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A COMMENTARY ON THE LAW OF STANDING IN CANADA

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concerned an incorporated company, Wigram V.C. observed that "[c]orporations like this, of a private nature, are in truth little more than private partnerships."[100] Consistent with this view, the rule that equity applied to partnerships, that the Court would not intervene in internal disputes except with a view to dissolution,[101] was adapted and applied to the corporation. The result was the ruling requiring plaintiffs to show that the acts of which they complained were not capable of ratification by the majority and that all means of seeking to have the corporation itself take appropriate action had been exhausted.[102] The influence of trust principles is equally clear, as the following passage from Wigram V.C.'s judgment shows:

> This in effect purports to be a suit by a *cestui que trust* complaining of a fraud committed or alleged to have been committed by persons in a fiduciary character. . . . The corporation, in a sense, is undoubtedly the *cestui que trust,* but the majority of the proprietors at a special meeting assembled . . . by the very terms of the incorporation . . . has the power to bind the whole body. How then can this Court act in a suit constituted as this is, if . . . the powers of the body of the proprietors are still in existence, and may be lawfully exercised for a purpose like that I have suggested.[103]

Similarly, the holding that the corporation itself was the appropriate plaintiff and that the shareholder could sue in representative form in its place only if all means of having the corporation itself commence action had been exhausted is modelled on the equitable discretion with respect to permitting suits in representative form.[104]

With these equitable principles, developed in the context of partnership and trust, the courts approached the legal relations between shareholder and corporation. Whether the importance that modified trust principles assumed is owed to the prevalence of the trust device in the unincorporated companies or to the general traditions of the equity courts is not, for our purposes, the significant point.[105] What is important is that the modern law of shareholders' actions developed from the equitable principles relating to partnership and trust, influenced by the equitable procedure of the representative action.

This brief summary allows several issues to be isolated that are of importance to standing questions generally.

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100 *Supra,* note 84 at 202 E.R.

101 See Boyle, *supra,* note 90, 318.

102 *Foss v. Harbottle, supra,* note 84 at 204-205 E.R.

103 *Ibid.* at 203 E.R.; see Beck, "Analysis" *supra,* note 83, 548-550.

104 See *supra* note 84 at 204 E.R. see also Boyle, *supra* note 90, 320, 326-327.

105 For this debate see L.S. Sealy, "The Director as Trustee", [1967] Camb. L.J. 83; G.W. Keeton, "The Director as Trustee", [1952] Cur. Leg. Pro. 11; Cooke, *supra,* note 90, 110-111.

(e) Some Issues of General Importance

(i) *Substance and procedure*

The rule that the company is the correct plaintiff in an action arising out of a wrong to it may appear to be, as it did to Lord Davey, "mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress."[106] But this procedural question is really a façade behind which important and difficult substantive questions wait for decision.[107] While it is true that the questions of whether there is a procedure to enforce rights and whether those rights exist are, for practical purposes, virtually the same question,[108] there is more at stake than can be accommodated by mechanical application of technical rules about parties or methods of pleading. As Professor Beck has forcefully argued, the real issues concern what rights ought to be legally protected and how those rights should be defined. The answer to the procedural question thus turns on, and ought to be enlightened by, the resolution of the substantive issues.[109]

The point may be demonstrated by looking at the so-called *ultra vires* exception to the rule. The exception holds that a derivative suit is permitted if the corporation has exceeded its powers and the act is incapable of ratification by the majority. But whether an act is *ultra vires* and incapable of ratification cannot be determined simply by examining the incorporating documents and governing legislation. It is a question that requires definition and balancing of the interests of managers and owners and of majority and minority.

> How these interests are to be balanced is the difficult substantive question faced by the courts, and ultimately by the legislation, when the courts fail to provide adequate solutions. It is this substantive problem of balancing conflicting economic interests and fashioning appropriate remedies . . . that is hidden behind the simple procedural façade of the rule in *Foss v. Harbottle*.[110]

Two things of general interest emerge from this discussion. The first is that the question of whether or not certain rights are or should be recognized may be phrased as a standing question. Second, the answer to a standing question may, for practical purposes, decide whether the rights will be vindicated. Thus, standing may be another way of describing a problem about the definition of rights. It is always concerned with access to remedies for their breach.

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106 *Burland v. Earle, supra,* note 86.
107 Beck, "Analysis", *supra,* note 83, 546.
108 Wegenast, *supra,* note 88, 316.
109 Beck, "Analysis", *supra,* note 83, 545-546.
110 *Ibid.,* 546.

(ii) *Whose rights?*

The distinction between personal rights and corporate rights underlies the rule in *Foss v. Harbottle.* Personal rights may be litigated, but a derivative action to enforce corporate rights lies only in the situations found to be exceptions to the rule. In many cases, however, the distinction between personal and corporate rights is elusive. Consider two examples. Failure to give a shareholder adequate notice of meetings has been said to be a breach of a personal right.[111] Expropriation of the company's property by wrongdoers in control of the company has been classified as an infringement of the company's rights.[112] But quite plausible arguments may be made in favour of different categorizations of even these normally uncontentious examples. Failure to give a shareholder notice of a meeting, for example, could be considered a wrong against the company in that its rules of procedure are violated, and the violation may have resulted in the company being deprived of informed and potentially valuable participation by a shareholder. Conversely, expropriation of the company's property by the majority is detrimental to the economic interests of shareholder. Characterizing the harm done as indirect does not detract from the reality or extent of it.[113] Admittedly, the arguments for these opposite categorizations in these traditionally uncontentious cases are a bit strained. But Professor Beck has shown that many difficulties of classification have arisen in the cases.[114] The distinction between "personal" and "corporate" rights is really a matter of degree rather than type. It is not an accurate way to describe reality nor does it easily sort the cases that arise.

This observation leads to two points of general interest. The classification of rights as either personal or corporate is problematic because it frequently fails to take sufficient account of who is injured by the breach of the rights. In many cases, breach of either type of right injures both the corporation and the shareholder. There may be a distinction based on the degree and directness of injury, but not the type. A parallel problematic distinction encountered elsewhere is that between public and private rights. This has already been noted in the discussion of public nuisance and is important in other areas to be discussed later. The parallel between this distinction and that between corporate and private

111 *Ibid.*, 573.
112 *Ibid.*, 567-569.
113 Beck, "Can. Bar Rev." *supra,* note 83, 187-9; see also M. Baxter, "The Derivative Action Under the *Ontario Business Corporations Act*" (1981), 27 McGill L.J. 453-478.
114 Beck, "Can. Bar Rev." *supra* note 83, 169-187.