Stakeholder Philosophy and Commonwealth Caribbean Company Law

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I. Introduction

It is always assumed that corporate law's primary concern is with the creation of legal structures that advance shareholders' interests. This is reflected most vividly in corporate laws' preoccupation with ensuring managerial accountability to the shareholders of a company and the equation of the company's interest with those of the shareholder. As a result, the claims of non-shareholder constituencies, such as creditors, employees and the communities in which the company operates, have often been disregarded; 'non-shareholder interests, if entitled to any legal protection at all, are for other, non-corporate law legal regimes'[24]. Nonetheless, there appears to be a growing recognition that the interests of the company are inextricably linked to not only the welfare of shareholders but also to the wellbeing of non-shareholder constituencies. This stakeholder philosophy is premised on the realities of modern commerce in which the corporation 'is the chief employer of both labour and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present substitute for it except the state itself'[25]. Consequently, modern company law has been compelled to move beyond the shareholder primacy norm, to expressly recognizing that the interests of non-shareholder

[24] D Million, 'Communitarians, Contractarians and the Crisis in Company Law', 50 Wash. & Lee L. Rev. 1373

[25] State Tax Commission of Utah v. Aldrich (1942), 316 U.S. 174, 192 (Jackson J.)

constituencies are direct legitimate interests falling within the corporate mandate[26].

In the Commonwealth Caribbean, company law statutes explicitly acknowledge that the company must be managed in a manner that has regard to the interests of all those who have a vested stake in the operation of the company[27]. This acknowledgement is embodied in section 174 (4) of the Jamaica Companies Act 2004 [hereinafter the JCA], which places a duty on directors, when 'determining what are the best interests of the company', 'to have regard to the interests of the company's shareholders, employees and the community in which the company operates'. While it has always been accepted that the company must be operated in favour of shareholders' interests and that creditors had a right to have their interests protected in relation to winding-up proceedings[28]or insolvency[29], the concessions made to employee and community interests indicates the intention of the legislature to broaden the pool of stakeholders in whose interest the company should operate. Nevertheless, the non-mandatory nature of the section 174(4) duty and the failure of the legislature to adequately explain whether the director should have regard to stakeholder interest per se or only as far as they benefit the shareholder, undermines the legitimacy of stakeholder philosophy in regional jurisprudence. Furthermore, the section lacks teeth as there is no provision in the statute that gives employees, creditors or the community the right to bring a claim alleging that the acts of the director or company had been oppressive or unfairly prejudicial to their interests[30]. The right to bring a derivative action is only vested in shareholders, directors and debenture holders and can

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[26] K Rattray, Company Law Reform-Challenge of the 1990's ,Corporate Management Manual 183, 221

[27] Barbados Companies Act (BCA), 1985. Cap.308; Trinidad and Tobago Companies Act (TCA), 1995: No.35; and Jamaica Companies Act, 2004

[28] JCA, ss. 286 - 296

[29] *Ibid*, s.282

[30] *Ibid*, s.212

only be enforced as a duty owed to the company[31]. In this regard, section 174 (4) when read in conjunction with sections 212 (definition of complainant) and 213A (derivative action), can be viewed merely as a means to bolster the ability of individual shareholders to advance their interests in the face of majority opposition and to temper the rigidity of the rule in *Foss v Harbottle*[32].

On the other hand, other regional company law statutes[33] with similar provisions to section 174 (4) give more weight to the conclusion that the stakeholder philosophy has become entrenched within regional jurisprudence. For example in the Barbados Companies Act 1985 [hereinafter BCA], section 95 (2) is similar to section 174 (4) of the JCA but the statute buttresses the enforceability of the right by broadening the category of complainants to include 'any other person who, in the discretion of the court, is *a proper person* to make an application'.[34] The wide discretion that is given to the court to determine who is a 'proper person' ensures that persons other than shareholders or directors can apply for redress where the actions of the company or director proves to be oppressive or unfairly prejudicial to the interests of directors, creditors, shareholder or debenture holders. While the court could give an employee or someone from the public the right to bring an action under the Act, the claimant must illustrate that the company's actions has been oppressive to persons falling within the aforementioned group. Consequently, there is no independent right to bring a claim against the company for actions that have been oppressive to an employee or the community in which the company operates. Nonetheless, cases such as *Lalla v Trinidad Cement Limited & TCL Holdings*[35] and *Five Star and Ambulance Services Limited v Telecommunications Services of*

[31] *Ibid*, s.213A

[32] (1843) 2 Hare 461, 67 ER 189

[33] BCA, s.95(2); TCA, s. 99(2)

[34] BCA, s.225(iv)

[35] (Unreported Decision Trinidad and Tobago) HCA No. 1593 of 2001

Trinidad and Tobago Limited[36] have demonstrated that regiona courts have been more than willing to give legal effect to th interests of non-shareholder constituencies through the use of th wide discretion afforded to courts to determine who is 'a prope person' and the meaning of oppressive or unfairly prejudicia conduct.

This essay evaluates the extent to which the stakeholde philosophy has become entrenched in the Commonwealt Caribbean by analyzing and comparing the statutory provision and case law emanating from Barbados, Trinidad and Tobago an Jamaica. Part II gives an overview of the shareholder versu stakeholder philosophy debate, focusing on the ways in whic company law has traditionally given primacy to the former and th rationale for adopting the latter in modern company law. Part II reviews the statutory provisions in Barbados, Trinidad and Tobag and Jamaica, which have sought to give credence to th stakeholder philosophy in regional company law. Part IV examine the role that regional courts have played in legitimizing th interests of non-shareholder constituencies through the exercise o judicial discretion conferred upon the courts by statutor provisions dealing with derivative actions.

II. Shareholder versus Stakeholder Philosophy

Theories on the role of the firm in society play a major role in dictating the company's objectives and more specifically, in deciding whose interests should legitimately fall within the corporate mandate. Accordingly, the debate relating to the adoption of either a shareholder primacy approach or a stakeholder approach is firmly grounded in two major theories of the firm: contractarian theory and communitarian theory.

Under the contractarian perspective, the firm is a connection of contracts in which participants in corporate activity

[36] (Unreported Decision Trinidad and Tobago) HCA No. Cv S-852/98

are allowed to specify their respective rights and obligations through contract[37]. Since the firm is created by shareholders and is regulated by contract, shareholders as owners have a right to determine the objectives of the firm.[38] The contractarian's individualistic and anti-regulatory stance justifies the imposition of the obligation to maximize shareholder's profits as the sole objective of the company. This is argued on the basis that the rights of non-shareholder constituencies are already well taken care of by employment, environment and insolvency laws, which are used to protect employees, the environment and creditors respectively[39]. It is therefore expedient that company law concentrates on protecting shareholders.

On the other hand, communitarians view corporations 'as more than just agglomerations of private contracts; they are powerful institutions whose conduct have substantial public implications'[40]. Therefore, the objective of company law should be modified to accommodate a wider range of interests, not merely as a means of achieving shareholder wealth but as valid in their own right. Accordingly, legal rules should be used to structure relations among the corporations' diverse constituents and corporate law must confront the harmful effects on non-shareholder constituencies of managerial pursuit of shareholder wealth maximization. The communitarian's greater willingness to use legal intervention is based on their skepticism of the practical efficacy in using contract as a mechanism to protect non-shareholder interests[41]. Communitarians therefore, believe that the role of the firm is to advance the interests of all it stakeholders;

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37 O Hart, 'An Economist's View of the Firm' (1989) 89 Colum L Rev 1757, 1757.

38 *Ibid*

39 S Kiarie, "At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder
Value: Which Road Should the United Kingdom Take" (2006) 17 (11) ICCLR 329 , 330

40 Million (n1) 1379

41 *Ibid*

shareholders are but one of the many stakeholders who help t
create the firm's pie. Consequently, the 'best way to govern th
corporation is by having decision making structures in place tha
permit all those affected by the company's decisions at least
voice, if not some control, on the decisions made'[42]. This ensure
that the company is governed in a manner that promotes overal
social good.

Shareholder Primacy and Corporate Law

One of the legacies of its colonial past is tha
Commonwealth Caribbean jurisdictions have maintained th
Anglo-American's focus on shareholder supremacy as th
cornerstone of corporate law. This is evidenced in corporate law'
fixation on reducing agency costs that result from the separation o
ownership and management within the corporation. The disconnec
between ownership and management meant that managers, wh
had little or no stake in the company, were inclined to pursue thei
own goals, which more often than not conflicted with the profi
maximization goals of shareholders. As the bearers of the residua
risk of the enterprise, shareholders had to be protected against th
self-interest of managers. Company law therefore had to inven
ways to align managerial interests to those of shareholders[43]. Thi
is achieved primarily through the law's imposition of fiduciar
duties on directors (representing management) and the lega
provisions that facilitate shareholder supervision of manageria
control.

In defining to whom the director owes a duty, the classica
theory is that this duty is owed to the company. However, th
'company's shareholders are the company and therefore no
interests outside those of the shareholders can legitimately be

[42] BSheeny 'Scrooge--The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate' (2005) 14 U Miami Bus LV 193, 201

[43] Kiarie (n14) 330

considered by the directors'[44]. Therefore, the directors' duty (such as to act bona fide in the interests of the company and not for any collateral purpose and not to put themselves in positions where their personal interests conflict with those of the company) while owed to the company can be equated to a duty owed to its present and future shareholders[45]. This conclusion is supported by the laws' (common law and statute) facilitation of shareholders who wish to bring derivative and personal actions against directors for breach of these fiduciary duties. For example in *Henry v Great Northern Railway*[46], the court upheld the claims of a shareholder who argued that the directors had abused their power to withhold profits from distribution. Furthermore, the Court held that the directors were to exercise their power 'with reference to the general interests of all classes of shareholders and not to favour one class of shareholder at the expense of the other'[47].

Other legal constraints also exist to limit directors' powers and to ensure their accountability to shareholders. These include enforcement of fair dealing[48], control over their power to issue shares, law against wrongful trading[49] and laws to facilitate the removal[50] and disqualification[51] of directors. Furthermore, there are statutory provisions which give shareholder's the right to appoint[52] and dismiss directors[53] at Annual General Meetings (AGM). This places an enormous power in the hands of the shareholders to ensure that management act in line with the interest of shareholders. Finally, shareholders can secure accountability through disclosure requirements and the use of auditors. Auditors

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44 *Martin v. Gibson* (1907) 15 OLR. 623 (Boyd C)
45 Gore-Brown, *Companies* (43rd edition Jordan, Bristol 1977-1985) 27 -29
46 (1875) 1 De G & J 606
47 *Ibid*, 638
48 Companies Act 1985, ss.311-347 (UK)
49 Insolvency Act 1986, s. 214 (UK)
50 Companies Act 1985, s. 303 (UK)
51 Company Directors Disqualification Act 1986 (UK)
52 Stipulated in companies articles of association
53 Stipulated in companies articles of association

are appointed by shareholders at AGMs and owe a duty t shareholders to ensure that company accounts reflect a true an accurate representation of the company's financial positio Nevertheless, this fixation on safeguarding shareholders' intere has meant that corporate law has given scant regard to the interes of non-shareholder constituencies, even though the actions of th company and its directors do and can have far-reaching effects o these constituents.

Rationale for Stakeholder Philosophy in Modern Corporate Law

The stakeholder approach aims at inclusion and advocate that all participants who are either affected by the company' activities or have contributed to its success must be included in th company's decision-making process. The main stakeholde include not only shareholders but also employees, creditors and th community in which the firm operates. All stakeholders deserve t have 'a fair division of the pie created by the firm since they hav all contributed to the ultimate size of that pie'[54]. Furthermor decision-making within the company not only affects shareholder investment but it also impacts on the terms and conditions c employment, the ability of creditors to secure loan repayment an the health of the environment in which the company operates. It i therefore inaccurate to regard shareholders as the sole residual ris owners. Rather the success of the company depends on a stakeholders and a company is therefore expected to consider th interests of these constituencies if it is to succeed. This i exemplified in the emphasis that Caribbean companies place o being good corporate citizens and especially in the financial secto where companies work hard to maintain a 'clean' corporate imag in order to attract and retain customers.

[54] J Wallace, "Value Maximisation and Stakeholder Theory: Compatible or Not?" (2003) 15(3) Journal of Applied Corporate Finance 12, 122.

The harmful effects of undue reliance on shareholder wealth maximisation on non-shareholder constituencies is illustrated by the negative consequences of hostile take-overs and the widespread devastation that is produced by corporate collapses. Hostile take-overs, which are primarily seen as a means of shareholder profit maximisation and strengthening the accountability of managers to shareholders, can and have produced extensive and uncompensated costs on non-shareholder constituencies. For example workers lose employment and pension benefits while communities suffer ripple effects through the closure of businesses. The failure of companies like Enron is testimony to the extent of the evil that can arise from obsession with shareholder value. This is reflected in that company's manipulation of the energy markets to boost share prices and the arbitrary dismissal of employees who failed to increase the company's stock prices[55]. Additionally, Enron's collapse not only wiped-out shareholders' investment but 'its employees were greatly affected since, apart from losing their jobs, most of them also lost their pensions and savings. Insurance, mutual and pension fund beneficiaries not only in the local community but internationally also lost out since many funds had heavily invested in Enron stock'[56].

While it is evident that company law must adopt an approach that has regard for interests beyond those of shareholders, there are numerous ways in which these interests can be given legal recognition. In Germany for example, the stakeholder value is implemented through a codetermination system ("Mitbestimmung"), which grants employees a voice in management by allowing their representatives to sit on a supervisory board[57]. On the other hand, Japan recognizes the stakeholder value through its relational board structure which

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[55] *Ibid*, 133

[56] *Ibid*, 134

[57] M Roe, "German Codetermination and Securities markets" (1999) 5 Columbia Journal of European Law 3, 9.

includes representatives of key stakeholders, such as employees, creditors and suppliers[58]. In both these jurisdictions the recognition of stakeholder interests is guided by an overarching principle which states that the company exists for the interests of all stakeholders and each stakeholder is given equal consideration in the decision making process. This is in sharp contrast to common law countries where the company was always seen as operating in the interest of shareholders. Nevertheless, these countries have also taken steps to recognize the interests of non-shareholder constituencies. For example in Canada, both the Canadian Business Corporation Act 1985 [hereinafter CBCA] and the Ontario Business Corporation Act 1990 [hereinafter OBCA] recognize that the director should take account of the interests of *some* stakeholders when determining the interests of the company. In the Commonwealth Caribbean we have also chosen to acknowledge the interest of certain stakeholders through the imposition of a statutory duty on directors to consider their interests and thus conferring on them enforceable rights. The question as to whether this recognition can lead to the conclusion that the stakeholder philosophy has become deeply entrenched in regional jurisprudence will be explored in Parts III and IV.

III. Stakeholder Interests and Statutory Provisions

Prior to the BCA 1985 it would have been fair to state that the law in the Commonwealth Caribbean equated the interest of the company to those of shareholders and the only circumstances in which the interests of other groups or entities could be legitimately promoted was 'where to do so ultimately advances the interests of the shareholders'[59]. This common law position has given way to statutory provisions such as section 95(2) of BCA and section 174(4) of the JCA which place a duty on directors to have regard to the interests of shareholders and employees in

58 J Salacuse, "Corporate Governance in the new century" (2004) 25 Company Lawyer 69, 75

59 *Hutton v West Cork Railway Company* (1883) 23 Ch. D

general when determining what are the best interests of the company. In Barbados the duty is mandatory since the section states that the director 'must' have regard to these interests. In contrast, Jamaica states that the director 'may' consider these interests and would therefore mean that the directors' duty is discretionary. This distinction is important as it will have repercussions on how the director will execute his/her obligation and how the court will assess whether the director was in default. Clearly, a director in Jamaica will have an enormous amount of discretion to determine when and if these interests are to be considered, unlike his Barbadian counterpart who it would seem has no discretion. It is interesting to note that while the Jamaican provision makes reference to the interests of shareholders, employees and the community in which the company operates, the Barbadian section fails to mention any other stakeholders besides shareholders and employees. One reason for the BCA's omission might have to do with the difficulty in placing a duty on a director to have regard to the interest of such a wide and indeterminate class. In fact one wonders whether it would be economically feasible or judicially wise to make a director of a company liable to the variety of sub-interests that make up a 'community'. To this extent we could argue that Jamaica's inclusion of 'the community in which the company operates' is no more than rhetoric since as was noted before, the director in Jamaica has wide discretion to decide whether or not he will choose to consider these interests.

The statutory provisions recognizes the practical realities of corporate life where the well-being of both shareholders and employees impact significantly on the success of the company; but the wording of the provisions in both Jamaica and Barbados begs one to question the extent to which these interests are to be regarded and the nature of the obligation in cases where these interests might conflict. The sections in both territories lack clarity as they fail to delineate the boundaries of the director's duty, especially in cases where there are conflicts of interests. On the one hand, it can be argued that the section requires the director to give equal consideration to the interests of both shareholder and employees and in this case it would be open to him/her to advance

the interests of one group over the other[60]. On the other hand, it has been argued that the section 'merely requires the director to consider the interests of the employees before acting in what they consider to be the best interests of the shareholder'[61]. Xerub has argued that the latter interpretation might be more appropriate since it would be naïve to expect or require a director to subordinate the interests of shareholders to those of employees in a case where the company desires to maintain and increase investment[62]. Invariably, one is lead to the conclusion that the duty placed on directors is reflective of the 'enlightened shareholder value', which requires the company to be operated in the collective interests of all shareholders, but at the same time recognizing that this can only be achieved by taking due account of wider stakeholder interests[63].

The difficulties that an employee or the wider community might have in enforcing the right in s. 174 arises not only because the director's duty can only be enforced as a duty owed to the company but more importantly, the JCA does not recognize these stakeholders as competent to bring a claim on the company's behalf. In this regard section 212 (3) states that a complainant for the purposes of section 213A (1) (the right to bring a derivative action) means a director, shareholder or debenture holder. Moreover, the derivative action will only be allowed where the court is satisfied that the act complained of is *oppressive or prejudicial to the interests of shareholders, creditors, directors and debenture holder[64]s*. Therefore, if an employee wishes to bring an action under section 174 (4) claiming that the director's neglect of his duty was oppressive or unfairly prejudicial, he/she would be precluded from doing so on the basis that he/she would neither fall

60 The Companies Act 1980 – a practical guide, (Oyez, London 1980), para 12.103

61 Xerub, Juridification of Industrial Relations 158

62 *Ibid*, 159

63 Modern Company Law: Developing the Framework para 2.22 <http://www.berr.gov.uk/files/file23245.pdf> *accessed* March 24, 2009

64 JCA, s.213A(1)

within the meaning of complainant nor the class of persons mentioned in section 213A(1). It is therefore apparent that section 174(4), as far as employees and the community are concerned, will prove tremendously difficult to enforce.

As such section 174 (4) when read in conjunction with the oppression remedy provision should only be viewed as apart of a broader attempt by the Act to give shareholders more control over the management of the company. In commenting on section 248 of the OBCA 1990, Beck argued that this oppression remedy 'is beyond question the broadest, most comprehensive and most open-ended shareholder remedy in the common law world'[65].This is especially true for minority shareholders whose interests have been severely undermined by the rule in *Foss v Harbottle*[66]. The rule in *Foss* prevented minority shareholders from bringing a claim against the actions of the directors and majority shareholders on the basis that only a company could bring an action in its own name and that a decision made by the majority shareholders was binding on the company. In *Ward v Mount Gay Rum*[67], Chief Justice Williams stated that while there were limited exceptions to this rule, the law proved to be unsatisfactory because the directors as agents of the company would go unpunished in cases where they committed a breach of duty and could not be made to bring a claim against themselves. Additionally, the rule placed the minority shareholder at the mercy of the majority[68]; even though the interests of shareholders had always been equated with that of the company, this was taken to mean majority shareholders. The Chief Justice stated further that reform in company statutes, especially the complainant remedies provisions, allowed these minority shareholders to bring actions against directors and the majority shareholders in cases where the actions of the

[65] Beck, Minority Shareholders' Rights in the 1980's (1982) LSUC Special Lects. 311 at 312

[66] *Foss (* n 9)

[67] Suite No. 357 of 1990 (unrep. Barbados)

[68] *Ibid*, 10

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director/company had been oppressive or prejudicial to their interests. In *Ward* the court found that the individual shareholder was a complainant for the purposes of the statute and that he had an arguable case in relation to the oppressive remedy provision.

However, the BCA 1985[69] and the Trinidadian Companies Act 1995[70] [hereinafter TCA] by broadening the category of complainants to include 'any person' the court may consider to be a 'proper person', has significantly increased the ability of creditors, employees and the wider community to make demands on the company's management to manage the company in a manner that is not unfairly prejudicial or oppressive to a wide variety of stakeholders. The discretion given to the court to determine who is 'a proper person' achieves two important objectives: it allows stakeholders, who prior to the Act would have been precluded from bringing a claim, to do so where the court deems that justice will be done and it prevents the company from being bombarded with a multiplicity of vexatious and frivolous claims. While neither the BCA nor the TCA demands that the director takes the interest of the wider community into consideration when determining the best interest of the company, the 'proper person' provision certainly allows interests from the community to have a voice in keeping the company accountable to its other stakeholders. It is important to note that in both jurisdictions the complainant can only bring a derivative action if the act/omission complained of is either oppressive or unfairly prejudicial to the main economic agents of the company (creditors, debenture holders or shareholders); other stakeholders have no independent right not to be subjected to oppressive or unfairly prejudicial conduct. This is probably explained by the fact that the rights of employees and the community are already protected through the use of employment and environmental laws. Nevertheless, it also speaks to an intention by the legislature to recognize the interests of all stakeholders while accepting that not

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[69] s. 225

[70] s.239

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all stakeholders can be treated equally: some must be given priority over others.

In relation to the matter of prioritizing the interests of stakeholders, it can be seen that the persons who provide the capital base for the company are given a greater voice in the corporate mandate. This can be seen in the extent to which the Acts in all three jurisdictions protect shareholders' interests through a variety of provisions but only makes two provisions that could be regarded as recognition of employee and community interests. This deference for stakeholders who provide monetary support to the company can also be seen in how the interests of creditors are recognized in relation to winding up proceedings[71], protected from unfair prejudicial or oppressive treatment by the company/directors[72] and given priority in cases where the shareholders are precluded from obtaining profits if the company is unable or would be unable to pay its creditors[73].

While the Companies Act fails to provide sufficient safeguards for customers/consumers against the actions of the company, the Jamaica Fair Competition Act 1993[JFCA], through its regulatory body the Fair Trading Commission [Commission], acts as sufficient constraint on the company's ability to use unsavoury measures against its customers. The JFCA prohibits the company from engaging in acts such as price-fixing[74], double ticketing[75], misleading advertising[76] and bid –rigging[77], which have dire consequences for the interests of the business's customer. In addition, the Commission is given wide investigatory powers, including initiating investigations at its leisure or at the request of

[71] JCA (n 5)
[72] JCA, s.213A (1)
[73] JCA, s. 212A(4) (a)
[74] JFCA, s. 34
[75] *Ibid*, s.39
[76] *Ibid*, s.37
[77] *Ibid*, s. 36

an affected party[78], authorizing the proper authority to search and seize documents from businesses under investigation[79] and summoning and examining witness for the purpose of the investigation[80]. These investigatory powers are buttressed by the enforcement provisions under Part VIII of the Act, which gives the Commission the right to seek an application from the Court to force compliance where a person either refuses to comply with the directions of the Commission or has contravened his/her obligations under the statute[81]. In such instances the Court is empowered to order pecuniary penalties and issue an injunction.[82]Consequently, the JFCA is a powerful tool in not only protecting the interests of customers but also in ensuring that companies maintain business practices that are in tandem with the interests of its customers.

IV. Judicial Recognition of Stakeholder Interests

The traditional attitude of the courts to the acknowledgement of non-shareholder constituencies in company law is demonstrated in Plowman J's judgment in *Parke v Daily News Limited:*[83]

> The view that directors, in having regard to the question what is the best interest of the company, are entitled to take into account the interests of employees ... is one which may be widely held ... In my judgment such is not the law ... however laudable and however enlightened from the point of view of industrials relations.

In *Daily News* the court went on to hold that the directors' action in using the company's principal assets to make redundancy payments to employees beyond their legal entitlements was ultra vires and could not be justified as reasonably incidental to the task or carrying out the company's business. However, a change in the

[78] *Ibid*, s.5(1) (d)
[79] *Ibid*, s.10 (1)
[80] *Ibid*, s.7(1) (a)
[81] *Ibid*, s.46 (a) and (b0
[82] *Ibid*, s.47 (a) and (b)
[83] [1962] Ch 927

attitude of judicial authorities is illustrated in the Canadian case of *Teck v Millar*[84] (a case decided before the passing of either the CBCA 1985 or the OBCA 1990) in which Berger J pointed out that:

> If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.

This more enlightened approach was also adopted in the American case of *Smith v Barlow*[85] in which Judge Jacobs highlighted the responsibility of corporations in modern commerce to 'discharge social as well as private responsibilities as members of the communities within which they operate'[86]. While *Daily News* underscored the gulf between the realities of modern commerce and legal doctrine, the two latter judgments sought to give legal recognition to the fact that the interests of the company are interwoven with the interests of all stakeholders who are either affected by its actions or contribute to its success. In the Commonwealth Caribbean statutory reform in company law has endowed the courts with wide discretion to give various stakeholders the opportunity to vindicate their rights in cases where the company's actions have adversely affected their interests. This is especially evident in relation to the oppressive remedy provisions and the widening of the category of complainant through the use of the 'proper person' provision.

In *Five Star Medical and Ambulance Services Limited v Telecommunications Services of Trinidad and Tobago*[87] Ventour J held that a business customer was a 'proper person' to bring proceedings under section 239 of the TCA, as the actions of the

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[84] (1972), 33 DLR (3d) 288
[85] 13 NJ 145
[86] *Ibid,* 154
[87] *Five Star (* n 13)

defendant in disconnecting the plaintiff's telephone service had caused the plaintiff to suffer substantial financial loss. In coming to its conclusion, the court reasoned that the wide discretion given to the court to determine who was 'a proper person' ensured that persons, who would not otherwise be able to bring a claim, were allowed to challenge the actions of the company in cases where its actions illustrated a *prima case* of being oppressive or unfairly prejudicial. Furthermore, the court argued that the broad power of the court to achieve justice and equity, by defining the scope of 'proper person' liberally, is meant to balance the various interests within the corporate structure[88]. In adopting this approach, the court clearly stated its intention to give effect to the spirit of the reformed TCA, which demanded that the court moved away from 'the principle that management of a corporation was a matter for the directors and the shareholders of the company'[89]. Similarly, in the Barbadian case of *Canwest International Inc and Another v Atlantic Television Limited*[90] the court held that a party to a pre-incorporation with a company was entitled to be treated as a 'proper person' and accordingly he/she would be able to institute proceedings to remedy oppression or unfair prejudice. Additionally, in *Lalla v Trinidad Cement Limited and TCL Holdings*[91], the court was able to use analysis from Canadian cases to hold that wrongful dismissal of a CEO could amount to oppressive or unfairly prejudicial conduct as envisioned by section 242 of the TCA. Even though the act stated that only a defined class of persons (excluding employees) could argue that the actions of the company had been oppressive or unfairly prejudicial to their interests, the court was able to find for the plaintiff on the basis that he was both a director and employee. In coming to this conclusion the court made it clear that the plaintiff's ability to seek relief in another area of law (in this case employment law) should not act as a bar for him to claim relief under the TCA.

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[88] *Ibid*, 14
[89] *Ibid*
[90] (1994) 48 WIR 40
[91] *Lalla* (n 12)

All three cases demonstrate that the court is willing to use its discretion to achieve justice in *each particular case.* The emphasis on deciding what is oppression or who is a proper person by looking at the facts of each case allows the court a wide scope to add to the class of persons who should be considered under the complainant remedies provisions. This is clearly demonstrated in *Lalla* where the court has effectively opened up the possibility for an employee who has been wrongly dismissed to claim relief under the Companies Act even though they could have brought a cause of action under employment law. In addition, *Five Star* has also made it possible for a customer to argue that he/she is a 'proper person' to bring a claim against the company in cases where the company's actions has been unfairly prejudicial to his/her interest. Nonetheless, this might be stretching the implications of the judgments too far since it would appear that the courts discretion might only lead it to recognize a *certain type* of employee or customer. This is supported by the fact that in *Lalla* the only reason the CEO was given a right to bring a claim under the oppressive remedy was because he was also a director. If he was only an employee he could not have complained that the company's actions were oppressive to his interests since employees are not included among the class of persons who can make this claim. Furthermore, we could also argue that in *Five Star* it was the nature of the plaintiff's business (he operated a telemarketing business that depended heavily on the availability of telephone service) and the losses he suffered that led the court to a conclusion that the acts of the defendant was oppressive to the plaintiff's interests.

In relation to creditors, it is now established law that 'directors in discharging their duties to their companies must take into account the interests of creditors, on the basis that the interests of their companies encompass the interests of the companies' creditors'[92].

[92] A Keay, 'The Duty of Directors to take Account of Creditors' Interests: Has it any Role to Play?' [2002] JBL 379

This was first articulated in Anglo-Commonwealth law by Mason J in the Australian case of *Walker v. Wimborne*[93]:

> It should be emphasised that the directors of a company in discharging their duty to the company must take into account of the interests of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them.

While Mason J's comments could be read as giving the creditors' interests equal weight with that of the shareholder and more controversially, the company itself, subsequent cases have demonstrated that this duty is only triggered in certain circumstances. Cooke J in *Nicholson v Permakraft (NZ) Ltd*[94] stated that this duty will arise where 'the company is insolvent, or near insolvent, or of doubtful insolvency, or if a contemplated payment or other cause of action would jeopardise its solvency'[95]. This based on the fact that in cases of insolvency the ownership of the company shifts from the shareholder to the creditor as the company is effectively trading with the creditor's money[96]. If the company collapses it is the creditor who will lose the most since the principle of limited liability shifts the risks of failure from the shareholder to the company. In these circumstances the duty to take account of the creditors' interests serves to mitigate this shift. The *Five Star* case demonstrates the willingness of the court to recognize creditors' interest even where there might be conflicts in the reading of the complainant remedies. The court decided that even though 'creditors' was not included in the category 'complainants', the 'proper person provision' was meant to protect the interests of normal creditors as distinct from a debenture holder (a secured creditor). This was justified on the basis that 'creditors' was listed as one of the category of persons whose interests might be unfairly prejudiced by the company's actions[97].

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[93] (1976) 137 CLR 1, 6-7; (1976) 3 ACLR 529, 532.

[94] (1985) 3 A.C.L.C. 453

[95] *Ibid*, 459

[96] *See Kinsella v Russell Kinsella Pty Limited* (1986) 4 ACLC 215

[97] *Five Star* (n13)15

The deference to creditors' interests can also be seen in the courts judgments on winding –up proceedings. For example in *Tele-Art Inc v Nam Tai Electronics*[98] the Court of Appeal of Eastern Caribbean States, held that 'creditor' in section 117 of the British Virgin Island Companies Act should be read so as to include a creditor in equity. As such the plaintiff who was the assignee of the debt was granted *locus standi* to institute winding up proceedings. The court was equally adamant that the creditor, once he/she had satisfied the criteria that there was an existing debt, a demand for payment, and a failure on the part of the debtor to meet that demand, would not be prevented from instituting these proceedings, even if he does so 'with venom, antagonism or from some ulterior motive'[99].

V. Conclusion

It is clear from both statute and case law that there is a growing and in some cases established trend in relation to recognition of the interests of non-shareholder constituencies in the management of today's corporations. Whether we can utilize this acknowledgement to proffer the view that the stakeholder philosophy has become entrenched in regional jurisprudence is debatable. If we accept that stakeholder philosophy means that all stakeholders are given equal consideration at the corporate table, then the experience in the Commonwealth Caribbean does not point to an entrenchment of this philosophy. If however, we view stakeholder philosophy as a principle that demands that the company considers the interests of all stakeholders while not necessarily giving each equal weight, then both case law and statue justifies the conclusion that the stakeholder philosophy has become firmly entrenched within regional jurisprudence.

[98] (1999) 57 WIR 76
[99] *Ibid*, 80