

Management Renewal?

Consequences of the new conception of the “best interests of the corporation” in North American and French Corporate Law

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Abstract

Corporate law integrates a stakeholder conception through the comprehensive meaning of the best interests of the corporation. In this paper, I address criticisms about classical definition of the firm's purpose. Even if American law is more discreet and uncertain, it is possible to defend a broad conception of the best interests of the corporation. The interests of Canadian and French firms include their partners. While the notion of *intérêt social* is debatable in France, Canada has recently modified its point of view regarding the purpose of the firm. Indeed, the decision of the Supreme Court of Canada *Magasins à rayons Peoples Inc. (Syndic de) v. Wise* in 2004 changed the concept of corporate law. With respect to fiduciary duties, the Supreme Court set aside the traditional interpretation of the “*best interests of the corporation*” which gave primacy to shareholders' interests. The Court held that the expression “*best interests of the corporation*” refers to the maximization of the corporation's value. This innovative vision of the best interest of the corporation introduces stakeholder theory and corporate social responsibility (CSR) into corporate law and provides a new field for the firm's management to frame their responsibilities. This paper concludes with an extended discussion of the implications of stakeholder and CSR influence for the future of corporate law, economy and financial researches.

Introduction

The main goal of this research is to show how corporate law in Canada and France allows the effectiveness of CSR and stakeholder theory. This paper proposes to demonstrate the integration of these theories into the *corpus* of corporate law mechanisms.

Today, the “*best interests of the corporation*” have a key position in both French and North American corporations. Indeed, the social interest of the company has substantial stakes in terms of politics, markets, and governance (Couret, 1996; Schmidt, 1995). First, the interest of the corporation guides the firm’s policies, particularly in terms of investment decisions, dividend distribution, or mergers. The interest of the corporation also has an effect on the market since it should understand the firm’s goals to allow for efficient decisions – a requirement for successful functioning of financial markets – purchasing, keeping, or suspending of titles. Finally, the power of the directors and managers and its limit vary in function of their acceptance of the interest of the corporation (Couret & *al.*, 1996). The latter determines the scope of the directors’ discretionary space because of judicial review (Charreaux, 1997) and the conditions of responsibility that define it. The best interest of the corporation leads the governance of firms and determines the range of the missions of the board of directors (connected with the *directoire* in the case of a dual structure) (Bissara & *al.*, 2007).

The interest of the corporation gains additional importance since the current governance of firms raises preoccupations that make their positioning difficult. The interest of the company appears to be an indispensable integration tool for the new paradigms of sustainable development, CSR, or even stakeholder theory at the heart of governance and legal framework. This is significant because “*the last decade has seen the rapid growth of concerns about this under the titles of “stakeholder” and “corporate social responsibility”*” (Charkham, 2005. For this tendency in Europe: Lozano & *al.*, 2008). There is a real danger of contradiction between the objectives of corporate law and those of these innovative concepts. Given the incentives for maximizing profit and shareholder value, does corporate law recognize stakeholder theory and CSR? Through the definition of the interest of the firm, should the corporate law guarantee a serious and serene understanding of these paradigms (Javillier, 2007)?

In this paper, I seek to answer this question. I do so by comparing American, Canadian, and French positions on the interest of the corporation. The consequences of these positions on the contemporary governance of firms will also hold our attention. This paper proceeds as follows. First, I expose the American jurists’ perception of the interest of the corporation to identify some important clues and doubts. Second, I present the perception of Canadian and French jurists through reference to recent choices. Since it constitutes a shift in the definition of the interest of the corporation, the study of the ruling *Magasins à rayons Peoples Inc. (Syndic de) v. Wise* by the Supreme Court of Canada (2004 CSB 68) – *Peoples* – is an opportunity to note that the North American model, which had served for a long time to justify the share-value-driven model of companies, is undergoing profound mutations¹. As a result, this paper makes some important contributions to the literature on corporate law and finance.

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Research methodology

On the one hand, traditional legal analysis implies a three-step process: (1) a study of all the rules of law and relevant modes of regulation regarding company control; (2) an interpretation of these rules; and (3) a synthesis of the legal constructions from Europe and other countries (making a comparative analysis possible) on the maximization of the value of the firm. Within this framework, a comparative study between North America and France will be adopted and multiple sources will be evoked. Firstly, if the United States and France appear to have different philosophies, Canada adopts a median position. The recent Canadian decision *Peoples* is the best illustration of this (Rousseau, 2006; Lee, 2005; Rousseau, 2001). Secondly, legal rules are globally defined and from the legislative *corpus* and public authorities (*Securities and Exchange Commission* in the United States, *Autorité des marchés financiers* in Québec or in France) or private groups which intervene in the corporate world (these quasi-regulatory functions are important because various stakeholders occur: Steger, 2006).

On the other hand, traditional legal analysis will be supplemented by an economic analysis founded on the postulate that, in an effort to maximize their well-being, individuals make rational decisions by taking into account the costs and benefits that their choices generate (Posner, 2007; Chandler, 1992; Votaw, 1965; Coase, 1937). Economic theory allows for a better understanding of the joint stock company and the problems of governance. Among the various corporate theories, the nexus of contracts theory is as essential as analysis framework (Jensen & Meckling, 1979, 1976; Alchian & Demsetz, 1972). According to this theory, the joint stock company can be considered as a legal structure that is used as the center for establishing contractual relationships. Moreover, this theoretical framework will be enriched by agency theory (Jensen & Meckling, 1976). This theory diagnoses most conflicts (e.g., the propensity of managers to privilege their interests, the domination of shareholders to the detriment of other partners of the firm) and identifies the mechanisms that mitigate governance problems. Although they were frequently employed in the context of the shareholder primacy model, the nexus of contract and agency theories provide a rich framework for the stakeholder model and the CSR (Pesqueux & Damak-Ayadi, 2005; Lépineux, 2005; Phillips, 2003; Friedman & Miles, 2002; Blair & Stout, 1999; Phillips, 1997; Donaldson & Preston, 1995; Freeman & Evan, 1990; Freeman, 1984). They recall studying the integrity of the contractual conditions that intervene in the parts of a joint stock company to understand its governance. The stakeholder theory can be seen as an extension of contractual theories of organizations, sharing with these the conception of the company as an individual voluntary association, united by a nexus of contracts, and organized to reach a particular goal (Mercier, 2001). The firm is a whole (Blair, 1995) and not a simple amalgam of shareholders (*Re Exchange Banking Company*, (1882) 21 Ch. 519, p.536 (C.A.)).

Results and consequences

This study reveals that the European and North American judicial corporate landscape has admitted for various interests (with varying intensity) other than those of its shareholders.

The American position: discussions and future evolution (?)

Even though exceeding the maximization of shareholders' profits is affirmed neither in case law nor in doctrine, the "*schizophrenia*" of the legal conception of the company (Allen 1992) and the incertitude that stems from it justify the new definition of the "*best interests of the corporation*". This doubt is accentuated by the content of the statutes of American

companies that refer to this concept in the assessment of company director duties. Indeed, nearly half of U.S. states adopted the “*constituency statutes*” that allow the board of directors to take into account the interests of non-shareholders when making decisions in the best interest of the company (Mitchell, 1992; Orts, 1992). Moreover, the American Law Institute is confused. If it announces a shareholder primacy, directors must respect ethics without considerations of profits for shareholders or for companies (Lee, 2006). This evolution is such that, though it is only currently potential, it has major consequences on the influence of the U.S. on the global corporate law and financial market scene. For evidence of this forward march, see Professor Lynn A. Stout’s appeal to renew the concept of social interest (Stout, 2007).

A few American rulings illustrate the change in legal perception of the company and its interests. Often brought up as the foundation of a strictly share-based conception of the company, the Dodge Brothers lawsuit against *Ford Motor Company* in 1919 should be considered (*Dodge v. Ford Moto Co.*, 170, N.W., 668, 684 (Mich. 1919)). After Henry Ford refused to distribute very large profits to shareholders and, instead, lowered the sales price of vehicles and hired new workers, the Michigan Supreme Court decided in favor of the shareholders and pointed out that only the shareholders had rights over the company. The company is set up first and foremost for the profit of the shareholders: “*There should be no confusion (...) 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 the directors is to be exercised in the choice of means to attain that end, and does not extend to (...) other purposes.*” Nevertheless, American case law adopted ambiguous positions after this ruling.

In 1953, the *Smith Manufacturing Co v. Barlow* decision of the New Jersey Supreme Court led to a redefinition of the aim of the company (*Smith Manufacturing v. Barlow*, (1953) in Beauchamp & Bowie, 2003). On July 24, 1951, the board of directors of Smith, a manufacturer of valves and fire hydrants, voted to donate \$1,500 to Princeton University. The New Jersey Supreme Court upheld the company’s decision and said that individual shareholders, whose private interests rest entirely upon the well-being of the corporation, ought not to be allowed to ignore present-day realities nor stand in the way of the long-visioned corporate action in recognizing and voluntarily discharging its obligations.

Next, the 1968 *Schlensky v. Wrigley* decision can be mentioned (*Schlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968)). While the minority of the Chicago baseball team firm’s shareholders asked for the installation of lights so that games could be played at night, the firm’s directors were so opposed to such a resolution, they used as a pretext the quality of life of the neighbors that would be affected around the stadium. The Federal Court, applying the law of the state of Delaware, judged in favor of the directors because the lower quality of life of those who lived around the stadium risked having a negative effect on the economic interests of the shareholders in the long term.

In addition, in the case *Unocal Corp. v. Mesa Petroleum Co.* de 1985 (*Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)), the Delaware Supreme Court pointed out that the board of directors must protect the public interest when dealing with an unsolicited public offer and, to that purpose, consider the impact of the offer on those involved (i.e. creditors, consumers, employees and, perhaps, the general community). The field of public bids shows a swinging of the case law pendulum. Following the *Unocal v. Mesa Petroleum* case, decisions took non-shareholders into account only when profits benefit to shareholders and thus emphasize the obtaining of a better price (*Paramount Communications, Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994); *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140

(Del. 1989); *Revlon v. MacAndrews*, 506 A.2d 173, 193 (Del. 1986)). Some authors perceive an evolution of case law. Professor Lee feels that the 1985 decision is favorable to a long-term strategy that reconciles the interests of both shareholders and non-shareholders (Lee, 2004-2005).

Finally, with the decision *Crédit Lyonnais Bank Nederland N.V. v. Pathé Communications Corp.* (*Crédit Lyonnais Bank Nederland N.V. v. Pathé Communications Corp.*, No 12150, 1991 Del. Ch. LEXIS, 215 108 (Dec. 30, 1991)), the Delaware Supreme Court clearly changed its view in the case of conflicting interests between the shareholders and other involved parties of the firm. When a company has financial difficulties, the shareholders cannot hold the board of directors responsible if they have not accepted to follow a high-risk strategy that is harmful to the company's creditors. It can be added that since the ruling *Dodge v. Ford*, few decisions have been made in favor of the maximization of the wealth of shareholders. Except *Long v. Norwood Hills Corp.* (*Long v. Norwood Hills Corp.*, 380 S.W.2d 451 (Mo. Ct. App. 1964) and *Katz v. Oak* (*Katz v. Oak Indus., Inc.*, 508 A.2d 873 (Del. Ch. 1986)), other judges' decisions (notably those from the state of Delaware) leave room for interpretation by referring to the interest of the shareholders and that of the company (for example, *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. Ch. 1939)). Furthermore, American case law allows taking into consideration future shareholders and points to an ever-increasing protection of creditors (*Re Trizec Corp.*, [1994] 10 W.W.R. 127 (Atla. C.A.)).

American legal doctrine shows that the definition of "*best interests of the corporation*" is changing. A trend favoring stakeholders is progressively emerging (Mahoney, Asher & Mahoney, 2005; Blair & Stout, 2001; Black, 1999; Blair, 1995). Two jurists are clear on this. On the one hand, Professor Stout goes even to qualify equating the firm's object with the interest of shareholders as an error, a judicial sport, or even an obsolete doctrinal curiosity (Stout, 2007). On the other hand, Professor Greenfield has developed new principles for American corporate law whose central element is that firms should serve the interest of society "*as a whole*" (Greenfield, 2006). Other American authors agree with this position and build bridges between stakeholder theory, CSR and the legal world. However, they are more reserved. Thus, Mr. Hansmann and Kraakmann recognize that one of the roles of law is to resolve the problem of agency between creditors, employees, and consumers (Hansmann & Kraakman, 2004). Though he may be skeptical about the fate of this type of attitude, Professor Mitchell also underlines that it is in the interest of American corporations to take into account other partners other than the shareholders that joint-stock companies indisputably need (Mitchell, 2003). On the same subject, Professor Clark takes a middle-ground position. Recognizing the primacy of the shareholders' interest be respected by directors and managers in their fiduciary role, he concedes that they should take into account specific obligations that protect other groups affected by the activities of the firm (Clark, 1986). Along these lines, Mr. Sundaram and Inkpen defend a shareholder's approach because it is "*pro-stakeholder*" (Sundaram & Inkpen, 2004).

Beyond legal developments, reconsidering shareholder supremacy is present in other scientific disciplines in the U.S. Compared to the situation of internal and external stakeholders of a business, Mr. Hopkins writes that "*legislation does have a role to play in how business is conducted so as to protect the externals – consumer safety, ethically produced product and so on*" (Hopkins, 2005). On a strategic level, Ms. Freeman and Mr. Evan insist that the law plays a role in favor of stakeholders by restricting managers and that economic and political institutions inherent in regulation today allow stakeholders' expectations to be taken into consideration (Freeman & Evan, 1990). American financial specialists such as Professors Zingales and Rajan (Rajan & Zingales, 2004) question the paradigm of share value and the

concentration of management's efforts in favor of these business partners (Zingales, 2000; Cornell & Shapiro, 1987).

Even if there is no clear attitude that emerges to supplant profit maximization (I recognize consequences of *Peoples* case are difficult to apply in takeovers: Rousseau & Desalliers, 2008), American law is not as favorable to shareholders as legal literature would like to think (Hansmann & Kraakman, 2004; Romano, 2001; Bainbridge, 1993; Macey & Miller, 1993; Romano, 1990; Friedman, 1970). Moreover, the definition of the firm's objectives in statutes of the majority of American businesses refer only to a legal purpose without other details about the defense of shareholders and arguments minimize the impact of the 1919 ruling.

The French and Canadian positions: evolution in action

While the situation is more debatable in France (neither legislators, judges, nor doctrine clearly defined notion of *intérêt social*), Canada has recently modified its viewpoint on the purpose of the firm. The Canadian position on the "*best interests of the corporation*" is rich with consequences. It constitutes a framing tool for directors' responsibilities. Thus, if the function of a directors was considered for a long time to control the performance of other members of the firm (Fama & Jensen, 1983; Fama, 1980; Jensen & Meckling, 1976; Alchian & Demsetz, 1972), today the role is more controlled to be more successful (Bournois & Duval-Hamel, 2006). And yet, such control implies the definition of a specific framework.

French position: the non exclusion from a wide view of the "*best interests of the corporation*"

For lack of a legal definition, doctrine is divided between a single (the interest of the shareholder or the interest of the firm) and a plural analysis.

Some people claim that the interest of the corporation should be the firm's interest, that is to say, that it should include the interests of shareholders, employees, creditors, and even the State (Teyssié, 2004; Daigre, 1996; Durand, 1947). For Professor Despax, this interest should be the interest of the company that transcends the interest of its shareholders, which constitutes the limit of sacrifices of shareholders or employees (Despax, 1957). In the same way, Professor Paillusseau adds that "*best interests of the corporation*" are the company's interest. It extends to assure the prosperity and continuity of the firm (Paillusseau, 1967). Directors and the majority should therefore act in accordance with the economic organism that the company represents.

Others think that "*best interests of the corporation*" should be understood as the interest of shareholders that hope for the creation of wealth and optimization of bond value (Martin, 2005; Ripert & Roblot, 2002). Based on articles 1832 and 1833 of the *Code civil*, Professor Schmidt thus considers the company would not be created for any other interest except that of its shareholders, who have the sole purpose of sharing the corporate earnings among themselves (Schmidt, 1995). The company's highest objective is the sole interest of its shareholders while respecting legal and statutory obligations (Schmidt, 2000; Bissara, 2003; Bissara, 2002; Schmidt, 1995).

Lastly, part of the doctrine adopts variable positions on the periphery of this dichotomy. Some make interest of the corporation a "*standard*". In this sense, Professor Bertrel defends the theory of *juste milieu* that analyses society as a mixed concept social interest as a notion

that, depending on the circumstances, favors long-term or short-term constraints (Bertrel, 1997). Others see the interest of the corporation as a multiform notion with variable content that can take on two meanings: the sole interest of the shareholders or a large dimension that represents the interest of the institution sociétaire as a whole (Cozian, Viandier & Deboissy, 2003). Still others see the interest of the corporation as a financial interest associated with the issue of power (Pirovano, 1995), either as a behavioral standard (Constantin, 1999), or as a modulable compromise (Chaput, 1993). Finally, some authors stress the legal entity to define the best interests of the corporation. By establishing the existence of an autonomous paralegal officer by registration at the corporate and trade register, the legal entity has a catalyzing effect that will bring out the distinct interests of each of its members (Bézar, 2004; Constantin, 1999).

The interest of the company debate affects the courts. Nevertheless, case law brings little light to the fog surrounding the interest of the corporation. Indeed, case law is characterized by an absence of delimitation of outlines of this concept, which does bring up difficulties since it is the judge precisely who is supposed to define them. The construction shows the incessant pendulum swinging between the interests of the shareholders, the interests of company, and the interests of the corporation. Many judgments also show this in regards to the misuse of company propriety (Poracchia, 2000; Vézinet, 1997). Even though magistrates claim that the law protects, in addition to the property of the firm, the interests of its shareholders and third parties, they have a restrictive vision of civil action and only grant to companies and their shareholders acting *ut singuli* (Dekeuwer, 1995).

French corporate law, far from providing a solution to this debate about the “*why*” of companies, defines the best interests of the corporation in a variable way without unanimity. The report on businesses listed on the stock market in 2003 (MEDEF-Afep, 2003) shows the insufficiency of the French situation. On the one hand, article 1.1. of this report clarifies that the board of directors must act under all circumstances in the interest of the company. But, on the other hand, article 6.2. says that the board of directors should consider itself the representative of shareholders. Similarly, the French Asset Management Association (Afg) is not clear about the meaning of the interest of the corporation (Afg, 2008). While the board of directors should act in the best interest and for all the shareholders, it is recommended that its strategy and action should be part of the sustainable development of the business (Afg, 2008). The Institut Montaigne has the same position: Institut Montaigne, 2003). Yet, if none of the following arguments in the French debate justifies the exclusion of an “*open*” or wide view of the “*best interests of the corporation*”. I am forced to note that this affirmation lacks a solid foundation.

It is unfortunate that a wider view of the interest of the corporation is not more prevalent whereas French corporations are opening up more and more to CSR, sustainable development and stakeholder theory. In its recommendation synthesis on the role and course of action of the board, the *Institut Français des Administrateurs* stresses that the board of directors should take into account the social responsibility of companies and develop the long-term value of the company (Institut Français des Administrateurs, 2007). Statistically speaking, while only 35% of companies were in conformity with the NRE law in 2003 (with a high rate of conformity for the companies on the CAC 40: Delbard, 2007), the rate rose to 80% in 2004. Moreover, despite some missing information (on suppliers or the territorial impact of activities), it must be recognized that firms increased both the quality and the quantity of information given in the social and environmental report. In the same way, the *CFIE-Conseil* on social and environmental information that analyzed the 2006 reports of companies on the stock market

revealed that the transparency of the reports of sustainable development are slowly but surely making progress (*Les échos.fr*, 2007).

Canadian position: the affirmation of a wide view to the “best interests of the corporation”

While the Canadian situation was for a long time a restrictive conception of the best interests of the corporation (conceived with the limited interest of the shareholders), it has changed since the case law evolution of 2004.

In article 122 of the Canadian Business Corporation Act, the interest of the corporation is mentioned to guide administrative conduct without any precise definition being provided. The traditional response of Canadian law was a predominance of shareholders' interest (Rousseau & Crête, 2008). Canadian legal structure thus followed the American position as Professor Palmer so illustrates: the company means the shareholders, no external interest outside of that of the shareholders can be considered legitimate by (the) directors and managers (Palmer, 1967). Coming to contradict the principles expressed in previous decisions (*Salomon c. A. Salomon & Co.*, [1897] A.C. 22 (H.L.)), the approach of Judge Evershed expressed in the famous 1950 ruling *Ardene Cinemas* clearly brought back the interest of the commercial corporation as that of its shareholders and foreshadowed the Canadian attitude to follow (*Greenhalgh v. Ardene Cinemas* (1950), [1951] 1 Ch. 286, p.291 (C.A.)). In this case, the magistrate pointed out that: “(...) the phrase “the company as a commercial entity, distinct from the incorporators : it means that the incorporators as a general body.” On the one hand, during takeovers of corporations by takeover bids, Canadian case law (influenced by the American *Revlon* decision of 1986: Nicholls, 2007; Halperin & Vaux, 1999) traditionally considered the director's duty to the business, when a takeover is impending, consists in maximizing the value of short-term certification values for the shareholders' benefit (*Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, (2007) ONCA 2005; *Re Sterling Centrecorp Inc.*, 2007 CANLII 32675 (ON S.C.); *Casurina Limited Partnership v. Rio Algom Ltd.*, [2004] O.J. No. 177; *CW Shareholdings Inc. v. WIC Western International Communications Ltd.*, (1998) 38 B.L.R. (2d) 196 (Ont. Ct. Gen. Div.); *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] O.J. N°2036 (Gen. Div.); (1998) 42 O.R. (3d) 177 (C.A.)). On the other hand, the duty of loyalty is a field in which Canadian courts have interpreted company interest as shareholders interest (*Palmer v. Carling O'Keefe Breweries of Canada Ltd.*, (1989) 67 O.R. (2d) 161 (Ont. H.C.J.); *Parke v. Daily News Ltd.*, [1972] 2 All. E.R. 929 (Ch.)). The Court of Appeal of Quebec in the *Peoples* case thus refused to recognize that the directors' duty of loyalty could serve to protect the creditors' interests that were weakened with the risk increase following the adoption of the new supply policy. If some advances were previously made in case law and legislation of corporate law (or the legislation of other legal branches), none had previously reached the amplitude of the Supreme Court decision of 2004. As the courts need to determine if an honest person, placed in a similar situation, would have sensibly believed that the operation was in the interest of the company, (*Charterbridge Corp. v. Lloyds Bank Ltd.*, [1970] Ch. 62, p.74 (R.-U. C.A.A)), directors have the discretion that allows them to act in the interest of other constituents other than the company's shareholders from the moment they increase the patrimony of the company. Creditors can be included through the directors' decisions (*Re London, New York & Paris Association of Fashions Ltd.*, (1982) 40 C.B.R. n.s. 127 (Nfld. S.C.); Hansel & Gillies, 1996; Ziegel, 1993). Next to the duty of loyalty, obligation for accountability resulting from Common Law fiduciary duties also leaves space for a wide view of the firm's objectives (Welling, 2006; Ribstein & Alces, 2006).

The decision of the Supreme Court of Canada *Magasins à rayons Peoples Inc. (Syndic de) v. Wise* in 2004 changed the conception of corporate law. Pursuant to section 122 of the Canadian Business Corporation Act, directors have the duty to act honestly and in good faith in regards to the “*best interests of the corporation*” in mind. Traditionally, the expression “*the best interests of the corporation*” was interpreted as the interests of the shareholders as a whole, as expressed by their financial welfare. The shareholder primacy norm coupled with the principle of limited liability can result, however, in the externalisation of costs by the corporation at the expense of its other stakeholders. The *Peoples* case dealt precisely with this issue. In this decision, the Supreme Court had to decide whether directors of financially distressed corporations are accountable to creditors. Specifically, it raised the question as to whether the contractual creditors of a corporation bear uncompensated risk and, therefore, need some form of a protective legal mechanism to offset such risk. With respect to fiduciary duties, the Supreme Court set aside the traditional interpretation of the “*best interests of the corporation*” which gave primacy to shareholders’ interests (Rousseau, 2006). The Court held that the “*best interests of the corporation*” refer to the maximization of the corporation’s value. Even if creditors’ interests increase in relevancy as a corporation’s finances deteriorate, directors continue to owe their fiduciary duties to the corporation whose interests are not to be confused with the interests of the creditors or those of any other stakeholders. Although the traditional position in Canada was in favor of shareholder interest (Comité mixte sur la gouvernance d’entreprise, 2001), some decisions have already defended a true stakeholder conception (*Re London, New York & Paris Association of Fashions Ltd.*, (1982) 40 C.B.R. n.s. 127 (Nfld. S.C.); *Teck Corporation v. Millar* (1972), 33 D.L.R. (3d) 288; *Sun Trust Co., Ltd. v. Bégin*, [1937] R.C.S. 305; *Bergeron v. Ringuet*, [1958] B.R. 222; *Lizée*, 1989). Nonetheless, these decisions were in minority and none had the impact of *Peoples*. This innovative vision of the best interest of the corporation is one method of integrating stakeholder theory and CSR into corporate law (Martel & Martel, 2008). But, the recent decision *BCE* is problematic because it rejects the influence of *Peoples* in takeovers: “*There is no doubt that the directors of a corporation that is the target of a takeover bid – or, in this case, the Trustees – have a fiduciary obligation to take steps to maximize shareholder (unitholder) value in the process*” (*BCE Inc. (Arrangement relative à)*, (2008) QCCS 905 CANLII).

The Possibility to Be Responsible

Even if stakeholder theory and CSR are widely studied (recently: Zakhem & *al.* 2008; Freeman and *al.*, 2007), there are few studies yet on the interactions between corporate law and these notions (McBarnet & *al.*, 2007; Dodd, 1932). One of the most essential lessons of the “*best interests of the corporation*” is acknowledging the effectiveness of the stakeholder theory and CSR. It is possible to consider corporate law in the context of stakeholder interests (Wheeler & Sillanpää, 1997). Thus, stakeholder theory and CSR exceed the discipline of management to affect corporate law. The central discussion in countries (Gospel & Pendleton, 2005) about the role of employees in companies provides an example of the evolution (Bottomley & Forsyth, 2007; Sarra, 1999). This implies the adaptation of certain rules, which apply to companies and adopt a different conception of the firm’s purpose. The modifications are fundamental for the firm’s managers. They must decide with stakeholders (Bonnafous-Boucher, 2006). “*The law leaves [them] the freedom to be irresponsible, but it does not make [them] irresponsible*” (Lee, 2005).

Finally, far from being an obstacle to maximize the value of the firm, legal tools (in Canada and France) strengthen this value by creating responsibility (Caby & Hirigoyen, 2005). The corporate law imposes to take care of all the contrarians (OECD, 2004) and this research gives strong legitimacy to the managers’ attitude in its favor (Jones & *al.*, 2007). The

apprehension of CSR and stakeholder theory in North American and French business law gives a great future to these theory in the matter of governance. In this way, sustainable development could not find a simpler expression in corporate law then through the stakeholder theory. Freeman and Velamuri propose the substitution of “*Corporate Social Responsibility*” with “*Corporate Stakeholder Responsibility*” (Freeman & Velamuri, 2006). McBarnet explains the creation of a new concept (“*corporate accountability*”) through the meeting between the law and the CSR (McBarnet, 2007). With this comparative view, it will be possible to offer new perspectives to corporate law (and to management of the firms) in evolution (Baird & Henderson, 2007; Valsan & Yahya, 2007; Stout, 2007; Greenfield, 2007; Mitchell, 2003). It is not the “*end of corporate Law*” (Hansmann & Kraakman, 2004).

This change in corporate law modifies the classic notion of the company. Corporate law recognizes that firms are the source of negative externalities and understands its stakeholders (Trébulle, 2007). Doesn't this confirm what the majority of doctrine highlights about stakeholder theory: that it would be a constellation of collective interests, interests that are recognized as existing. The corporate law demonstrates the existence of an authentic “*society of stakeholders*”. This conclusion in the legal field reinforces economic writings such as Post, Preston and Sachs (Post, Preston & Sachs, 2002), Chandler (Chandler, 1992), Aoki (Aoki, 1988; Aoki, 1984), Jameux (Jameux, 2005), Coriat (Coriat, 1994) that redefine the firm without borders (Quélin, 2002; Pesqueux, 1987). The same is true for directors such as Savall and Zardet who replace an old perception of the firm based on hierarchical ideas and specialization for a new perception based on the concept of contractualization (Savall & Zardet, 2005). Because of the opening of markets, diffusion of new technologies, fragmentation of markets, disruption of production methods, and recognition of stakes linked to innovation and knowledge, a new industrial organizational method is being developed by which cooperative strategies between a variety of heavily interdependent agents are redefining the firm. The firm then appears as a set of multilateral contracts between stakeholders (Bainbridge, 2002) whose importance and expectations vary but who have a specific goal (Mercier, 2001).

This proposition has significant implications for future financial research about performance. This new vision of the firm leads to a profound evolution in measuring its performance. Studies show that even we must resort to a firm's financial performance to know if the stakeholders' expectations have been respected by a company and, inversely, one must measure the social performance to determine financial performance (Igalens & Gond, 2003). Why the need to compare the stakeholders' expectations with the financial performance of the firm? Why show that this respect leads to better financial performance? The only answer that seems to justify the search for such interaction is that the stakeholders' expectations are perceived in monetary terms. The logic behind the accounting system is based on a definition of property according to which a firm is the propriety of its shareholders, who are the only party with the right to appropriate the remainder estimated to be equal to book profit. If comparing social performance with financial performance can teach a lesson, it must not be forgotten that the two notions are of a different nature or kind. Financial performance comes down to numbers, taking into consideration accounting and stock information, and it offers a short-term vision. Social performance or “*stakeholder satisfaction*” admittedly refers to monetary (the shareholders are included in the stakeholder category) and others expectations (e.g., protection of working conditions, importance of the environment) and implies a maximization of the firm's value in the long-term (stakeholder theory justifies that shareholders are not the sole people to be taken into account) (Jensen, 2001). As a consequence, evaluating stakeholder satisfaction should take place on two levels: the growth of value and of other purposes of the firm (Freeman & *al.*, 2007; Harrison & Freeman, 1999;

Charreaux & Desbrières, 1998). Only long-term value growth of the firm will allow the company's performance to be measured. To do so, quantitative performance criteria are indispensable tools (Mitchell, 2003). Blair's developments on the place of human capital demonstrate the necessary linking to a quantitative tool. The human rights of property (belonging to employees), though clearly separate from financial rights of property (belonging to shareholders) are expressed through the actions of employees. These actions therefore attest to the performance of non-financial capital of the firm and show that reference to a quantitative tool can be abandoned. However, it must be added to this first criterion of quantitative value, a second criterion: the firm exists for other purposes than the growth of its financial value (Al Gore, 2007). Measuring company performance requires taking into consideration the diversity and interdependence of firm's stakeholders, both internally and externally (Pasquero, 2005). This criterion remains that the path bringing invested capital in resources that creation of value is a complex process and imply taking into account the clients' judgment(s) on the products or their quality.

This paper is an original attempt to associate management, economy, and corporate law. I tried to demonstrate the existence in corporate law of effective tools to struggle against the famous "*Frankenstein tendency*" of firms (Wormser, 1935).

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Codes of governance

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