FAIRNESS IN COMPANY LAW

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At a recent conference, Sir Robin Cooke said:

"there is now a more open acknowledgement that deciding a new point may not be primarily a process of deduction; and that the search is rather for the solution that seems fair and just after balancing all the relevant considerations."[1]

Sir Robin went on to discuss fairness as a criterion in judicial law-making, including its utility in areas of law as diverse as the Treaty of Waitangi, administrative and employment law, and the law of constructive trusts.

Sir Robin's comments would seem to have little bearing on existing company law were it not for the words of section 209 of the Companies Act 1955:

Any member of a company who complains that the affairs of the company have been or are likely to be, oppressive, *unfairly* discriminatory, or *unfairly* prejudicial to him (whether in his capacity as a member or in any other capacity) . . . may make an application for an order under this section [my emphasis]

Sir Ivor Richardson in *Thomas v H. W. Thomas Ltd* said this about fairness under section 209, again linking it to a balancing process:

Fairness cannot be assessed in a vacuum or simply from one member's point of view. It will often depend on weighing conflicting interests of different groups within the company. It is a matter of balancing all the interests involved in terms of the policies underlying the companies legislation in general and sec. 209 in paticular.[2]

These ideas could well be thought to be confined in company law to section 209 were it not for the Law Commission *Report on Company Law Reform and Restatement*. Paragraph (d) of section 2 of the Draft Companies Act mooted by the Law Commission[3] states that one of the purposes of the Draft Act is:

to encourage the efficient management of companies by permitting directors a wide measure of discretion in matters of business judgment while protecting shareholders and creditors against abuses of management power.

Whilst founding its recommendations on a contract based enterprise model of the corporate form[4] the Law Commission places the burden of being the ultimate arbiter in disputes on the court. The nature of the discretion of the court is described thus: "The test for intervention, where a decision is made in good faith, is one of reasonableness."[5]

1 "Fairness" Australasian Universities Law Schools Association Annual Conference, Wellington, 1989, now published at (1989) 19 *VUWLR* 421. Comp.: "Fairness in the business context is an illusory concept; it is not a justiciable issue", L.S. Sealy, *Company Law and Commercial Reality*, Sweet & Maxwell, London, 1984, p 47.

2 [1984] 1 NZLR 686, 694–695.

3 Law Commission Report No.9, *Company Law Reform and Restatement*, Wellington, 1989, (hereinafter cited as *"Report"*) pp 179–378. The Draft Companies Act proffered by the Law Commission will hereinafter be cited as the "Draft Act".

4 *Report*, 18–20.

5 *Report*, 35.

These statements reveal a tendency, in both judicial and law reform circles, to view the problems of internal dispute in companies as best resolved using criteria of fairness and reasonableness. This note attempts to show that such an approach is founded on a simplistic perception of the dynamics of corporate life; it argues that this perception involves the idea of competing interests which should be "balanced" by judges in situations of dispute. Such a rejection of the common law solution to the complex problems associated with the fluid nature of interests in company law is, it is here asserted, unwarranted without a more fundamental understanding of companies and how they work.

I THE JUDICIARY: FAIRNESS, REASONABLENESS AND BALANCING

Both Sir Robin Cooke and Sir Ivor Richardson explain "fairness" as a balancing of interests in the context of the existing law: the "relevant interests" and "all the interests involved in terms of the policies underlying the companies legislation in general and sec.209 in particular" are the words they use in the above quotations to describe what is "balanced".

Sir Ivor Richardson elaborated on the balancing process and its context of "policies" by describing the methodology a court should adopt as:

> to have regard to the principles governing the duties of a director in the conduct of the affairs of a company and the rights and duties of a majority shareholder in relation to the minority; but to recognize that sec.209 is a remedial provision designed to allow the court to intervene where there is a visible departure from the standards of fair dealing; and in the light of the history and structure of the particular company and the reasonable expectations of the members to determine whether the detriment occasioned to the complaining member's interests arising from the acts or conduct in that way is justifiable.[6]

Presumably he was saying that the court should look to the nature of the interests of the parties as defined in the existing case law in the fields of directors' duties, fraud on the minority and shareholders' rights for the definition of detriment to the complaining member's interests. Sir Ivor moved on to assert that the second stage of the "balancing" process is to determine whether the detriment to the interests of the complainant as established by those principles justifies the intervention of the court under section 209 as measured by "standards of fair dealing". The third and final limb of his formula is to enquire as to whether the detriment to the complaining member's interests is justifiable "in the light of the history and structure of the particular company" and "the reasonable expectations of the members".[7]

[6] *Thomas v H.W. Thomas Ltd* [1984] 1 NZLR 686, 694–5: Followed in *Vujnovich v Vujnovich & Anor* [1988] 129 NZLR 129 and cited with approval in *Wayde v New South Wales Rugby League Ltd* (1984) 61 ALR 225. Comp. the piecemeal approach to section 209 advocated in A. Borrowdale, "Shareholders' Protection: The S209 Remedy — a Survey", [1988] *NZLJ* 196.

[7] The relationship between the constituent parts of the test is not at all clear. Tipping J in re *Ashby Bergh & Co Ltd* (1988) 4 NZCLC 64, 131 summarized the test into one of "unjust detriment" and then moved on to explain each limb separately, but also without explaining how they relate to each other.

The extent to which the reference in section 209(2) that the Court may, if it is "of the

All of the "policies underlying the companies legislation" used by Sir Ivor as the elements of his formula,[8] with the possible exception of "the history and structure of the particular company" are unexceptionable statements of the existing law. The first three are obviously the principles of common law. The next is the standard formula for oppression deriving from Cooper L.J.'s judgment in *Elder v Elder and Watson*.[9] The last is a reference to Lord Wilberforce's "equitable considerations" in *Ebrahimi v Westbourne Galleries Ltd*.[10] "In the light of the history and structure of the particular company" is the only phrase without an identifiable source. Remembering that judgments are not to be read like statutes, one hesitates to place too much meaning on it. In its context it looks suspiciously like a passing reference to the obvious point that a Court should refer occasionally to the facts in its "balancing".

Not one of Sir Ivor's "policies" clarifies his formula, either as defining "interests" or indicating when intervention is "justifiable". Each part of it includes as an element the "fairness" or "reasonableness" sought to be defined. For example, Lord Wilberforce's reasonable expectations test from *Ebrahimi v Westbourne Galleries Ltd*[11] starts with the fact that shareholders have expectations as to how the affairs of a company should be conducted. These may relate to a number of matters but, most importantly, are as to participation in management, method of remuneration and degree of participation in profits, and ability to extract investment. Lord Wilberforce made the point that where a company is small, perhaps analogous to a partnership, the expectations should be protected even though they are not reflected in the constitution of the company. In other words, the court should protect implicit expectations over the explicit constitution, despite the latter being at the discretion of

opinion that it is just and equitable to do so . . . make such orders as it thinks fit" conditions the balancing process itself is also not clear — only "reasonable expectations of members" is directly traceable to section 217(f), the "just and equitable" ground for winding up. Henry J. at first instance in *Vujnovich v Vujnovich & Anor* [1988] 2 NZLR 129 noted that the "just and equitable" requirement is not to be read as merely "oppression" i.e. as a reference to section 217(f), and that it should be given a wide interpretation. He thought that the court should first determine whether the complaint falls within section 209(1) and then determine whether in the circumstances it is just and equitable to make the order sought. On appeal, the Court of Appeal cited without comment his analysis of *Thomas v H.W. Thomas Ltd* [1984] 1 NZLR 686, but sounded a caution in relation to "just and "equitable" by noting the doubts of Sir Thaddeus McCarthy in that case: The power to intervene, said the Court of Appeal, should not be lightly exercised as "the traditional right of shareholders to determine the management of their company according to their shareholder" might be invaded. It would appear, then, that the reference to "just and equitable" in section 209(2) is being interpreted as ensuring that the court exercises a discretion in deciding what orders to make, as well as in deciding whether conduct is remedial. As such, it does not help in understanding "fairness" and has little impact on the thrust of the section. See also *Wayde v New South Wales Rugby League Ltd* (1984) 61 ALR 225, 233 per Brennan J.

8 Viz.: "The principles governing the duties of a director . . ."; "The principles governing . . . the rights and duties of a majority shareholder . . ."; ". . . a visible departure from the standards of fair dealing"; "in the light of the history and structure of the particular company"; "the reasonable expectations of the members".

9 1952 SC 49, 55.

10 [1973] AC 360, 370.

11 *ibid*, 379.

the parties.[12] However, the reasonable expectations formula is of little help in deciding what is fair. Lord Wilberforce's expectations may exist even as arrangements in many companies; the problem is not whether they exist but when they should be protected. Lord Wilberforce did not provide criteria for this question, nor have they been developed in cases since then.

"Fair dealing" also begs the question: What are the standards of fairness to be applied? The import of the phrase lies in its context in *Elder v Elder and Watson*:

> the essence of the matter seems to be that the conduct complained of should at lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.[13]

As an injunction that the British idea of gentlemanly games (cricket, not football) is to provide the mores applicable to the business world as standards of behaviour the infringement of which is easily recognized, the concept is sadly lacking. Such standards are not the common language of business.[14] Arguably, the idea is an idealized vision of the business world held by a cocooned judiciary.

Returning, therefore, to the original concept, a simple "balancing" process would require an objective perception of exactly what the interest of a member is. However, this is not easy to acquire, as is revealed by the classic description of a share in *Borland's Trustee v Steel Bros & Co Ltd*:

> A share is the interest of a shareholder in a company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the [U.K.] Companies Act 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.[15]

The sole measure of the interest in the matters referred to is a sum of money. Alternatively, all the rights of a shareholder might be listed. Yet the rights of a member are far from certain. Only an undefined number of the articles may be enforced against a majority[16] and the member has only a degree of vaguely defined common law protection against fraud by the majority.[17]

The rights of a member are not sufficiently certain to support a balancing process. In any event the concern is with equitable considerations prevailing over common law rights.[18] Hence Sir Ivor Richardson in *Thomas v H.W. Thomas Ltd*[19] retreated to the "interests" revealed in the common law doctrines

[12] *Re Ashby Bergh & Company Ltd* (1988) 4 NZCLC 64,131, 64,141.

[13] 1952 SC 49, 55, per Cooper LP.

[14] Nor, indeed, of the writer, who comes from the land of the underarm bowler.

[15] [1901] 1 Ch 279, 288.

[16] That is the internal management rule, for which *Mozley v Alston* (1847) 1 Ph 790 is the paradigm case.

[17] This is the result of the application of the proper plaintiff rule, the paradigm case for which is, of course, *Foss v Harbottle* (1843) 2 Hare 461.

[18] *Re Ashby Bergh & Company Ltd* (1988) 4 NZCLC 64, 131.

[19] [1984] 1 NZLR 686.

protecting companies and shareholders as modified by the principles behind judicial interpretation of statutory injunctions to intervene in the internal affairs of companies.[20] However, lifting the level of abstraction of the process of balancing does not clarify either what the interests to be protected are or what are interests sufficient to be considered as justifying detriment to members' interests. Furthermore, analysis of what is known of both sides of the equation reveals a tautology.

The established principles of company law firmly maintain that centralized control promotes efficient management and that democracy, or majority rule, provides for the accountability of management to shareholders. This is the essence of the internal management rule. Again, when majority rule fails remediable wrongs are done; that is, a member may claim there has been a breach of rights or fraud on the minority committed for which the member may sue personally or on behalf of the company as an exception to the rule in *Foss v Harbottle*. These two doctrines help define the rights and hence interests of a member: All members have an interest in efficient management but that interest is limited by the doctrines maintaining majority rule.

On the other side of the equation is the claim that the actions of the company are justifiable. However, what outweighs the interests of one or more members is not defined. As I have demonstrated, the principles underlying the legislation as described by Sir Ivor Richardson do not help as each begs the question. In established law, which is all that is then left to direct us here, decisions which benefit directors, or other members or groups to the detriment of some, are only justified by the application of the principle *bona fide* for the benefit of the company as a whole.[21] There is no objective or external means of ascertaining the interests of the company because it exists for the shareholders.[22] Therefore, benefit of the company is defined by the decisions of the shareholders as effected under the constitution of the company. Hence centralized management, and majority rule and its limits are at the foundation of the constitution and are therefore also included on this side of the equation.

Perhaps in order to avoid these difficulties, Brennan J. of the High Court of Australia in *Wayde v New South Wales Rugby League Ltd*[23] modified "balancing" by adding an extra feature:

> The Court must determine whether reasonable directors possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which the decision will impose on a member on the other, would have decided it was unfair to make that decision.

Brennan J.'s suggestion, that the standards of the "reasonable director" are those the court should use to assess fairness, is like setting a fox to guard chickens: management is an interested party. It may be that its interest in an expanded discretion is not direct, but in pursuing their own self-interest

[20] Both the common law doctrines and the principles behind the interpretation of section 209 were termed "policies" by Sir Ivor.

[21] *Peters American Delicacy Co Ltd v Heath* (1939) 61 CLR 457.

[22] For example, in *re Waitiki Link Ltd* (1989) 4 NZCLC 64,922 a company had been set up both as an investment vehicle and for social purposes (to own golf links); this dichotomy eventually appeared in the form of a dispute as to whether dividends should be paid.

[23] (1984) 61 ALR 225, 234.

it may well be that directors would prefer a narrowed definition of what is fraud on shareholders. To resort to the "reasonable" director again begs the question: "Reasonable" is assessed by reference to either some concept of standards of behaviour or by definition of the interests of shareholders.

The absence of foundation to "balancing" implies that it is inevitable that some form of the internal management rule will be applied in future cases where fairness is considered the appropriate criterion for deciding when a court may intervene. Managerial discretion is a fundamental principle in law because the corporate form requires strong central control for its efficiency and effectiveness. The balancing process is therefore seen as weighing the various interests of a shareholder against each other: managerial discretion balancing protection of shareholders' interests.[24] But asserting that management has a role or discretion does not draw the line between those situations where the court should balance interests and those where this is the task of management. Accepted principles of law provide a single framework for all companies: the majority in meeting, directors' duties and personal rights or fraud on the power. If these are initially rejected and a new set of limits applied to one company, for the next they may be hopelessly restrictive.[25] Since the courts feel the need to make the ambit of managerial freedom predictable, although a court should decide these matters on the facts, the principles applied in the exercise of the discretion tend to include its definition. As cases where management requires greater freedom influence the definition, less and less behaviour falls outside it.[26]

[24] This was put rather baldly in *Thomas v H.W. Thomas Ltd* [1984] 1 NZLR 686 by Sir Thaddeus McCarthy (at p 679). The Court of Appeal reaffirmed the point in *Vujnovich v Vujnovich & Anor* [1988] 2 NZLR 129, at pp 152–153.

[25] For the general meeting to remove rights of occupation of flats is wrongful in one company but not the next: In *Crumpton v Morrine Hall Pty Ltd* [1965] NSWR 240 and *Fischer v Easthaven Ltd* [1965] NSWR 261 the Supreme Court of New South Wales came to differing conclusions on very similar facts within a few months; see also *re Empire Building Ltd* [1972] NZLR 683. A corporate yacht provided for by resolution of the board of directors for their comfort may be acceptable to one court but not the next: In *re Kong Thai Sawmill (Miri) Sdn Bhd* [1976] 1 MLJ 59 (FC), [1978] 2 MLJ 227 (PC), the Federal Court of Malaysia and the Privy Council came to differing conclusions in this situation. (With respect, in the latter case the Federal Court decision is much to be preferred.)

[26] This process explains why the old "oppression" formulation was steadily confined in scope, necessitating the amendment of section 209 into its present form. For academic condemnation of the trend, see: B.H. McPherson, "Oppression of Minority Shareholders" (1963) 36 *ALJ* 427; K.W. Wedderburn, "Oppression of Minority Shareholders" (1966) 20 *MLR* 321; R. Baxt, "Oppression of Shareholders — The Australian Remedy" (1971) 8 *MULR* 91; D. Prentice, "Protection of Minority Shareholders" (1972) 25 *Current Legal Problems* 124; A. Boyle, "Power of the Court to Grant Relief on a Petition Alleging Unfair Practice" (1980) 1 *Company Lawyer*, 280. Perhaps the process is repeating itself for unfairness: the Court of Appeal's comments in *Vujnovich v Vujnovich & Anor* [1988] 2 NZLR 129 cautioning against too ready intervention in the affairs of companies reek of it. In this context it is worth quoting *The Interim Report of the Select Committee on Company Law (Lawrence Report)*, Ontario Queens Printer, 1967, para 7.3.12:

> In our opinion, section 210 [the "oppression" section] raises as many problems as it lays to rest and, more importantly, is objectionable on the grounds that it is a complete dereliction of the established principle of judicial non-interference in the management of companies. The underlying philosophy of section 210 has an air of reservation and defeatism about it as if the legislature was unable to offer any solution to the plight of minority shareholders other than abandoning the problems to the judiciary to be dealt with ad hoc on the basis of determining, from case to case, whether the affairs of the company are being conducted in a manner oppressive to some part of the shareholders.

II THE DRAFT COMPANIES ACT[26a]

The Law Commission also advises a test of reasonableness for deciding when intervention by a court in disputes is warranted. If the operation of the test were to be in the context of the old law, as hinted at,[27] it would be subject to the same criticisms as "fairness" and "balancing". However, the Law Commission *Report* is an intensely theoretical document, despite its disclaimer.[28] It contains both a strong statement of the "enterprise" model of the company and elements of the contract analysis, although neither is expressly admitted to be the theoretical background to the recommendations. What is expressly admitted[29] to provide "working models for reform" are the post Dickerson Committee[30] Canadian companies statutes. What, then, is the function of a "reasonableness" test in the context of the enterprise or contract models of companies, in the Canadian "division of powers" form of company and in the Draft Act itself?

A. *Fairness and Reasonableness*

The chief impact in the Draft Act of the "reasonableness" test[31] is on the duties of directors. Section 101, the "fundamental duty" provides:

> The fundamental duty of every director of a company, when exercising powers or performing duties as a director, is to act in good faith and in a manner that he or she *believes on reasonable grounds* is in the best interests of the company [my emphasis].

Sections 102 and 107 contain similar phrases. The effect of their inclusion is to ensure an element of objectivity in the duties the sections purport to codify. In other words, the court is not to impose its idea of what is a proper purpose for the exercise of a power, but neither are directors to be given the right to believe the most improbable actions are for the benefit of the company. "Believes on reasonable grounds" falls somewhere between the two, reflecting the common law position.[32] It hardly represents a "test of

[26a] At the time of last review of this essay, the introduction of a Companies Bill was but a few days away, but no details of any differences between it and the Draft Act were available.

[27] "In the United States, the supervisory nature of the Court's jurisdiction is known as the 'Business Judgment Rule' around which much jurisprudence has developed. But a similar policy has resulted in very much the same judicial role in the United Kingdom, Australia and New Zealand", *Report*, 35.

[28] "We have not thought it necessary to be dogmatic about these questions of theory." *Report*, 45.

[29] *Report*, 9.

[30] Robert W.V. Dickerson, John L. Howard and Leon Getz, *Proposals for a New Business Corporations Law for Canada*, Information Canada, Ottawa, 1971; hereinafter this report will be referred to as *"Dickerson Report"*.

[31] It may be recalled this is the test for intervention of the court in the affairs of the company, as expressed by the Law Commission: *Report*, 35.

[32] The issue where this point is most directly raised is the power to issue shares. There was a suggestion in *Hogg v Cramphorn Ltd* [1967] Ch 254 that an issue of shares made with the purpose of maintenance of control by management in the face of a take-over could never be for the benefit of the company. However, the High Court of Australia held otherwise in *Harlowe's Nominees Pty Ltd v Woodside (Lake's Entrance) Oil Company No Liability* (1968) 42 ALJR 123 and the Privy Council similarly in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821. It is probably fair to say that the Law Commission was not so much rejecting the common law as repudiating *Hogg v Cramphorn Ltd* [1967] Ch 254, but it also could be said that it was accepting the slightly more extreme position taken in *Teck Corporation v Millar* (1973) 33 DLR (3d) 288 (BSC). Certainly the words of Berger J: "I think the courts should apply the general rule in this way: the directors must act in good faith. Then there must be reasonable grounds for their belief" are echoed in section 101.

reasonableness" although reasonableness is an element. It is also an element more conducive to uncertainty over the extent of court intervention than the statement of the Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd* that the court "will necessarily give credit to the bona fide opinion of directors, if such is found to exist, and will respect their judgment as to matters of management"[33] because it is less explicit as to what is "reasonable".

The remaining usages of "reasonable" in the Draft Act are statements of degrees of skill a director must have. This is the direct import of section 106:

> Every director . . . must exercise the care, diligence and skill reasonably to be expected of a director . . . [my emphasis]

It is also the effect of section 107 which refers to "after reasonable enquiry" as part of its test for the degree to which a director may rely on information or advice.[34]

The question left begging is, what is the level of skill reasonably to be expected of a director? The Law Commission itself said this:

> We think it reasonable to expect a certain level of competence of directors although the level of competence will vary markedly according to the nature of the enterprise.[35]

Again the matter is left for the court to decide: The Draft Act fails to address the question of the extent to which the new law should depart from the test in re *City Equitable Fire Insurance Co Ltd.*[36]

"Reasonable" is used slightly differently in the two situations discussed above, but in both the court is left with the question of what is reasonable in the circumstances. Courts will have to develop guide-lines if business is to operate in an environment of certainty. Whilst it is a task to which the court is well suited, it is a task already performed in the common law, and if not well done in that context, there is no reason to believe the courts will fare any better in interpreting "reasonable". Moreover, "reasonableness" is not being used as a "test for intervention", as a threshold criterion for when a court might decide it has jurisdiction, but rather as a criterion for standards of conduct.[37] In its latter guise, "reasonableness" again begs the question: just when is it that a court should override the opinion of the managers?

"Fairness" is little used in the Draft Act: It is the measure of value for a variety of transactions[38] and is retained in the "oppression" section, section

[33] [1974] AC 821, 835.

[34] The full test is "Every director . . . may accept as correct . . . to the extent only that the director acts in good faith, after reasonable enquiry when the need for enquiry is indicated by the circumstances, and without knowledge that would cause such acceptance to be unwarranted".

[35] *Report*, 121. The discussion of the subject by the Law Commission should be compared with the expansive, though legalistic examination by the Australian Senate Standing Committee on Legal and Constitutional Affairs in its *Report on Company Directors' Duties* (AGPS, Canberra, 1989), ch 3.

[36] (1869) LR 4 Ch App 376.

[37] Section 137 is an exception to that proposition. There the court is given a discretion to relieve directors or auditors of liability for negligence, default, breach of duty or breach of trust if they have acted "honestly and reasonably". This section is, however, not new, being section 468 of the Companies Act 1955.

[38] e.g. in relation to minority buy-out rights in sections 83 and 84, and self-interested transactions under sections 110 and 112.

135. Its former use is unexceptionable, and the latter leads us back to the previous part of this essay.

B. *Canadian Companies Statutes*

In 1971 the Dickerson Committee submitted its *Report* in the form of a Draft Canada Business Corporations Act[39] with an accompanying commentary. That draft has provided the basis for companies statutes in eight of the eleven Canadian jurisdictions and they provide the models on which the Law Commission *Report* is based.

The Canadian model is of companies with a statutory division of power between the various bodies. This is contrasted with what in Canada is called the "contract" model of companies, where the foundation of relations between the constituent organs of the company is the equivalent of section 34 of the New Zealand *Companies* Act 1955.[40] Whilst a provided division of power is the most obvious change in the form of companies, it is the product of a more fundamental change in the recent Canadian models: If a person wishes to seek redress for a wrong thought to have been suffered, they do not have to establish a *right* to sue, rather they must show that they are of a *status* given a statutory capacity to sue. The idea is to avoid the procedural and substantive complexities associated with the establishment of a right, including the rule in *Foss v Harbottle* and the need for a shareholder action to be fitted into an exception to it. Instead, discretionary relief is available when and for whom Parliament deems protection is necessary. Accordingly, shareholders have personal rights to apply for relief for oppressive or unfair conduct[41] and to apply to commence a derivative action.[42] These actions replace all the common law procedures for fraud on the minority and personal relief.[43] Creditors, if "security holders", and those in various other defined categories have the same rights to take action.[44]

The fundamental postulates of company law are not otherwise altered by the Canadian Acts. The basic principles of company law, namely corporate personality, managerial power, majority rule and minority protection, are merely made more explicit. Thus the ideas behind the duties of managers are retained, as is the position of shareholders. How these principles are

[39] Vol 2, *Dickerson Report*.

[40] This is a mistaken analysis of English model statutes, see David A. Wishart, "A Conceptual Analysis of the Control of Companies" (1984) 14 *MULR* 601. However, whether the rights of a shareholder are founded on contract or in equity does not matter for my present purposes.

[41] Draft Canada Business Corporation Act (*Dickerson Report* Vol 2), para 19.04.

[42] *ibid*, para 19.02.

[43] The Canadian Draft Business Corporation Act relies on the absence of a section 34 equivalent to accomplish this. It is still open to the courts to find that the Articles of Association (the name is retained in the Canadian Draft Act) are a contract. If so, there would be an additional right of action available to shareholders, but the philosophical basis of the Act would be undermined: E.E. Palmer, D.D. Prentice and B.L. Welling, *Company Law: Cases, Notes and Materials*, 2nd ed, Butterworths, Toronto, 1978, 2.31–2.32. In the Law Commission's Draft Act, sections 127(4) and 131(1) prevent derivative actions otherwise than in accordance with its provisions, but actions arising from rights in common law are not barred. The theory is that the Draft Act would provide a simpler and more substantial remedy in every case that might arise.

[44] Draft Canada Business Corporation Act (*Dickerson Report* Vol 2), para 19.01, where "complainant" is defined to include security holders, directors or officers, the Registrar, or, at the discretion of the court, any other "proper person".

related to each other is not clarified, except in certain particular situations,[45] although the locus of their discussion is shifted from the complexities of establishing rights to sue to the substantive exercise of discretions to intervene. This, again, leads us straight back to the problems of "fairness".

C. *The Principles of the Draft Act*

i. Business Judgment

Section 2(d) of the Law Commission's Draft Act, quoted at the outset of this essay, sets out as one of the purposes of the act distinguishing between the province of managerial power and situations where minorities need protection. The phrase "business judgment" is used to describe the area in which directors should have "a wide measure of discretion".

"Business Judgment" is a reference to the "Business Judgment Rule" as developed in the United States.[46] This, in the opinion of the Law Commission, is the name given to the "supervisory nature of the Court's jurisdiction" to determine disputes among shareholders, directors and the company, and "around which much jurisprudence has developed". It means, says the Law Commission, that the

> Courts are not called upon to second-guess what the directors or the majority have decided upon as being in the best interests of the company, as long as the decision is made on reasonable grounds.[47]

Hence the Law Commission recommended that the "test for intervention, where a decision is made in good faith, is one of reasonableness. No more precise test is practicable." "Reasonableness" is, however, of limited utility, as demonstrated above, which leaves the Business Judgment Rule as a possible source of criteria for the distinction between managerial power and minority protection. On examination, it fails to be so.

In the Delaware case of *Aronson v Lewis*, the Business Judgment Rule was described as:

> a presumption that in making a business decision, the directors of a corporation acted on an informed basis in good faith and in the honest belief that the action was taken in the best interests of the company[48]

As one casebook puts it:

> Broadly speaking, the duties of management are: (1) to act intra vires and within their respective authorities; (2) to exercise due care; and (3) to observe fiduciary duties: in short, to be obedient, diligent, and loyal. Where a transaction involves no breach of any of these duties, it is said to be within the "business judgment rule".[49]

[45] e.g., whether the power as provided in the statute to manage is original or delegated, see para 9.01 of the Draft Canada Business Corporations Act; the significance of ratification of illegal acts by directors, see para 9.19(3).

[46] *Report*, 35.

[47] *ibid.*

[48] 473 A 2d 805, 812 (Del 1984).

[49] Harry G. Henn, *Cases and Materials on the Laws of Corporations*, West, St Paul, 1974, 419. See also J.H. Farrar, "Business Judgement and Defensive Tactics in Hostile Takeover Bids", (1989) 15 *Canadian Business LJ* 15, 19–21.

Two versions of the rule can be detected in the above, neither of which is at all helpful for present purposes. One is that the Rule does not protect fraud, conflict of interest transactions or illegality because they are exceptions to it; the substance of the Rule is the degree of diligence required of directors. In other words, the Rule and negligence are conflicting principles. In this guise, the Rule is too narrow and inconclusive: It impacts only on section 106 of the Draft Act, and very few US cases are won on the simple basis of negligence.

An alternative view of the "Business Judgment Rule" is that it is a description of the conclusion that a director's acts are not in breach of duty. The "jurisprudence" of the Rule is that of the entire field of directors' duties. As such, a reference to "business judgment" adds nothing to the understanding of when a court should intervene in the internal affairs of a company.

ii. The Enterprise Model

The Law Commission *Report* contains an explicit rejection of the equation, in current law, of the company with the collective shareholders.[50] Whilst it goes on to say "(W)e have not thought it necessary to be dogmatic about these questions of theory" it does imply that identification of the company with the "enterprise" is to be preferred.[51] Unfortunately, the Law Commission does not explain exactly what is meant by "the enterprise".

The Commission does use the term when it makes the comment: "Since it has been held that the collective shareholders include future shareholders, identification of the company with the enterprise may have been largely achieved in law."[52] Were it so, the Draft Act would not purport to change much of the conceptual background to company law and we could move on to consider other things. Yet there are undercurrents of conceptual change in the Draft Act, changes not acknowledged in the *Report*. They hinge on enhanced recognition of corporate entitihood and spring from the importance of status to the new scheme.

The Canadian scheme of statutory remedies for defined interest group categories emphasizes the formal distinctions between those categories and removes the need to investigate why a person has one status or another. As a consequence, the relations between the various groups are merely a question of remedies. All this was quite deliberate. However, in the common law, the rationale for the status of shareholder did supply a means of coping with the group aspects of corporate life: It provided the criteria by which the trade-off between the individual and the group was regulated. Without it, and with that trade-off provided by statute, something to represent the group interest is necessary. In as much as the law already recognized the company as a person in its relations with outsiders, it was a small step to extend the idea to internal relations. This is reflected in the Draft Act in many areas, but particularly in the provisions as to incorporation, the duties of directors and enforcement. In each of these, emphasis is laid on the company

[50] *Report*, 22.
[51] *ibid*, 45.
[52] *ibid*.

as a separate institution: It is created by, not of, the shareholders[53] and has its characteristics described not as the consequence of the act of incorporation[54] but as the nature of a thing created by statute according to a certain procedure;[55] there is a clear distinction between duties owed to shareholders[56] and those owed to the company,[57] the former dealing solely with the shareholder's position as investor[58] while the latter, which are paramount and from which shareholders' opinions and interests are entirely divorced,[59] deal with the company as a business;[60] and the question of who can sue whom is set out as a matter of status.[61]

The judiciary may not recognize the conceptual changes here asserted to be effected in the Draft Act. If so, my comments as to the present law would obtain. If, however, the company itself were accepted as an element in the internal affairs of a company,[62] what that element is will need to be explored. It is what the Law Commission calls the "enterprise" but this is not, as we have seen, further defined in the *Report*.

The interpretation of the "fundamental duty" of directors most obviously raises this problem of the definition of "the company". Again, section 101 reads:

> The fundamental duty of every director of a company, when exercising powers or performing duties as a director, is to act in good faith and in a manner that he or she believes on reasonable grounds is in the best interests of the company.

[53] "Incorporators", defined in section 10, apply for "incorporation of a company" under section 11, and if they do it "properly" the Registrar enters the "particulars of the company" on the register of companies and issues a certificate of incorporation under section 12. This should be compared with the existing provisions, with their emphasis on subscription to a "Memorandum of Association" the *subscribers* to which, when it is registered under section 26, "shall be a body corporate . . ." (section 27(3)).

[54] The current legislation has it that once the subscribers to the Memorandum have become a body corporate they are "capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a corporate seal . . .": section 27(3) of the Companies Act 1955.

[55] Sections 5 to 9 deal with the "characteristics of a company" and sections 10 to 12 with "method of incorporation". Section 7 is a good example of the uncompromising language used: "A company is a person in its own right separate from its shareholders, and continues in existence until it is removed from the New Zealand register in accordance with this Act."

[56] Set out in section 131(2).

[57] Set out in section 131(3).

[58] The personal duties are: to supervise the share register (section 68); to avoid unfair prejudice or unfair discrimination against existing shareholders (section 102); to comply with the constitution of the company and with the Act (section 104); and in relation to share dealings (i.e., insider dealing, section 113).

[59] e.g., the effect of ratification is severely curtailed (section 136(3)); any exercise of original power is virtually unassailable (section 79); and the distinction between the duty to act in the reasonable belief that best interests of the company are being served with the duty not to unfairly prejudice or unfairly discriminate between shareholders (section 101 as an exception to section 102) means that the interests of shareholders and the company are accepted to differ. The converse is also true: by section 80 a shareholder voting on the exercise of the statutory rights attached to shares owes no duty to the company or any other person.

[60] The duties to the company are: to act in good faith and in the best interests of the company (the "fundamental duty" section 101); to maintain solvency (sections 48 and 105); and as to disclosure of interests (section 109) and use of company information or opportunity (section 112).

[61] Part 8.

[62] Not that the Draft Act contemplates "internal affairs". It merely establishes remedies, in certain situations accepted to need them, for persons of the appropriate status.

The question a court will face is, are there bounds to the belief of a director? Can a director believe the most outrageous acts are for the benefit of the company? If so, the test merely repeats the requirement of good faith; the test is therefore not entirely subjective. "On reasonable grounds" sets the bounds of belief: The director has to have a good reason for their belief. "Good" in this context, is some objective standard of benefit to the company. What sorts of things are good for the company? The answer to this depends on what "the company" is: "The enterprise" says the Law Commission,[63] and "the enterprise" is not the collective shareholders.[64] Furthermore, the directors are given, subject to the Draft Act and the constitution of the company, the power to manage the company. This power is not subject to shareholder control.[65] Conversely, shareholders may exercise their statutory powers unfettered by duties to the company or any other person.[66]

The Draft Act disconnects shareholder interests from those of the company. No criterion of benefit of the company is provided, other than "reasonableness": The court is granted an unfettered discretion. Hence the idea of enterprise in the hands of the Law Commission serves to remove a means of finding out what the interests of the company are.

The concept of enterprise itself, that is apart from what the Law Commission thinks it is, also provides little guidance. The concept was developed by Clive Schmitthoff from European origins.[67] It is essentially an accommodation of German codetermination principles to the common law. The concept of company inherent to those principles is a relationship between capital, management and labour for the mutual benefit of all. This is incompatible with the Law Commission's conception of what company law is about.[68] Apart from Schmitthoff, the enterprise seems to be little more than a vague allusion to the business of the company. As such, the concept is obviously inadequate for the tasks set it. The good of the business begs the question of who should decide it — which is where we started.

iii. The Contract Model[69]

In recent years economists have paid some attention to the nature of the "firm" and have developed a model based on contracting or, as they put it, transaction costs.[70] At the foundation of the model is the economist's

[63] *Report*, 47.

[64] *Report*, 45.

[65] Section 79. Comp. Para 9.01 of the Draft Canada Business Corporations Act.

[66] Section 80. If the shareholders exercise or direct the exercise of a power which would, were it not for the constitution of the company, otherwise fall on the directors (e.g., the power to manage under section 98), the shareholders are deemed for the purpose of directors' duties (sections 101 to 107) to be directors.

[67] Clive M. Scmitthoff, "Employee Participation and the Theory of the Enterprise" [1975] *JBL* 265; see also Niel Martin-Kaye, "The Theoretical Basis of Modern Company Law" [1976] *JBL* 235.

[68] The Law Commission confines company law to the "use . . . of the company form"; and states: "[The new Act] should not seek to achieve other social objectives, such as worker participation in management or environmental protection"; *Report*, 17.

[69] This is not the (section 34(1)) "contract" based common law model of the company which North American writers compare to the "division of powers" model.

[70] About the only readily available discussion is scattered through J.H. Farrar and Mark W. Russell, *Company Law and Securities Regulation in New Zealand*, Butterworths, Wellington, 1985.

assumption that community wealth is maximized when individuals maximize their own wealth by organizing their own affairs through contracting in free markets.[71] Part of the cost structure of each good or service is the cost of entering each contract involved in its manufacture or supply, that is, its "transaction cost". The less the transaction costs, the more wealth individuals acquire and the higher the community wealth. The means of organization of the supply of the services or the manufacture of the goods imposes costs, whether it is done through simple contracting or the complex of transactions comprising the hierarchical structure known as the firm.[72]

Whilst there are many other aspects to the firm, one of its major elements is the provision of capital by investors to management.[73] This is the substance of company law[74] but, in the economist's eyes, is carried out through contracting, which has certain transaction costs. Directors and shareholders are acknowledged to have differing interests which are compromised and protected by the contracts they make. Thus the substance of a contract made by an investor is the handing over of funds to be managed for a return on the investment. However, the investor is also interested in the security of their investment and should provide for a degree of control of the management of the funds commensurate with the degree of risk to be undertaken. An investor undertaking a greater risk would hope for a larger return. To enable the exercise of control when management steps outside the stated bounds, the contract should provide for the decisions of management to be monitored. The costs of an investment transaction are, therefore, those of negotiating it, of implementing the monitoring and control systems, of enforcing the contract or of securing compliance, and the value of the difference between the hypothetical returns from decisions in the best interests of the investor and what they actually get.[75] The market for investment funds ensures

[71] A comprehensive discussion of the assumptions at the basis of economic theory and of the misconceptions many lawyers have about those assumptions is in P. Burrows and Cento G. Veljanovski, *The Economic Approach to Law*, Butterworths, U.K., 1981, ch 1.

[72] The relationship between contracting and the firm was first discussed in R.H. Coase, "The Nature of the Firm" (1937) 6 NS Economica 386, reprinted in G.J. Stigler and K.G. Boulding (eds) *Readings in Price Theory*, Irwin, Illinois, 1952, p 331. For a graphic description, see Steven S. Cheung, "The Contractual Nature of the Firm" (1983) 26 *Journal of Law and Economics*, 1. Further analysis of the nature of transactions as a continuum from contracts to the firm can be found in Oliver E. Williamson, "Transaction Cost Economics: The Governance of Contractual Relations" (1979) 22 *Journal of Law and Economics*, 233; and Ian R. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law" (1977–8) 72 *Northwestern University Law Review*, 854.

[73] Coase, "The Nature of the Firm" 333; Oliver E. Williamson, "Contract Analysis: The Transaction Cost Approach" in P. Burrows and Cento G. Veljanovski (eds), *The Economic Approach to Law*, Butterworths, U.K., 1981, 39, 45.

[74] Comp. J.H. Farrar, "Ownership and Control of Listed Public Companies: Revising or Rejecting the Concept of Control" in B.G. Pettet (ed), *Company Law in Change*, London, Stevens, 1987, 39, 45. "Firm" is a much broader concept; it encompasses output and input, employment and so forth; in other words, a "firm" is what one would loosely call the "business". A company and company law are more concerned with a narrower range of matters. Many companies can comprise one firm. The function of the company as a legal entity is ambiguous within the contract model, perhaps the only reference is to it as a "nexus for a set of contracting relationships among individuals": Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 *Journal of Financial Economics*, 305, 310.

[75] Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 *Journal of Financial Economics*, 305, 308. The last cost should be adjusted by subtracting any inclusion of the other costs.

that the firms with lower transaction costs will acquire cheaper capital and are, as a consequence, more likely to survive.[76]

In this context the function of the law is to minimize transaction costs. Legislation may do this by providing the terms of contracting, and the mechanisms of monitoring, control and enforcement. The parties accept the suggested terms and mechanisms if the cost of negotiating or operating their own is greater than the costs resulting from that suggested being less than the best possible for them. Such legislation should, therefore, to the extent it is not merely enabling, be subject to contrary agreement, and should be amended in line with advances in contracting methods in order to ensure transaction costs are kept to a minimum.

The Draft Act seems to partake of this stream of thought, particularly in relation to the company constitution. Part 4 provides quite clearly that the Act itself is the constitution of the company, but that the incorporators or the shareholders may alter it as they deem necessary. Shareholders rights are specified in the Draft Act, but they may be added to or limited.[77] Of course, much of the internal affairs of a company is not provided for, being left for later negotiation; this is quite consistent with the theory. On the other hand, the Draft Act does provide that some of the investment "contract" whether it be for debt or equity, cannot be removed by the parties.[78] This reflects the perception that the various markets controlling management may fail, enabling abuse of powers otherwise irremediable by the contracting process. To the extent that these provisions impose costs not willingly undertaken by the parties, the community bears the loss of wealth.

The question raised by the contract model is whether its inclusion in the Draft Act helps either to determine when a court should intervene in the internal affairs of a company or to resolve the true nature of the interests of the parties.

The essence of the contract model is agency: It is often called the "agency theory of the firm". It is about the relationship of management with investors. By placing the concept of the enterprise between directors and shareholders, by replacing discussion of that relationship with the idea of status and by severing the interests of shareholders from the calculus of what the interests of the company are, the Law Commission has effectively disabled the contract model. It has confined the contract model in the Draft Act to being the rationale for the provisions as to the mutability of the company constitution.

III Conclusion: The Interests of Shareholders

What are the interests of shareholders? By way of conclusion to this essay, I venture to assert that there are some simple propositions that have been

[76] Eugene F. Fama and Michael C. Jensen, "Separation of Ownership and Control" (1973) 26 *Journal of Law and Economics*, 301; Eugene F. Fama and Michael C. Jensen, "Agency Problems and Residual Claims" (1973) 26 *Journal of Law and Economics*, 327; Eugene F. Fama, "Agency Problems and the Theory of the Firm" (1980) 88 *Journal of Political Economics*, 288. A good summary of the context of these theories can be found in J.H. Farrar, "Ownership and Control of Listed Public Companies: Revising or Rejecting the Concept of Control" in B. G. Pettet (ed), *Company Law in Change*, Stevens, London, 1987, 39, 44–47.

[77] Section 26, *Report*, 19–20.

[78] e.g., directors' duties are not subject to the constitution of the company. See sections 101–113, *Report*, 19–20.

forgotten or, at least, submerged in the developments traced above. They hinge on the fact that shareholders put their money into a pool of funds to be managed by certain people in the hope of a return greater than the investors would get by using the money themselves. This is the fundamental idea which has enabled the corporate form to be the engine of capitalism and therefore from which the law should not depart.

The propositions to be drawn from this fundamental fact of corporate life can be seen operating in the derided principles of common law and are those on which the economists have concentrated, although in the first case they have become hopelessly convoluted[79] and in the latter are converted to quite alien uses.[80] When a shareholder invests funds, return is expected. It is larger than the investors think they could obtain for themselves, bearing in mind their evaluation of the costs of alternative investment, because there are benefits of size and of specialization of the management function to be obtained. There are also costs of the investment process, denying investors the ideal, or costless, return on their investment, but the investor can be taken to have traded the costs against the benefit to be obtained and to have decided that they are outweighed by the latter. These are the simple propositions upon which the agency theory is based, but they remain true for all that.

Proceeding with agency theory a little, it is also true that handing over property to be dealt with by others involves risk of loss, hence there is a need for the investor to be able to check what is being done, to control the management of the funds if necessary and to be able to resolve problems as they arise. Such control can only be to that degree commensurate with the idea of handing over funds to be managed in the hope of return. Those investors who receive a return not varying with the fortunes of the fund do not need any control over decision-making, except to the extent that there may be a risk of default. Those whose return does vary with the fortunes of the fund may be trusted to control the fund in the best interests of all, because they will try to ensure maximum return to themselves, so ensuring payment of fixed return investors, given that fixed return investors hold priority in payment of their return. In this way debt and equity may be distinguished.

The trade-off in control is between securing against loss and enabling risk-taking for profit. The desired compromise between the two varies between investors, and between investors and management, and according to the nature of the fund. Wherever it may lie, the compromise implies a degree of subordination to the decisions of managers, no matter the wishes of the investor. It also implies that there are limits to that subordination, where control by investors is warranted, and also where control by individual investors is warranted.

Economics tells us that these are the variables involved in the investment relationship, but does not give it substance. For example, where does the

[79] This is, perhaps, the point of K.W. Wedderburn's paradigm article, "Shareholder's Rights and the Rule in Foss v. Harbottle" (1957) 15 *Cambridge Law Journal* 194 and (1958) 16 *Cambridge Law Journal* 93. It has been made far too often to cite since then. A recent recitation, but one with a deal of common sense to it, is L.S. Sealy, "Directors' 'Wider' Responsibilities — Problems Conceptual, Practical and Procedural" (1987) 13 *Monash ULR* 164.

[80] In P. Burrows and Cento G. Veljanovski, *The Economic Approach to Law*, Butterworths, U.K., 1981, ch 1, there is a good description of the epistemological differences between law and positive economics.

trade-off lie and when is the risk of loss high enough for debt to become, as it were, equity? Each legal regime may describe the substance differently, and thus provide differing answers to these questions. There may even be differing descriptions within a legal system, with attendant complications and uncertainties.

In this essay I have adverted to the common law compromise between investor and manager as the internal management rule and the rule in *Foss v Harbottle*. These establish majority rule, fraud on the minority, personal rights and *ultra vires* as the elements of the investment "contract".[81] I have elsewhere characterized them as reflecting group life in society at large,[82] except to the extent that the judges themselves have little knowledge of why or what they are doing and have become confused by the formalism that has descended on the principles.[83] The courts are, however, moving to an explicit recognition that debtors' interests are involved in the interests of the company when the company is in danger of bankruptcy:[84] At that point, debtors take on the characteristics of members because they then are the stochastic residual cash flow claimants.[85] On the other hand, the judiciary has found it difficult to utilize these principles to solve the problems engendered by shareholders' non-investment rights,[86] probably, and I here speculate, because all companies are conceived of in company law as having investors provide the capital. They then are seen as making decisions using investment oriented priorities, which stand uneasily against rights otherwise expressed.

Without having derived a clear perception of "interest" from the common law principles, courts have also found "fairness" under section 209 difficult to handle. Given that shareholder is a voluntary status and contractual in the agency theory sense, "fairness" is probably an inappropriate term. It invokes a feeling of a set of moral standards, but, as I hope to have demonstrated, that is illusory.

The same comments apply to any thoughts of regulating corporate life through expansion of judicial discretion. As the principles behind the common law remain inarticulate, the courts have not taken up the tools provided by statute. Other theories currently extant of the company are insufficiently developed to provide more satisfactory answers than could be derived from a thorough understanding and overhaul of current principles. To think that a simple legislative injunction to be reasonable can solve problems involving the fluid nature of the interests of parties in the relationships constituted by companies is an invitation to uncertainty and doubt.

[81] I am not here referring to the section 34(1) contract, rather the agency theory.

[82] David A. Wishart, "A Conceptual Analysis of the Control of Companies" (1984) 14 *MULR* 601.

[83] A good example of this is the judgment of the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] 1 All ER 354, especially at p 364.

[84] *Walker v Wimborne* (1976) 137 CLR 1; in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 Cooke P. said (at p249): "In a situation of marginal commercial solvency such creditors may fairly be seen as beneficially interested in the company or contingently so."

[85] This ghastly, if accurate, phrase (and the point) may be blamed on Eugene F. Fama and Michael C. Jensen, "Separation of Ownership and Control" (1983) 26 *Journal of Law and Economics*, 301, 302–303.

[86] These rights are enforceable only if they are held in the capacity of shareholder. The rule in *Foss v Harbottle* is the result of persons having rights as both management and shareholder yet it has never given a satisfactory answer to the problem of the relationship between the definition of those two sets of rights.

What is necessary is a firm statement by either the judiciary or the legislature of the principles upon which the interests of shareholders are seen to be based. These, I would suggest, are the propositions of economics outlined above. The judicial process could then develop the criteria for distinguishing between the spheres of activity of management and investors, that is, between managerial discretion and control, and between debt and equity. Hopefully, these criteria would enable lines appropriate for each particular company to be drawn with relative certainty.[87]

[87] A suggestion for a test is developed in David A. Wishart, "A Fresh Approach to Section 320" (1987) 17 *UWALR* 94, 124–7. Briefly, it involves an assessment of what decisions and constitutional arrangements members reasonably acquiesce to on joining the company.