resulting from the LBO was inevitable.²⁵⁰ Accordingly, the court deferred to the business judgment of management to accept the purchaser’s offer.²⁵¹

²⁴⁵ *Arthur v. Signum Commc’ns Ltd.*, ¶ 132, [1991] O.J. No. 86 (Ont. Gen. Div.) (Can.), *aff’d* [1993] O.J. No. 1928 (Div. Ct.) (Can.), 42 A.C.W.S. (3d) 332; *see* *Krynen v. Bugg*, [2003] 64 O.R.3d 393, 409–12 (Can.).

²⁴⁶ *BCE Inc.*, [2008] 3 S.C.R. at 595.

²⁴⁷ *Id.* at 590.

²⁴⁸ *Id.*

²⁴⁹ *Id.* (citing *Scottish Co-operative*, [1959] A.C. at 342–43).

²⁵⁰ *BCE Inc.*, [2008] 3 S.C.R. at 605–06. Indeed, in setting out the terms of the auction process, BCE Inc. had advised potential participants that, in evaluating their bids, it would

Although the court found that management had considered the interests of the debentureholders, there was no corresponding duty on management to act in those interests when management also had to consider competing stakeholder claims and the interests of the corporation itself. What the court did find was that management had considered the debentureholders' interests and had assured them that the terms of the debentures would be met,²⁵² but ultimately determined that those interests had to be subordinated to other concerns. As a result, the Supreme Court determined that there was no need for it to consider whether the conduct cited in the complaint oppressed, unfairly prejudiced, or unfairly disregarded the debentureholders' interests.²⁵³

In practice, Canadian courts have imported fiduciary duty considerations into their analyses of oppression claims.²⁵⁴ Thus, courts assessing whether oppression exists often examine whether management's actions are consistent with the corporation's best interests, rather than focusing solely on the reasonable and legitimate expectations of com-

"consider the impact that their proposed financial arrangements would have on BCE and on Bell Canada's debentureholders and, in particular, whether their bids respected the debentureholders' contractual rights under their trust indentures." *Id.* at 576.

²⁵¹ *Id.* at 607–08. The court stated:

The best interests of the corporation arguably favoured acceptance of the offer at the time. BCE had been put in play, and the momentum of the market made a buyout inevitable. . . . Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one.

Id. The Business Judgment Rule does not properly apply to ward off allegations of management's breach of fiduciary duty, however. See *United Copper*, 244 U.S. at 263–64.

²⁵² *BCE Inc.*, [2008] 3 S.C.R. at 604.

²⁵³ *Id.* at 608. The court also held that the trial judge had not erred in approving the arrangement under section 193 of the CBCA, though that issue is not particularly relevant to the matters considered herein. *Id.* at 611.

²⁵⁴ See, e.g., *Ballard Ltd.*, [1991] 3 B.L.R.2d at 113. The court held that:

while it would be appropriate for a director to consider the individual desires of one or more various shareholders . . . it would be inappropriate for that director (or directors) to only consider the interests of certain shareholders and to either ignore the others or worse still act in a way detrimental to their interests. The safe way to avoid this problem is to have directors act in the best interests of the corporation [and have the shareholders derive their benefit from a "better" corporation].

Id.

plainants.²⁵⁵ Indeed, there are similarities between breach of fiduciary duty claims and oppression claims. Neither requires the presence of bad faith,²⁵⁶ notwithstanding that oppressive conduct is necessarily antagonistic to the interests of the complainant and may, in fact, be exploitative. Additionally, both oppression and fiduciary duty claims depend on context, are fact-specific, and are activated upon certain forms of inequitable conduct or unfairness.

Unlike breach of fiduciary duty claims, which concern duties owed to the corporation, the analysis of oppression claims concerns the reasonable and legitimate expectations of complainants. As the oppression remedy is personal to the complainant, it is only concerned with the complainant’s interests to the extent that those are consistent with the complainant’s reasonable and legitimate expectations. Meanwhile, management owes fiduciary duties to the corporation. Therefore, whether the actions of management in allegedly oppressing a complainant are consistent with the corporation’s best interests—which may or may not be consonant with the corporation’s best interests generally speaking—ought not be material to the disposition of the oppression claim.

The continued use of fiduciary duty analysis in oppression cases may be affected by the *Peoples* judgment. In *Peoples*, management’s fiduciary duty was distinguished from the oppression remedy through the court’s statement that the *Peoples* directors did not owe creditors a fiduciary duty, but that creditors ought to have instead argued that they were oppressed by the directors’ actions. That being said, the earlier warning to keep fiduciary duty analysis out of considerations of oppression claims in *Brant Investments Ltd. v. KeepRite Inc.* seems to have had little impact on subsequent analyses of oppression claims. The *Brant Investments* court had stated:

²⁵⁵ See *Peoples*, [2004] 3 S.C.R. at 481 (referencing *Ballard Ltd.* and approving the notion proposed in *Ballard Ltd.*, that acting in the best interests of the corporation is an appropriate benchmark for management in resolving conflicts between majority and minority shareholders).

²⁵⁶ See *Furs Ltd. v. Tomkies*, [1936] 54 C.L.R. 583, 592 (H.C.) (Austl.); *Boardman v. Phipps*, [1967] 2 A.C. 46, 104, 105, 112 (H.L.) (U.K.); *Regal (Hastings) Ltd. v. Gulliver*, [1942] 2 A.C. 134, 137 (H.L.) (U.K.) (per Viscount Sankey: “In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*”); *Keech v. Sandford*, [1726] 25 Eng. Rep. 223, 223–25 (Ch.) (U.K.); ROTMAN, *supra* note 182, at 660–61 (“[F]iduciary liability arises from fiduciaries’ departure from the fiduciary standard of conduct, not extraneous considerations such as fiduciaries’ subjective motivations or the presence of good faith or absence of bad faith.”); see also *Brant Invs.*, [1991] 3 O.R.3d at 302–07 (discussing the irrelevance of bad faith to oppression claims).

It must be recalled that in dealing with s. 234 [the oppression remedy section in the Ontario *Business Corporations Act* (“OBCA”)], the impugned acts, the results of the impugned acts, the protected groups, and the powers of the court to grant remedies are all extremely broad. To import the concept of breach of fiduciary duty into that statutory provision would not only complicate its interpretation and application, but could be inimical to the statutory fiduciary duty imposed upon directors in s. 117 [the provision for directors’ and officers’ fiduciary duties under the OBCA, which is now section 122(1)].²⁵⁷

Adding to the confusion is that the judgment in *BCE Inc.* also indicates that fiduciary analysis *does* have a role to play in the assessment of oppression claims.

In assessing whether BCE Inc.’s management oppressed, unfairly prejudiced, or unfairly disregarded the debentureholders’ interests in agreeing to the LBO and reducing the trading value of their debentures below investment grade, the Supreme Court held that it had to consider whether management engaged in a fair resolution of the conflicting interests of the corporation and of its stakeholders. This required determining whether management discharged its fiduciary duty to act in the best interests of the corporation which, in turn, comprehended “a duty to treat individual stakeholders affected by corporate actions fairly and equitably.”²⁵⁸ Thus, if management did not equitably and fairly consider all competing interests of individual stakeholders in agreeing to the LBO as required by oppression jurisprudence, it would have also failed to discharge its fiduciary duty.²⁵⁹

The Canadian Supreme Court in *BCE Inc.* effectively held that the process of assessing whether management engaged in the fair resolution of conflicting stakeholder interests—a necessary part of the inquiry into whether the expectations of a complainant are reasonable under the oppression remedy—is inextricably linked with management’s fiduciary duty to act in the corporation’s best interests. This inference is reflected in the court’s statement that, in oppression cases, it must inquire as to whether “in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat af-

²⁵⁷ See *Brant Invs.*, [1991] 3 O.R.3d. at 301.

²⁵⁸ See *BCE Inc.*, [2008] 3 S.C.R. at 598.

²⁵⁹ *Id.*

affected stakeholders in a fair manner, commensurate with the corporation’s duties as a good corporate citizen.”²⁶⁰ Before the court examines whether the complainant has been oppressed, however, it must first establish that the complainant’s expectations were reasonable or legitimate.

In assessing the threshold issue of whether the debentureholders reasonably held the expectation that the directors of BCE Inc. would have maintained the trading value of their debentures as investment grade, the Supreme Court indicated that it could take into account whether the debentureholders could have protected themselves against the harm they claim to have suffered.²⁶¹ The court also stated that it would examine whether the directors attempted to resolve the conflicting interests of the various stakeholders and those of the corporation “in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”²⁶² As suggested above, this statement suggests that the corporation’s duties as a “good corporate citizen” require its management to consider the interests of *all* of its stakeholders, not only its shareholders.²⁶³ This implication is not at all consistent with the adoption of a shareholder primacy model of corporate governance.

c. A Comparison of Statutory Remedies

Although a complainant in Canada is eligible to bring either a derivative action (with leave of the court) or an oppression claim, and may, in fact, join the two, in most circumstances the action giving rise to a derivative action claim will not give rise to an oppression remedy, and vice versa. Thus, complainants do not have the ability to choose whether to pursue a derivative action or an oppression remedy absent special or unique circumstances in which harm can be caused to both the corporation and to its shareholders from the same conduct.²⁶⁴

²⁶⁰ *Id.*

²⁶¹ *Id.* at 597.

²⁶² *Id.* at 597–98.

²⁶³ *Id.* at 598 (stating “[t]here is no principle that one set of interests—for example the interests of shareholders—should prevail over another set of interests”).

²⁶⁴ See *Charlebois v. Bienvenue*, [1967] 2 O.R. 635, 644 (Can.) (finding that the holding of an annual meeting and election of directors after directors had sent out a misleading information circular was a breach of the directors’ fiduciary duty to the corporation). In discussing this judgment, the Ontario Court of Appeal concluded that this action would also be a breach of duty to the shareholders as well as a breach of duty to the corporation. See *Goldex Mines Ltd.*, [1974] 7 O.R.2d at 218–19.

In the absence of such rare circumstances, the determination of which of these causes of action is appropriate hinges on a court's assessment of the party suffering the primary harm from the act alleged to have occurred, as cited in a complaint. Accordingly, if an action causes harm to a corporation and has incidental effects on its shareholders, a derivative action is the only appropriate claim. For example, where an impugned action causes a corporation to become insolvent, thereby resulting in a loss of shareholder equity, the shareholders' loss is deemed to be merely incidental to the primary harm to the corporation. Consequently, a derivative action, not an oppression remedy, is the appropriate claim.²⁶⁵

As with the conclusions drawn from the analyses of notable U.S. cases such *Dodge*, *Shlensky*, *Unocal*, *Revlon*, and *Paramount*, the Canadian Supreme Court's judgments in *Peoples* and *BCE Inc.* clearly demonstrate that Hansmann and Kraakman's assertion of the triumph of the shareholder primacy model does not hold sway in Canada. Moreover, these judgments are consistent with the structure of Canadian division of powers corporations statutes, which illustrate—particularly through the breadth of the derivative action and the existence of the oppression remedy—that the shareholder primacy model does not accurately describe the operation of corporate governance in Canada.

CONCLUSION

On the basis of the arguments posed herein, it may fairly be stated that Hansmann and Kraakman's bold proclamation of the end of history for corporate law is, at best, premature, and, at worst, incorrect.

²⁶⁵ See *Hercules Mgmt. Ltd.*, [1997] 2 S.C.R. at 175. Shareholders acting in the capacity of supervising management's conduct relied on negligently prepared auditor reports. Shareholders made decisions in reliance on those reports, which resulted in the corporation going into receivership. As a result, the shareholders lost their equity in the corporation. They sought an oppression remedy against the auditors in order to recover their lost equity. The Canadian Supreme Court held that the audit reports were prepared to allow the shareholders to supervise management's conduct and to make decisions concerning the administration of the corporation. Consequently, the court determined that the shareholders were not relying on the audit reports to protect their own individual interests, but, in the "managerial role" they undertook, they relied on the reports to act for the general benefit of the corporation. The court concluded that the primary harm caused by the negligently prepared reports was to the corporation, which went into receivership, with the shareholders suffering an incidental harm—the loss of their equity in the corporation. See *id.* at 212–13; see also *Tooley v. Donaldson, Lufkin & Jenrette Inc.*, 845 A.2d 1031, 1039 (Del. 2004) ("The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.").

This Article has provided various bases to suggest that the confidence with which they made their pronouncement has little substantive foundation in either U.S. or Canadian corporate jurisprudence.

Prominent U.S. corporate judgments as discussed in Part II.A fit far less comfortably with Hansmann and Kraakman's suggestion of the end of history for corporate law than may have previously been surmised. These corporate judgments include *Dodge v. Ford*, *Shlensky v. Wrigley*, and *Unocal v. Mesa Petroleum Corp.*, which are generally regarded as the beacons for shareholder primacy advocates, and *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, which advocates the need to maximize shareholder benefits upon the inevitable breakup of a company subject to a takeover bid. Hansmann and Kraakman's assertion of the triumph of the shareholder-oriented model of the corporation would, therefore, appear to be premised more upon conjecture and the power of suggestion, rather than upon a solid foundation in legal reality.

The Canadian Supreme Court's recent judgments in *Peoples* and *BCE Inc.* reveal a rather different understanding of management's duties in corporate governance than the view espoused by Hansmann and Kraakman. So, too, does the structure of Canadian corporate law statutes, as evidenced by the physical and conceptual separation of management's fiduciary duties from its duty of care, the broader range of individuals granted standing to bring derivative actions on behalf of corporations in Canada than in the United States, and the existence of the statutory oppression remedy that provides significant relief for a broad range of aggrieved corporate stakeholders.

This is not to suggest that the shareholder primacy model is an entirely unattractive one. It appears to be a simple solution, buttressed by the "science" of law and economics. It is certainly easier to discern the success of management in fulfilling this model by looking to the price of corporate shares than it is to satisfy a broader constituency-based approach, which requires the satisfaction of multiple stakeholder interests. It might also be argued that the disparate interests of stakeholders under progressive models of corporate governance facilitate a "duty to many equals yet a duty to none" syndrome.

Fulfilling a stakeholder-centered model of corporate governance is necessarily more difficult than satisfying the shareholder primacy model. Appearances are often deceiving, however. The fact that the shareholder primacy model is easier to fulfill says nothing about whether it is a more appropriate basis for assessing the role of corporate management in corporate governance. The shareholder primacy model also places an inordinate amount of emphasis on share price, which might also encourage

share price manipulation or shady accounting practices to achieve that goal, as most notably seen in the Enron scandal.

Although the apparent simplicity and definitiveness of the shareholder primacy model is attractive, it drastically oversimplifies matters. As Plato once suggested in his dialogue *Statesman*, “A perfectly simple principle can never be applied to a state of things which is the reverse of simple.”²⁶⁶ Corporate law is complex, and attempts to oversimplify it are either bound to fail or, at a minimum, to mislead. Nonetheless, the idea that corporate governance ought to be understood solely by reference to theories of shareholder primacy is often treated by its proponents as if it was so obvious that everyone must accept it.

Indeed, Hansmann and Kraakman begin their article “The End of History for Corporate Law” by asserting that “there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”²⁶⁷ They conclude in much the same way, stating that “the triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured.”²⁶⁸ This posturing²⁶⁹ has come largely in the place of substantive argument. In fact, it is almost as if they are asking readers to see shapes in the clouds simply by the force of suggestion. This is reminiscent of a dialogue in Shakespeare’s *Hamlet* between Hamlet and Polonius:

Hamlet: Do you see yonder cloud that’s almost in the shape
of a camel?

Polonius: By th’ mass, and ’tis like a camel indeed.

Hamlet: Methinks, it is a weasel.

Polonius: It is back’d like a weasel.

Hamlet: Or like a whale?

Polonius: Very like a whale.²⁷⁰

There is no need for those who study corporate law to play Polonius to the shareholder primacy Hamlets who seek to fill their heads with inappropriate characterizations of the status of contemporary corporate governance. The latter’s insinuations and conclusions are as amorphous as the clouds upon which they are based. This does not mean that we ought not listen to what shareholder primacy advocates have to say, only that we ought not uncritically accept it as gospel. As

²⁶⁶ PLATO, *Statesman*, in THE DIALOGUES OF PLATO 322 (Benjamin Jowett ed., 1937).

²⁶⁷ Hansmann & Kraakman, *supra* note 1, at 439.

²⁶⁸ *Id.* at 468.

²⁶⁹ See Hansmann, *How Close Is the End of History?*, *supra* note 45, at 745.

²⁷⁰ WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

Winkler has indicated, the conclusion that corporate law has reached the end of history rests “on an artificially narrow understanding of corporate governance.”²⁷¹ Nevertheless, the basis for the same assertion made herein differs from the rationale that he offers for it.

Winkler argues that the existence of broader stakeholder protections that sit outside of “traditional” corporate law serve as a basis for contesting Hansmann and Kraakman’s claim of the end of history for corporate law. As Winkler explains it:

Despite the common conception of corporate governance as pertaining to shareholder-management relations, the actual decisionmaking of corporate officers is heavily constrained by legal rules from outside of corporate law. . . . One must take into account environmental law, labor law, civil rights law, workplace safety law, and pension law, lest one be left with a distorted and incomplete view of how the law actually shapes those corporate decision matrices.²⁷²

This Article does not suggest that Winkler is incorrect in his assertions about the implications of the broader area of business law on corporate behavior and governance. Rather, it contends that the same conclusion can be reached within the narrower field of corporate law itself.

A noted commentator has provided the following appraisal of corporate management’s duties:

I venture to assert that when the history of the financial era which has just drawn to a close comes to be written, most of its mistakes, and its major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that “a man cannot serve two masters.” . . . No thinking man can believe that an economy built upon a business foundation can permanently endure without some loyalty to that principle.²⁷³

These words were written in 1934 by former U.S. Supreme Court Chief Justice Harlan Stone. Nevertheless, they remain as relevant today as they were then. Directors cannot properly serve the best interests of corporations and shareholders when the interests of these groups are frequently not aligned. Chief Justice Stone’s emphasis on the contin-

²⁷¹ Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 *LAW & CONTEMP. PROBS.* 109, 133 (2004).

²⁷² *Id.* at 128.

²⁷³ Harlan F. Stone, *The Public Influence of the Bar*, 48 *HARV. L. REV.* 1, 8–9 (1934).

ued importance of foundational principles in corporate law may also be seen to parallel the sentiments of President Barack Obama in his inaugural speech characterizing the challenges that lie ahead for the United States as a result of the current economic climate:

That we are in the midst of crisis is now well understood. . . . Our economy is badly weakened, a consequence of greed and irresponsibility on the part of some, but also our collective failure to make hard choices and prepare the nation for a new age. . . . Nor is the question before us whether the market is a force for good or ill. Its power to generate wealth and expand freedom is unmatched. But this crisis has reminded us that without a watchful eye, the market can spin out of control—the nation cannot prosper long when it favors only the prosperous. . . . Our challenges may be new. The instruments with which we meet them may be new. But those values upon which our success depends—honesty and hard work, courage and fair play, tolerance and curiosity, loyalty and patriotism—these things are old. These things are true. They have been the quiet force of progress throughout our history. What is demanded then is a return to these truths.²⁷⁴

The reality of contemporary corporate law is that, some seventy years after the Berle-Dodd debate over corporate purpose and more than fifty years after Berle conceded defeat to Dodd's vision, corporate law scholars continue to argue over the most appropriate model of corporate governance.²⁷⁵ This Article adds to a debate that is not likely to end soon. Such a situation is certainly not consistent with the "end of history" for corporate law.

²⁷⁴ President Barack Obama, Inaugural Address (Jan. 20, 2009), *available at* <http://www.whitehouse.gov/blog/inaugural-address/>.

²⁷⁵ *See* Stout, *supra* note 133, at 1200 (arguing that the true issue emanating from the Berle-Dodd debate is which choice is worse, "to require directors to maximize shareholder wealth, even . . . where shareholder wealth maximization is inefficient? Or to allow directors to look at the interests of nonshareholder 'stakeholders,' recognizing that they may use their enhanced discretion to serve themselves?").