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REVIEW ESSAYS

THE PROMISE OF THE OPPRESSION REMEDY: A REVIEW OF MARKUS KOEHNEN'S *OPPRESSION AND RELATED REMEDIES*

The oppression remedy found in the Canada Business Corporations Act¹ and most provincial corporate law statutes² provides courts with the discretion to move beyond the technical legal rules that bind corporate stakeholders and consider whether a complainant's reasonable expectations have been defeated. Where those expectations have been defeated, courts are provided with a broad discretion to craft a remedy to rectify the matters contested by the oppressed party.³ For example, courts can order the corporation (or any other person) to purchase securities from a security holder⁴ or to compensate an aggrieved person.⁵

The concept of oppression in corporate law, with its accompanying focus on equality and minorities, conjures up an image of corporate law operating in the public interest. It was the lure of the language surrounding the oppression remedy in Canadian corporate law that prompted Poonam Puri and myself to embark on an empirical study of the remedy, the precise contours of which were fuzzy at best.⁶ After reviewing all reported oppression cases between 1995 and 2001, we reported in 2004 that the remedy had developed as a mechanism to protect minority investors in closely held corporations from the exercise of majority control.⁷ We noted, however, that in recent years Canadian courts had granted the remedy, in certain limited instances, to creditors of closely held corporations

1. R.S.C. 1985, c. C-44, s. 241 (CBCA).
2. Quebec and Prince Edward Island do not have oppression remedies in their corporate law statutes. For a review of the differences in the provincial corporate statutes, see Ronald J. Daniels, "Should Provinces Compete? The Case for a Competitive Corporate Market" (1991), 30 McGill L.J. 130.
3. CBCA, *supra*, footnote 1, s. 241(3).
4. *Ibid.*, s. 241(3)(g).
5. *Ibid.*, s. 241(3)(j).
6. Stephanie Ben-Ishai and Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995 – 2001" (2004), 30 Queen's L.J. 79.
7. *Ibid.*, at p. 81.

and minority shareholders of widely held corporations. While we were concerned with the reluctance of Canadian lawyers and the judiciary to expand the remedy to a broader range of corporate stakeholders, we were impressed by the judiciary's willingness to craft creative remedies for successful actions.⁸ We concluded that the oppression remedy had a great deal of potential to deal with unequal power relations in both widely and closely held Canadian corporations, provided that both the judiciary and the lawyers that appear before it developed it in this manner.⁹

Since our study was published Canadian courts have released three high-profile decisions considering the oppression remedy.¹⁰ In addition, in contrast to the dearth of writing on the remedy at the time that we embarked on our study, over the last year Canada Law Book¹¹ and Thomson Carswell¹² each published a book on the oppression remedy written by prominent Canadian commercial litigators.¹³ This short review essay draws on Markus Koehnen's *Oppression and Related Remedies* to suggest that the remedy continues to be useful to minority shareholders of closely held

8. *Ibid.*, at p. 108.

9. *Ibid.*

10. *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, 2004 A.C.W.S.J. LEXIS 8022, 1 B.L.R. (4th) 186 (Ont. S.C.J.) (hereafter *Hollinger*); *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 244 D.L.R. (4th) 564, 2004 SCC 68 and *Stelco Inc. (Re)*, 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 253 D.L.R. (4th) 109, motion to stay refused 196 O.A.C. 260.
11. Sonia L. Bjorkquist, Allan D. Coleman and David S. Morrill, *The Oppression Remedy* (Aurora, Canada Law Book, 2004).
12. Markus Koehnen, *Oppression and Related Remedies* (Toronto, Thomson Carswell, 2004).
13. At the time we engaged in our study, full-length texts devoted to the oppression remedy had not been published. A number of brief case comments were published by practitioners in various professional publications and the following articles were representative of the academic commentary on the Canadian oppression remedy: Kevin E. Davis and Edward M. Iacobucci, "Reconciling Derivative Claims and the Oppression Remedy" (2000), 12 Sup. Ct. L. Rev. (2d) 87; Jason W. Neyers, "Is There an Oppression Remedy Showstopper?: *O'Neill v. Phillips*" (2000), 33 C.B.L.J. 447; Mary Condon, "Pandora's Box or Trojan Horse?: Recent Developments in the Use of the Oppression Remedy under the CBCA" (1994), Meredith Mem. Lect. 465; Markus Koehnen, "The Oppression Remedy: Reasonable Expectations: *Nanef v. Con-Crete Holding Ltd.*" (1994), 73 Can. Bar Rev. 274; Jeffrey G. MacIntosh, "Bad Faith and the Oppression Remedy: Uneasy Marriage, or Amicable Divorce?" (1990), 69 Can. Bar Rev. 276; Michael Rice, "The Availability of the Oppression Remedy to Majority Shareholders in Ontario" (1989), 16 C.B.L.J. 58; Karen C. Ulmer, "Business Issues: The Oppression Remedy" (1989), 53 Sask. L. Rev. 209; and Jeffrey G. MacIntosh, "The Retrospectivity of the Oppression Remedy" (1987), 13 C.B.L.J. 219.

corporations, and has also been expanded to creditors and minority shareholders of some widely held companies. Both Koehnen's book and the emerging case law demonstrate that Canadian lawyers and judges have an increased understanding and ability to apply the remedy to these contexts.

The central claim in this essay is that if the development of the oppression remedy for shareholders and creditors is not matched by the development of the remedy to deal with the reasonable expectations of non-shareholder/creditor corporate stakeholders, the remedy will create legal incentives for boards to exploit or at the very least disregard the interests of non-shareholder/creditor stakeholders. That is, if the remedy is interpreted in a manner that provides protection to creditors and shareholders, and not to other stakeholders, it may interfere with the wide latitude currently accorded to boards of directors by other parts of Canadian corporate law to pursue the best interests of the corporation.¹⁴ For example, such an interpretation of the remedy may cause boards and management to focus more closely on minority shareholders and creditors at the expense of protecting jobs and securing favourable treatment for workers and other corporate stakeholders. The remedy would create legal incentives for boards and management to behave in this manner. This interpretation of the remedy would also limit any possibility for relief through the courts from such conduct where the reasonable expectations of non-shareholder/creditor corporate stakeholders have been defeated. Such a result is inconsistent with the original promise of the oppression remedy as articulated by the Dickerson Committee's position that the

14. See Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2005) (unpublished, manuscript on hand with author) applying the Team Production Theory developed by American corporate law scholars Margaret Blair and Lynn Stout to argue that Canadian corporate law's understanding of public corporations that are not controlled by a single shareholder or group of shareholders can be better explained by the director primacy norm than the shareholder primacy norm. Canadian corporate law provides that directors of such public corporations with widely held share ownership and voting rights are free from direct control of any corporate stakeholders. Rent allocation among Canadian corporate stakeholders depends on extra-legal advantages. A potential departing point for the Canadian experience, the oppression remedy, continues to develop to deal with such extra-legal advantages rooted primarily in unequal power relations among corporate stakeholders. However, in its current application the oppression remedy does not provide any given stakeholder group with an ability to dominate the board of public corporations and obviate the director primacy norm.

oppression remedy is the broadest of all Canadian corporate law remedies.¹⁵

Part 1 briefly outlines and considers the three recent high-profile decisions concerning the contours of the oppression remedy and the implications of the judicial rhetoric produced in these decisions. This part suggests that these oppression remedy decisions may be interpreted in a manner that assists minority shareholders and creditors at the expense of other more vulnerable corporate stakeholders. Commercial litigators, especially those who are writing in the area, play a key role in determining the way that these decisions will be interpreted. Part 2 situates Koehnen's book within this context and highlights the key contributions that *Oppression and Related Remedies* makes for lawyers and judges' understanding of the remedy.

1. *Peoples, Hollinger and Stelco*

In November 2004, the Supreme Court of Canada released *Peoples Department Stores Inc. (Trustee of) v. Wise*,¹⁶ which has prompted much academic debate as well as commentary and attention from lawyers.¹⁷ The Supreme Court upheld the Quebec Court of Appeal's decision to not impose on the directors of Peoples a fiduciary duty to that company's creditors. In addition, the Supreme Court applied the business judgment rule to limit the duty of care owed to the creditors of Peoples. The court held that "the interests of the corporation are not to be confused with the interests of the creditors or any other stakeholders".¹⁸ In reaching this decision it relied heavily on the existence of the oppression remedy in Canadian corporate law and the Dickerson Committee's rhetoric on

15. Robert W.V. Dickerson, John L. Howard and Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa, Information Canada, 1971), vol. 1.

16. *Supra*, footnote 10.

17. See for example Catherine Francis, "*Peoples Department Stores Inc. v. Wise: The Expanded Scope of Directors' and Officers' Fiduciary Duties and Duties of Care*" (2005), 41 C.B.L.J. 175; Wayne D. Gray, "A Solicitor's Perspective on *Peoples v. Wise*" (2005), 41 C.B.L.J. 184; Warren Grover, "The Tangled Web of the *Wise* Case" (2005), 41 C.B.L.J. 200; Ian B. Lee, "*Peoples Department Stores v. Wise* and the 'Best Interests of the Corporation'" (2005), 41 C.B.L.J. 212; Stéphane Rousseau, "Director's Duty of Care after *Peoples*: Would It Be Wise to Start Worrying about Liability?" (2005), 41 C.B.L.J. 223; and Jacob Ziegel, "The *Peoples* Judgment and the Supreme Court's Role in Private Law Cases" (2005), 41 C.B.L.J. 236.

18. *Peoples, supra*, footnote 10, at para. 43.

the remedy.¹⁹ In addition, it held that an oppression remedy analysis is different from a fiduciary duty analysis.²⁰

The *Peoples* decision may be interpreted to expand the availability of the oppression remedy. A broad interpretation suggests that while the possibility of an action by creditors based on a breach of fiduciary duty is limited by a broader construction of the corporation and its stakeholders, oppression actions based on similar conduct may be pursued. However, given past jurisprudence this interpretation is unlikely to be followed by Canadian courts. Appellate courts before *Peoples* had given the direction that the judicial application of the oppression remedy is to be divorced from a fiduciary duty analysis.²¹ This direction has not had a significant impact on how the judiciary has engaged in its analysis of oppression actions.²² As a practical matter, judges draw on their overall knowledge of corporate law in dealing with the relatively few oppression actions that they are faced with each year.²³ As a result, judicial treatment of the oppression remedy has frequently drawn from the case law on breach of statutory duties and imported from that source the analysis of concepts such as the best interests of the corporation and the business judgment rule.

Only a few weeks after *Peoples* was released, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*,²⁴ pursuant to an application brought by Catalyst, a non-voting public shareholder of Hollinger, Colin Campbell J. removed the majority of Hollinger's board of

19. *Ibid.*, at para. 60.

20. *Ibid.*, at para. 51.

21. See for example *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289, 45 O.A.C. 320 (C.A.), affg 60 O.R. (2d) 737, 42 D.L.R. (4th) 15 (H.C.), supp. reasons 43 D.L.R. (4th) 141n, where the Court of Appeal held at p. 301:

It must be recalled that in dealing with s. 234, 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(1) (now s. 122(1)) of the CBCA.

22. See for example, *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755, 160 D.L.R. (4th) 131 (Gen. Div.) and *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 40 B.L.R. (2d) 244 (Ont. Ct. (Gen. Div.)), affd 42 O.R. (3d) 177 *sub nom.* *Maple Leaf Foods Inc. v. Schneider Corp.*, 113 O.A.C. 253 (C.A.).

23. See for example, Ben-Ishai and Puri, *supra*, footnote 6, at p. 81, where the authors noted there were 71 cases that dealt with the oppression remedy on its merits between January 1995 and November 2001.

24. *Supra*, footnote 10.

directors using the power granted to him by the oppression remedy in the CBCA. The relief was sought because Hollinger made a loan to its parent company, Ravelston, that was not in the best interests of Hollinger. Prior to *Hollinger*, the oppression remedy had been primarily applied to closely held corporations with a small number of shareholders, an absence of a public market for the corporation's shares, substantial shareholder participation in the management of the corporation, and shareholders who were generally linked by family or other personal relationships. The closely held corporation can be contrasted with the widely held company, where the shareholder is normally a passive investor with little knowledge or interest in the other shareholders or management of the corporation.

The general inapplicability of the oppression remedy to widely held corporations is based on the idea that in such companies power is centralized in the hands of the board of directors. In contrast, in closely held corporations the board is often controlled by the shareholders holding a majority of the voting power. As a result, the controlling shareholders of closely held corporations can cause the board to act in ways that are detrimental to the minority shareholders. For example, a minority shareholder's employment can be terminated, dividends might not be declared, minority shareholders can be removed from management, and majority shareholders might be given high compensation at the expense of the corporation. Similar actions may be taken in a widely held corporation. There, however, minority shareholders can exit more easily by selling their shares in the public market.

Like *Peoples*, *Hollinger* may be interpreted to expand the availability of the oppression remedy. *Hollinger* may be used to argue that the oppression remedy is now available to minority shareholders of widely held corporations. However, the existence of a dual-class share structure suggests an alternative interpretation. The prevailing distinction made in oppression remedy case law before *Hollinger* ignored the fact that in the Canadian context the line between a widely held corporation and a closely held one is often a difficult one to draw. There are a significant number of widely held corporations in Canada that employ a dual-class share structure and operate in a manner similar to the traditional closely held corporation. Canadian corporations with dual-class shareholding structures generally have share structures that provide for different voting and dividend rights among the control-block holders, who are generally

family members, and the corporation's public shareholders. Canadian corporations that have dual-class share structures account for approximately 20 to 25% of those listed on the Toronto Stock Exchange.²⁵ Campbell J. went to great lengths to justify his decision to remove the board members by highlighting the fact that the public controlled only 12% of Hollinger's voting shares.²⁶ Accordingly, *Hollinger* may represent a new sensitivity to this common structure, rather than an expansion of the oppression remedy to minority shareholders of all widely held corporations.

Most recently, in the context of Stelco's reorganization under the Companies' Creditors Arrangements Act,²⁷ Blair J.A. considered *Hollinger* and applied *Peoples* to overturn Farley J.'s earlier decision to remove two board members who represented shareholder interests.²⁸ The employee stakeholders in the Stelco reorganization had argued that because of their commitment to shareholder interests, the two directors would not be able to serve in a neutral capacity. Blair J.A. used the rhetoric in *Peoples* to hold that directors should not be removed merely because of the reality in the Canadian context that they have relationships with powerful stakeholders, provided they act in the best interest of the corporation broadly defined.²⁹ While the employees did not bring an oppression action, Blair J.A. considered whether such a suit would be successful. He concluded that it would not be and distinguished the *Stelco* circumstances from the *Hollinger* situation, where Campbell J. held that there was evidence of the directors acting in their own best interests and not in the best interests of the corporation.³⁰

Taken together, *Hollinger*, *Peoples* and *Stelco* may be interpreted to suggest that Canadian courts could be willing to grant relief to a significant number of minority shareholders and creditors using the oppression remedy. However, when situated in the historical context of the judicial application of the remedy and the specific facts of each of the cases, such a result is unlikely. At the same time, it is

25. Shareholder Association for Research and Education, "Second Class Investors: The use and abuse of subordinated shares in Canada" (April 2004), online at <<http://www.share.ca/files/pdfs/SHARE%20Dual%20Class%20-%20final1.pdf>> at p. 5.

26. *Hollinger*, *supra*, footnote 10, at para. 6.

27. R.S.C. 1985, c. C-36.

28. *Stelco*, *supra*, footnote 10, at paras. 77-78.

29. *Ibid.*, at paras. 59-60.

30. *Ibid.*, at para. 56.

uncertain how these decisions will be interpreted and applied by the judiciary. There is no doubt that lawyers practicing and writing in this area will play a significant role in dictating the nature of the development of this remedy. If an approach that favours increasing availability of the remedy to minority shareholders and creditors is advocated, while a continued resistance to expanding the remedy to other corporate stakeholders (such as the employees in *Stelco*) is maintained, this will have significant implications for how boards and management treat these other corporate stakeholders. The next part of this review considers *Oppression and Related Remedies* in this context.

2. *Oppression and Related Remedies*

Markus Koehnen's general goal in *Oppression and Related Remedies* is to address his discomfort with the amount of discretion courts have in applying the oppression remedy. To do this he provides commercial litigators and the Canadian judiciary with core principles that he has distilled from his in-depth analysis of the judicial treatment of the doctrine. Consistent with his general goal, it is clear from the first chapter of *Oppression and Related Remedies* that Koehnen's intended readership is one that is familiar with the oppression remedy. It is not until chapter 3 that Koehnen engages in a discussion of the oppression remedy generally that would be of benefit to readers unfamiliar with the concept.³¹

Koehnen begins in chapter 1 by situating the oppression remedy within its historical context. He traces the existence of the remedy from the problematic decision in *Foss v. Harbottle*³² and its prohibition on shareholder suits for corporate harms, to the introduction of the remedy in the CBCA in 1975. Unlike most other commentaries on the development of the doctrine, Koehnen provides some insight into the political economy of the remedy. He notes provincial tensions and disagreement on the extent of courts' involvement in management of corporations, which ultimately led to the adoption of the remedy in all provincial corporate law statutes except for those of Quebec and Prince Edward Island.³³ Koehnen observes that, unlike Ontario, which initially rejected the introduction of the

31. Koehnen, *supra*, footnote 12, c. 3.

32. (1843), 2 Hare. 461, 67 E.R. 189 (V.C.).

33. Koehnen, *supra*, footnote 12, at p. 6, note 24.

remedy,³⁴ British Columbia was the first province to adopt the remedy (in 1960) and later to expand it to include a broader definition of oppression (in 1975).³⁵

Chapter 2 addresses which complainants have standing to bring an oppression action. In a CBCA action, for example, complainants include security holders, directors and officers, the Director and any other person whom the court identifies as a “proper person”.³⁶ Koehnen notes that the standing provisions for oppression actions in Canadian corporate law statutes are the broadest in the common law world.³⁷ However, he fails to highlight that in practice the “proper person” test has only been used to extend complainant status to creditors.³⁸ A complete discussion of how and when standing has been extended to creditors is followed by a few sentences on employees.

A helpful addition to chapter 2 would be a discussion that moves beyond the case law on employees as complainants and outlines principles for when it would be appropriate for employees to be granted standing as a proper person. The limited discussion of employee standing in oppression actions in chapter 2 reflects a theme that persists throughout the book: scant attention is given to vulnerable corporate stakeholders. A later example in chapter 2, Koehnen’s discussion of representative actions³⁹ and class actions,⁴⁰ focuses on whether such actions could provide a vehicle for minority shareholders to overcome the financial obstacles to bringing an oppression action but ignores other corporate stakeholders. A discussion of the implications of the availability of a representative oppression action and the blurry state of the law on oppression actions brought as class actions for other corporate stakeholders would have enriched this section.

Chapters 3 through 5 trace the contemporary concept of reasonable expectations that underlies the oppression remedy to *Ebrahimi v. Westbourne Galleries Ltd.*⁴¹ There the House of Lords attempted to give substance to the concept of unfairness by considering the

34. *Ibid.*, at p. 5.

35. *Ibid.*

36. CBCA, *supra*, footnote 1, s. 238.

37. Koehnen, *supra*, footnote 12, at p. 7.

38. Ben-Ishai and Puri, *supra*, footnote 6, at pp. 97-104 and 108.

39. Koehnen, *supra*, footnote 12, at p. 61.

40. *Ibid.*, at p. 67.

41. [1972] 2 All E.R. 492 (H.L.).

reasonable expectations of the parties. Koehnen effectively pulls together common situations where Canadian courts have found that minority shareholders' reasonable expectations give rise to a successful oppression action.⁴² He highlights the sources that courts have generally found appropriate to look for such expectations, such as past practices of the parties.⁴³ Koehnen builds on the analysis of reasonable expectations by providing descriptions of common categories of oppression.⁴⁴ He provides examples that include dividends,⁴⁵ management fees,⁴⁶ corporate opportunities⁴⁷ and self-dealing.⁴⁸ In addition, he provides a set of questions that highlight when Canadian courts have used the business judgment rule to limit the availability of an oppression action. For example, are the benefits and burdens flowing from the decision mutual or one-sided?⁴⁹ These questions will be useful for lawyers who have been engaged to provide advice to boards on defending an oppression action or taking pro-active steps to avoid one.⁵⁰ Next, Koehnen employs a similar analysis to consider when an oppression action can be used to address conduct in the context of a plan of arrangement,⁵¹ a going-private transaction⁵² or a squeeze out⁵³ that is oppressive to minority shareholders.

In addition to chapters 3 through 5, which are useful for lawyers acting for a shareholder or creditor considering whether to bring an oppression action, chapters 8 through 10 are also helpful in determining the nature of the remedy that should be sought.⁵⁴ These three chapters provide a comprehensive discussion of the wide-ranging remedies courts have granted for successful actions and the principles that they have used to balance their desire to give meaning to parties' reasonable expectations and at the same time minimize judicial interference in corporate affairs. This analysis is also helpful in

42. Koehnen, *supra*, footnote 12, ch. 3.

43. *Ibid.*, at pp. 88-105.

44. *Ibid.*, ch. 4.

45. *Ibid.*, at p. 131.

46. *Ibid.*, at p. 130.

47. *Ibid.*, at p. 127.

48. *Ibid.*, at p. 124.

49. *Ibid.*

50. *Ibid.*, at p. 113.

51. *Ibid.*, at p. 169.

52. *Ibid.*, at p. 196.

53. *Ibid.*

54. *Ibid.*, chs. 8-10.

framing responses to the various remedies that a complainant in an oppression action might seek.

Chapters 6 and 7 are the most significant in terms of articulating the prevailing position held by Canadian lawyers who play a role in shaping the development of the oppression remedy. Koehnen's discussion of directors' duties in chapter 6 suggests that if his understanding of the oppression remedy and how it should develop is taken seriously, the significance of the discussion of the best interests of the corporation in *Peoples* may be limited. Koehnen describes the prevailing understanding among the commercial bar before *Peoples* as "the best interests of the corporation are typically defined as the benefits of the shareholders as a whole".⁵⁵ The discussion in of takeover bids in chapter 7 is also used to argue that even in that context directors are obliged to take into account the best interests of the shareholders as whole, not the best interests of the corporation.⁵⁶

The reasoning in *Peoples* runs against Koehnen's understanding of directors' duties. However, if lower courts adopt the Supreme Court's direction that an oppression remedy analysis is different from a fiduciary duty analysis, it is possible that Koehnen's approach could be applied to oppression actions. In *Peoples*,⁵⁷ the Supreme Court of Canada applied to the bankruptcy and reorganization context the reasoning developed in the takeover context, which Koehnen argues stands for the proposition that directors are obliged to act in the best interests of shareholders as a whole. The court held that

in determining whether they are acting with a view to the best interests of a 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.⁵⁸

Even prior to *Peoples*, the role of directors of widely held corporations as set out in Canadian law departed from the understanding that Koehnen articulates. The primary legal role of directors is to "manage, or supervise the management of, the business and the affairs of the corporation".⁵⁹ Canadian law does not grant shareholders any power to

55. *Ibid.*, at p. 203.

56. *Ibid.*, ch. 7.

57. *Peoples*, *supra*, footnote 10.

58. *Ibid.*, at para. 42.

59. CBCA, *supra*, footnote 1, s. 102(1).

initiate action or to control the board. For example, a review of Koehnen's discussion in chapter 11 of the procedural obstacles to bringing a derivative action⁶⁰ suggests that directors are not constituted as shareholders' agents. Rather, Canadian law provides boards with wide latitude in pursuing the best interests of the corporation. If the oppression remedy is developed so that it can be used to protect creditors from oppressive conduct by directors, and the remedy is made available to minority shareholders of widely held corporations yet continues to be limited in its application to other corporate stakeholders such as employees, the oppression remedy may represent a departure from the role corporate law currently accords directors of widely held corporations. The prevailing position held by the commercial bar on how the remedy should develop, as articulated by Koehnen, may in fact cause corporations to be run in the best interests of the shareholders as a whole, and sometimes creditors.

The development of the oppression remedy suggested by Koehnen's book, which is consistent with a possible interpretation of recent case law, would result in directors acting on behalf of majority shareholders, but subject to fair treatment of minority shareholders and creditors as protected by the oppression remedy. To the extent that directors of public corporations are accorded a high level of independence by corporate law to pursue the best interests of the corporation, the oppression remedy would limit this. The result would be that the remedy would actually facilitate the exploitation, or at the very least disregard of corporate stakeholders other than shareholders and creditors, rather than uphold their reasonable expectations. Following the reasoning in *Stelco*, it is likely that, in this context, if a corporate stakeholder such as an employee claimed that she has been treated unfairly the independent legal role of directors would still be pointed to by the courts to justify their reluctance to intervene. However, as in *Hollinger*, if a creditor or minority shareholder brought a claim for unfair treatment, Canadian courts would operate on the understanding that directors of public corporations generally act on behalf of majority shareholders, and would intervene to ensure that relatively powerful corporate stakeholders such as creditors and minority shareholders were treated fairly.

60. Koehnen, *supra*, footnote 12, ch. 11.

3. Conclusion

Markus Koehnen is to be applauded for putting together a comprehensive text on the oppression remedy. The critique and questions raised in this review are not leveled against his book, but rather at the predominant understanding of the remedy held by commercial litigators, which Koehnen does an excellent job of articulating in *Oppression and Related Remedies*. Only with the development of texts like this can the implications of a broader application of the remedy be considered from the perspective of all corporate stakeholders. From the perspective of non-shareholder/creditor corporate stakeholders, in the short term limiting the oppression remedy to minority shareholders of closely held corporations may be more appealing than developing the remedy. In the long term, however, if the perspective currently represented by the texts written by commercial litigators on the oppression remedy is built on with writing that offers a principled approach for considering non-shareholder/creditor corporate stakeholders' interests in applying the remedy, there is a possibility that the promise of the oppression remedy may be realized for a broad range of corporate stakeholders.

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