Justiciability and standing to challenge legislation in the Commonwealth: a tale of the traditionalist and judicial activist approaches

Chuks Okpaluba**
Professor of Jurisprudence & Director: School of Law
University of the North

Abstract
A court will not entertain an application for judicial review of legislation where the applicant does not disclose his/her right, interest or legitimate expectation on the subject matter of the complaint. This requirement of public adjudication is a vital component of the principle of justiciability. Originally developed as a principle of administrative law, this requirement has been imported into constitutional adjudication by the courts through their interpretation of the provisions of the constitution. This is the case in the United States, Australia, Nigeria and Zimbabwe where the law of standing remains in the traditionalist domain. Although the common law of standing has witnessed flashes of judicial activism in recent years owing to the sporadic judicial broadening of its base, it is the Canadian courts that have developed a systematic approach to the subject. They have developed four identifiable and guiding rules whereby citizens genuinely desirous of challenging the constitutionality of legislation, are granted standing in the discretion of the courts. The litigant can approach the courts in his/her own capacity, in the public interest or, where the party was brought to court on a criminal charge or civil suit, in defence of such charge or claim. This paper critically analyses the foregoing developments.

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**LLB LLM (London), PhD (West Indies).
Introduction

It has already been shown that standing is an aspect of justiciability and is subject to the same 'complexities and vagaries that inhere in justiciability.' In effect, some of the complications peculiar to standing serve, on occasion, as a 'shorthand expression for all the various elements of justiciability.' Not only are there 'many subtle pressures which tend to cause policy considerations to blend into constitutional limitation' at work, there is also the vicious circle syndrome whereby although standing is about legal capacity to initiate action in court, it is said that a party before the court lacks standing if his action is not justiciable. In reverse order, a party would have no locus standi where his/her cause of action is not justiciable since a court will not be in a position to exercise judicial powers vested in it by the constitution. The complexity surrounding justiciability and standing is not made any easier by the pervasive influence of the concept of jurisdiction, the requirement of reasonable cause of actions and, to a lesser extent, the doctrine of judicial

1Okpaluba 'Justiciability and constitutional adjudication in the Commonwealth: the problem of definition' 2002/August THRHR.
2Per Warren CJ in Flast v Coben 392 US 83 at 98-100 (1968).
3Lewis 'Constitutional rights and the misuse of standing' (1962) 14 Stanford LR 433 at 453.
4Warren CJ Flast v Coben n 2 above.
5Busari & Others v Osemi & Others (1992) 4 NWLR 557 at 586E per Tobi JCA.
7Speaking in R v Big M Drug Mart (1985) 1 SCR 295 at 313, Dickson J observed: 'Standing and jurisdiction to challenge the validity of a law ... is the same regardless of whether that challenge is with respect to ss 91 and 92 of the Constitution Act 1867 or with respect to the limits imposed on the legislatures by the Constitution Act 1982.'
8In Afolayan v Ogunrinde & Others (1990) 1 NWLR (127) 369 when counsel contended before the Supreme Court of Nigeria that the claim and pleadings filed in a chieftaincy dispute did not disclose a cause of action, counsel was questioning not only the absence of facts constituting the elements of the chieftaincy dispute but also the competence of the High Court to hear and determine the matter. Again, in Attorney General, Anambra State & Others v Ebob (1992) 1 NWLR (218) 491 at 507 when Uwaifo JCA upheld the trial court's finding that on the facts pleaded, the respondent demonstrated sufficient justiciable interests upon which he could be heard in court, the judge was thereby equating such justiciable interests to those Obaseki JSC had identified in Afolayan as constituting the cause of action, namely: a cause of complaint; a civil right or obligation for determination by a court of law; and a dispute in respect of which a court of law is entitled to invoke its judicial powers. Both judges were addressing different principles of law — one the cause of action, the other the respondent's standing to be heard on the matter in court. Admittedly, the ascertainment of the existence of both cause of action and standing to sue derive from the same source. While the factual basis of the dispute or complaint indicates whether a reasonable cause of action has been disclosed, it is this same factual basis that would point to the determination whether the person in court is the proper party to lay the complaint. Accordingly, failure to disclose locus standi is as fatal to the action as failure to disclose a cause of action. It is also clear that in the absence of any of them, a court cannot assume jurisdiction or exercise judicial power. However, notwithstanding the common
In addition to the overwhelming importance of the subject matter of the complaint as a determinant of the jurisdiction of a court in any given case, the question as to who may bring a constitutional challenge to the attention of the court whether of the invalidity of legislative action or the legality of executive or administrative action, is of primary relevance. In public adjudication, as in private litigation, a court would not entertain an action, far less hear and

origins of cause of action and standing, some distinguishing features abound. In this regard, the Supreme Court decision in *Thomas & Others v Olufosoye* (1986) 1 NWLR (18) 669 at 682–5 is instructive. It was held that in determining *locus standi* the court must constantly bear in mind that its judicial powers were being invoked which, under s 6(6)(b) of the Nigerian Constitution, is made 'to extend to all matters between persons or between government or authority and any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person'. The requirement of standing cannot stand independently of this constitutional provision which makes it mandatory, thus constitutionally limiting the determination of a ‘case’ or ‘controversy’ or a ‘matter’ to the existence of the legal capacity of the parties to the litigation. So, when Harlan J, dissenting in *Baker v Carr* 369 US 186 (1962), held that the appellants did not show an infringement by Tennessee of any rights assured by the Fourteenth Amendment, hence the complaint stood dismissed ‘for failure to state a claim upon which relief can be granted’, he was advertent to the absence of facts disclosing a claim of right capable of judicial enforcement. Standing, therefore, presupposes the primary existence of a cause of action both of which were found by the majority to exist in *Baker v Carr*. The Canadian courts also acknowledge that the issues of standing and reasonable cause of action tend to merge at some point — *Finlay v Canada (Minister of Finance)* (1986) 2 SCR 607 at 636; *Canadian Council of Churches v Canada* (1992) 1 SCR 236 at 253; *Energy Probe v Canada (Attorney General)* (1989) 68 OR 449 at 465; *Canadian Civil Liberties Association v Canada (Attorney General)* (1999) 161 DLR 225 at 253 par 52. Although the consideration of the merits for the purpose of determining standing is not a determination of the ultimate merits of the case, it is more or less an exercise akin to a determination as to whether a reasonable cause of action has been disclosed. This can be ascertained from the facts of the case since whether a serious issue of invalidity exists to warrant standing would depend on the facts of the case. Again, to show that the issue raised in a case is one of ‘general public importance’ must be supported by the facts; it cannot be raised in the abstract. See also *Brown v Alberta* (2000) 177 DLR (4th) 349; *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 2 SA 54 (CPD); *Knop v Johannesburg City Council* 1995 2 SA 1 (A); *Lewis v Oneanate (Pty) Ltd & Another* 1992 4 SA 811 (A).

For a brief description of this expression in Australian & Nigerian constitutional law see Okpaluba ‘Constitutionality of legislation relating to the exercise of judicial power: the Namibian experience in comparative perspective (part I)’ 2002 TSAR 308 at 330–332. In addition to the cases cited in Part II of the same article 2002 TSAR 436 extolling the implications of judicial power and thus judicial independence, see the following cases from the High Court of Australia: *Attorney General v Breckler* (1999) 163 ALR 576; *Sue v Hill & Another* (1999) 163 ALR 648 at 657 and especially *Nicholas v S* (1998) 193 CLR 173 where the question was whether a law which had sought to whittle down the judicial discretion in relation to the admisibility of lawfully obtained evidence in certain circumstances was a usurpation or infringement of judicial power.

See generally, Okpaluba n 1 above.

Chayes ‘The role of the judge in public law litigation’ (1976) 89 Harv LR 1281 at 1289 submits that the question of the plaintiff’s standing at common law merges with the legal merits of the case. Thus in *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 264, Gaudron, Gummow & Kirby JJ held that ‘in private law there is, in general, no separation of standing from the elements in a cause of action’.
determine a dispute brought before it, or for that matter grant redress of public wrong, to a person who cannot show that the administrative action sought to be challenged, or the law of which the validity is impugned, adversely prejudices his/her right, interest or legitimate expectation to such a right or interest. Such an applicant can neither raise legal issues nor obtain judicial redress in matters not directly but remotely affecting his rights, interests or obligations.

Crisply stated, the general principle is that 'a private person who seeks relief from what is nuisance to the public must show that he has a particular interest or will suffer an injury peculiar to himself if he would sue to enjoin it.' At

12Where what is involved is a right or interest of a proprietary nature, something in a tangible form, or pecuniary interest, or means of livelihood, the ascertainment of interest or right may not be difficult. In most instances, however, the so-called tangible interest may not be visible and there lies the problem. While holding in *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 at 530 that the foundation had no special interest in the preservation of the particular areas as it sought to enforce, Gibbs J turned on the interest that is required in this context to ground the cause of action. Such interest, the judge said: 'does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to some disadvantage, other than a sense of grievance or a debt of costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.' Stephen J held (at 539) that: 'an individual does not suffer such damage as gives rise to standing to sue merely because he voices a particular concern and regards the actions of another as injurious to the object of that concern.' See also *per* Mason J at 548. In *Onus & Another v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 37, Gibbs CJ retracted from, or at best, modified his earlier view in *Australian Conservation Foundation* when he stated that a special interest is nonetheless sufficient if it is accompanied by an emotional or intellectual concern. Thus, it was a matter of distinguishing between these two factors represented by these two Australian cases where, in the earlier case, it was held that the appellants were seeking to give effect to their beliefs or opinions on a matter which did not affect them personally except in so far as they held beliefs or opinions about it and, in the latter case, where the appellants claimed not only that their relics had a cultural and spiritual significance, but that they were custodians of them according to the laws and customs of their people, and that they actually used them. Indeed, as Gibbs CJ put it in *Onus* (*ibid*): 'The position of a small community of aboriginal people of a particular group living in a particular area, which that group has traditionally occupied, and which claims an interest in relics of their ancestors found in that area, is very different indeed from that of a diverse group of white Australians associated by some common opinion on a matter of social policy which might equally concern any other Australian.' In *Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558 where the issue concerned the validity of Sunday trading, with a certificate of exemption granted by the minister to certain Adelaide shops, the High Court rejected the objection to standing and held that the rule as to standing 'is flexible and the nature and subject matter of the litigation will dictate what amounts to a special interest'. The court found that the shop assistants employed in the central shopping district had an interest in the trading hours of the shops in which they were employed, which is different from and greater than that of other members of the public. 'Obviously no shop assistant is uniquely affected by a change in shopping hours, but it is sufficient if those concerned have a special interest as a particular class.'

common law, a private person in the same situation as any other member of the public has no standing to claim either an injunction or a declaration to enforce a public right or duty if no private right of his has been or is likely to be interfered with — the so-called 'sufficient interest' rule in the Boyce case. The rationale for the evolution of the Boyce doctrine as explained in Bateman's Bay represents an attempt to alleviate this state of affairs whilst keeping 'the phantom busybody or ghostly intermeddler' at bay — even though the result has been 'an unsatisfactory weighting of the scales in favour of defendant public bodies'.

The foregoing sets the tone for the discussion of the common law (traditionalist) approach to standing to challenge the constitutionality of government acts which, in the absence of constitutional or statutory reform, continues to

14Onus & Another v Alcoa of Australia Ltd (1981) 149 CLR 27 at 35-6; Australian Conservation Foundation Inc v The Commonwealth (1980) 146 CLR 493 at 526, 559-1, 537, 547-8; GouTiet v Union of Post Office Workers (1978) AC 435. In Bateman's Bay n 11 above, where these Australian cases were reviewed and applied, the High Court unanimously held that the proposal of the appellants to conduct a contributory funeral benefit fund, catering for all aboriginal persons pursuant to its powers under the Aboriginal Land Rights Act 1983 (NSW) would, if not restrained, cause severe financial detriment to the respondents' business, thus the latter had a sufficient interest to seek equitable relief. In his concurring judgment, McHugh J (at 283) distinguished Alphapharm Pty Ltd v Smith Kline Beecham (Australia) Pty Ltd (1994) 49 FCR 250 and held that there was no statutory criteria to render the commercial interests of an individual on an inadequate basis for standing hence to 'deny the respondents standing on the basis that they did not fall within the scope of protection afforded by the relevant provisions of the Funeral Funds Act or the Land Rights Act or that their injury was not direct would be to adopt a test of standing which is inconsistent with the statements of principle made by the majority of members of this Court in Australian Conservation Foundation and Onus'.

16Per Gaudron, Gummow & Kirby JJ in Bateman's Bay n 11 above at 260-1.

17Craig Administrative law (3ed 1994) 484.

18The situation in the Southern African Kingdom of Swaziland is even more critical. In the absence of a written constitution and the pervasive presence of ouster clauses in Royal Decrees, judicial review of governmental acts is absolutely non-existent. Consequently, the granting of standing to a citizen or organisation to challenge governmental acts or decisions is somewhat of a mirage. Take the recent case of Lawyers for Human Rights (SWD) & Another v Attorney General of Swaziland & Another civil appeal case 34/01 (delivered 3 December 2001) (CA); Lawyers for Human Rights (SWD) & Another v Attorney General of Swaziland & Another civil trial 1822/01 (delivered 30 August 2001) (HC). The plaintiffs, an association of human rights lawyers and the Human Rights Association of Swaziland respectively had sought a declaration to the effect that the retiring age of judges of the High Court of Swaziland was seventy-five years and that those judges who were over the age of sixty-five remained in office until they reached the age of 75, as stipulated in Act 9 of 1973. This was a sequel to a Royal Decree, 2 of 2001, s 14 of which had purported to amend s 99(5) of the saved portion of the Swazi Constitution of 1968 by the King's Proclamation to the Nation of 12 April 1973, which had replaced the words 'sixty-two' with the words 'sixty-five'. Although Decree 2 of 2001 (including the controversial amendment) was subsequently repealed following a public outcry, the associations sought clarity on what they considered a prevailing uncertainty as to which of the two figures: sixty-five or seventy-five was the correct retiring age of judges. They argued that this state of affairs was 'generally disruptive and not conducive to the proper functioning of the court' and that judges who have reached the age of sixty-five 'cannot comfortably attend to their duties while there is doubt as to their rights to occupy their seats on the bench'. A full court of the
play an important part in the constitutional development of these core common law jurisdictions:

- The United States of America, a common law country with the oldest written constitution and therefore the conventional starting point for any enquiry into constitutional interpretation and adjudication in the common law world;
- Australia, one of the members of the old Commonwealth with over a century-old written constitution and a wealth of experience in constitutional adjudication and interpretation;
- Nigeria and Zimbabwe, two Commonwealth African countries sharing between them over forty and twenty years respectively of fairly advanced constitutional jurisprudence pre-dating the South African constitutional revolution.

In these countries, together with India, the courts have adopted an interpretation invariably indicating that by incorporating certain words, the constitutions have impliedly imported the common law doctrine of *locus standi*.19

A brief discussion of the relevant jurisprudence from these jurisdictions sets the background from which the developments in Canada have sprung, and the South African constitutional provisions have radically departed. It is with this background that the developments in these two countries must be viewed. Since it is the jurisprudence developed by the Supreme Court of Canada in the

High Court of Swaziland, digging deep into the jurisprudence of the common law (see eg *per* Boshoff JP in *Veriava & Others v President, SA Medical & Dental Council & Others* 1985 2 SA 293 (T) at 315D–G; Rabie CJ *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 3 SA 369 (A) at 392E–G) upheld the respondents' point in *limine* that the applicants lacked *locus standi* to bring the action. Apart from finding the arguments of the applicants to be mere 'generalisations', 'vague', 'meaningless' and 'speculative suppositions', the Court of Appeal threw out the appeal on the question of *locus standi* and held that they had neither shown a sufficiently direct nor special interest in the subject matter of litigation to clothe them with *locus standi* to seek judicial relief in this matter. According to Beck JA: 'they have shown no interest of any kind beyond ordinary curiosity in seeking a judicial decision on whether the retiring age of judges is 65 or 75.' The Justice of Appeal, with the concurrence of the full court of the Court of Appeal, rejected an argument based on the Canadian trilogy (*infra*) and held that even if the exceptions accepted in Canadian law were to avail in Swaziland, two of the requirements in the Canadian exception, namely: that the plaintiff must have a genuine interest in the resolution of the question; and that there would be no other reasonable and effective manner in which the question could be brought to court would have neither been satisfied nor met in this case. Finally, the Court of Appeal could not imagine anyone except the judges who would have *locus standi* to raise the issue of the retiring age of judges nor was it suggested that: 'there has been a refusal to raise the issue in that obvious manner. Indeed, so obvious is the direct and substantial interest that the judges have in the issue that the appellants wish to have decided that they should have been joined by the appellants as necessary parties.'

The common law judicial review in Australia has significantly been affected by the Administrative Decisions (Judicial Review) Act 1977 (Cth). On the part of South Africa, the evolution of its modern judicial review in administrative law started with s 24 of the interim constitution of 1993 and carried further by s 33 of the final constitution of 1996. That journey was concluded with the passing into law of the Promotion of Administrative Justice Act 3 of 2000 comprehensively dealing with every conceivable aspects of judicial review of administrative action.
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last three decades that is the focus in this context, little is said in this article of the constitutionalisation of standing in South Africa whose recent experience is a product of express constitutional stipulation. It is not borne out of judicial activism hence it is appropriately dealt with in a separate context. The development in Canada began with the courts granting freer access to challenge the validity of legislation on federal grounds culminating in their changing the common law through judicial initiative and activism, while the South African constitutional experiment is designed for the enforcement of the provisions of the Bill of Rights. Both approaches represent a radical departure from the core traditional attitude toward standing in favour of a liberalised approach.

The traditionalist approach

At common law a belief, however felt, that the law should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi* to bring or intervene in legal proceedings since it is the province of the Attorney General to protect the public interest. Clearly, therefore, unless an individual or a group of persons have an identifiable interest, a right or immunity in the breach or threatened infringement of public right in that he or they are ‘more particularly affected


22 Lord Denning MR's suggestion in *Ex rel McWhitber v Independent Broadcasting Authority* (1973) QB 629 at 649 that an individual could apply to court where the Attorney General improperly refuses leave or is unreasonably slow in granting it was rejected by the House of Lords in *Gouriet v Union of Post Office Workers* (1978) AC 435 at 477 where Lord Wilberforce restated the role of the Attorney General in these matters. However, the Supreme Court of Nigeria adopted an approach similar to that of the Master of the Rolls in *Fawebinmi v Akilu & Another* (1987) 4 NWLR (67) 797.

23 Such expressions as 'real interest', 'substantial interest', 'special interest', 'personal interest', 'special damage' and 'sufficient and protected interest' have been employed to quantify the requirement of *locus standi* to no meaningful avail. See eg *Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd* (1921) 2 AC 430 at 448; *Anderson v Commonwealth* (1982) 47 CLR 50; *Foster v Joddex Australia Pty Ltd* (1972) 127 CLR 421 at 437–8; *Robinson v Western Australian Museum* (1977) 138 CLR 283; *Australian Conservation Foundation Inc v The Commonwealth of Australia & Others* (1980) 146 CLR 493 at 504–6; *Allan v Development Allowance Authority* (1998) 152 ALR 439 (FCA); *Allan v Development Allowance Authority & Another* (1999) 163 ALR 31 (FCA); *Colonial Development (Pty) Ltd & Others v Outer West Local Council & Others; Bailes & Another v Town & Regional Planning Commission & Others* 2002 2 SA 589 (NPD) at 599E–F.
than other people', the jurisdiction of the court may not be successfully invoked in his or their instance. It has been held in Australia that a state Attorney General has the duty to protect public rights and thus it is the state law officer who has the interest to invoke the provisions of the constitution for the purpose of challenging the validity of Commonwealth legislation which extended to, and operated within, the state whose interests he represents. Accordingly, the Attorney General of the state of Victoria had standing to challenge whether the Pharmaceutical Benefits Act was authorised by section 81 of the constitution.

Except in those specific instances where the courts in Canada, India, Namibia and South Africa may be called upon to deliver advisory opinion.
ions to the government in the limited circumstances prescribed by their constitutions, the extensive grant of standing to challenge governmental acts and conduct in breach of the provisions of the Bill of Rights in the South African Constitution, and the general right of access without qualification to challenge the constitutionality of legislation or any act taken under an enactment inconsistent with the provisions of the constitution granted by the Constitution of the Republic of Ghana, the requirement of public law that any person seeking to challenge a government act must first show in what respect the act sought to be challenged adversely affected or affects or will affect his rights, interests or legitimate expectation is of universal application. Hence in Australia, the plaintiff's standing in Crouch v The Commonwealth was grounded on the fact that his business was hampered by the necessity of obtaining permits under an allegedly invalid law.

**United States**
The principle that an applicant for judicial review of government action must assert sufficiently imminent injury to have standing has long been established, reiterated and recently re-affirmed in American constitutional law.

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30 By virtue of ss 79(4)(b) and 121(2)(b) of the 1996 constitution, the Constitutional Court can give an opinion if requested by the President or a Premier of a Province on the constitutionality of a Bill: *Ex parte the President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill 2000* 1 SA 732 (CC); *In Re: The Constitutionality of the Mpumalanga Petitions Bill, 2000 2001* (11) BCLR 1126 (CC).

31 Section 38, Constitution of the Republic of South Africa 1996 on which see Okpaluba n 20 above.

32 By s 2(1) of the Constitution of the Republic of Ghana, it is provided that 'a person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment or by any act or omission of any person is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect'. Bamford-Addo JSC was thus correct to have come to the conclusion in *New Patriotic Party v Attorney General* (1999) 2 LRC 283 at 294b-d that there is no qualification of person or limitation as to what actions such a person can challenge. What it means is that it is in accordance with the intention of the framers of the constitution and in the public interest to open the door widely to permit both natural and artificial persons, like the plaintiff, access to the court as no limitation is placed on the nature of persons who may invoke the original jurisdiction of the Supreme Court, thus the substantially old principle of standing had been discarded albeit *sub silentio* and, as Atuguba JSC (at 326g) lamented, without 'appropriate judicial ceremony befitting the status of *stare decisis*'. Ampiah JSC's judgment did not turn the full circle for although he would grant standing to the plaintiff in the matter because the alleged infringement covered associations whether national or international, whereas he would hold that the plaintiff could not have the violation of the right of another person determined under art 2(1) of the constitution. Kpegah JSC (at 319a) stuck to the guns of the traditionalist approach when, in a wholly dissenting opinion, he would uphold the preliminary objection of the Attorney General that the plaintiff lacked standing since the jurisdiction of judicial review was limited to actual cases and controversies and the court had no jurisdiction to give an advisory opinion.

33 *(1948) 77 CLR 339.*

34 *Massachusetts v Mellon* 262 US 447 (1923).

35 *Plast v Cohen* n 2 above.
adjudication — by far the most developed constitutional jurisprudence in the common law world. It is undeniably the Supreme Court of the United States of America that was responsible for importing the common law requirement of locus standi into the sphere of constitutional litigation while, at the same time, that court was the original proponent of the virtues of judicial review in the democratic state. Standing as a requirement in constitutional litigation in the United States emanates from the 'case' or 'controversy' clause of article III section 2 of the American Constitution. In other words, though some of its elements express prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of article III. In Massachusetts v. Melon, the United States Supreme Court held that the party who invokes the power of the court must be able to show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. And, where he seeks to speak for a class or group who are adversely


38The pronouncements of Chief Justice Marshall in Marbury v Madison 5 US 137, 2 L.Ed. 60 (1803) is well known to students of constitutional law to warrant repetition here. Suffice it to note that those pronouncements of the United States Supreme Court have reverberated in Commonwealth constitutional adjudication. See eg Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 262 (Aust HC); Liyanage v The Queen (1967) AC 254 (PC); Attorney General of Bendel State & Others v Attorney General of the Federation & Others (1982) 3 NCLR 1 at 101 (SCN); O'Toole v Charles David Pty Ltd (1990) ALJ 618 at 624 (Aust HC).

39See generally, Brilmayer 'The jurisprudence of Article III: perspectives on the “case or controversy” requirement' (1979) 93 Harv LR 297; Tushnet 'The sociology of Article III: a response to Professor Brilmayer' (1980) 93 Harv LR 1698; Brilmayer 'A reply' (1980) 93 Harv LR 1727. This same Article III has also given birth to a whole set of other principles of judicial restraint enunciated in American constitutional adjudication such as: the principle that the courts do not offer advisory opinion nor do they deliberate on matters that have not quite arisen for decision in that they are premature, moot or abstract in nature. See generally, Rotunda, Nowak & Young Treatise on constitutional law: Substance & procedure vol 1 (1986) 81-152.

40Per Scalia J Lujan v Defenders of Wildlife et al 504 US 555 at 560 where he had stated that 'one of those landmarks, setting apart the “case” and “controversies” that are of the justiciable sort' referred to in Article III — serv(ing) to identify those disputes which are appropriately resolved through the judicial process ... is the doctrine of standing.' See also Whitmore v Arkansas 495 US 149 at 155 (1990); Allen v Wright 468 US 737 at 751 (1984). Justice Scalia extra-judicially, has developed the theory of the link between standing and separation of powers in 'the doctrine of standing as an essential element of the separation of powers' (1983) 17 Suffolk ULR 881.

41262 US 447 (1923); Ex parte Levitt 302 US 633 (1937); Schlesinger v Reservists to Stop the War 418 US 208 at 220 (1974); US v Richardson 418 US 166 (1974).
affected by the law or action complained of, he must not only have a personal
and substantial interest infringed by the statute, but must also 'bring himself,
by proper averment and showing, within the class as to whom the act thus
attacked is unconstitutional.' 42 The test is 'whether the plaintiff has 'alleged
such a personal stake in the outcome of the controversy' to enable him invoke
the federal jurisdiction and to justify exercise of the court's remedial powers
on his behalf.' 43

In Baker v Carr 44 it was stated that the question of standing was 'whether the
party seeking relief has alleged such a personal stake in the outcome of the
controversy as to assure that concrete adverseness which sharpens the
presentation of issues upon which the court so largely depends for illumina­
tion of difficult constitutional questions'. The party seeking to challenge the
validity of legislation or other government act must show that he/she was
personally and substantially injured by it, or was in substantial danger of
sustaining such injury. Thus, where standing is placed in issue in a case, the
question turns on whether the person whose standing is being challenged is
a proper party to request an adjudication of a particular issue and not whether
the issue is justiciable. 45 By this argument, Alexander Bickel seeks to separate
the cause of action, the subject matter of challenge, from the legal capacity of
the party to prosecute the matter in court, which, after all, is what the doctrine
of locus standi is all about, but which invariably intertwines with justiciability.
It is obvious that the cause which the party lacking standing takes to court is
for that same reason not justiciable on account of the wrong party purporting
to prosecute a matter totally foreign to him in the eyes of the law. The issue is
rendered non-justiciable in the light of the fact that a court can only assume
jurisdiction if the proper parties in a matter appear before it.

Two recent cases further illustrate the unchanging attitude of the Supreme
Court of the United States toward the requirement of 'imminent injury' as
against 'purely speculative, nonconcrete injuries' as grounding standing to
challenge government acts be they legislation or executive conduct. Thus in
Lujan v Defenders of Wildlife et al. 46 the court held that the Court of
Appeals erred in holding that the respondents, wildlife conservationists and
other environmental organisations who sought to interdict the Secretary of the
Interior from promulgating the geographical scope of the responsibilities of
agencies in respect of the preservation of endangered or threatened species,
had standing on the ground that the statute's citizen-suit provision confers on
all persons the right to file suit to challenge the Secretary's failure to follow the
proper consultative procedure, notwithstanding their inability to allege any

42Southern Railroad Co v King 217 US 524 at 534 (1910); Massachusetts v Laird 400
US 886 (1970); Valley Forge Christian College v Americans United for the
43Warth v Seldin 422 US 490 at 469-90 (1975); Simon v Eastern Kentucky Welfare
44396 US 186 at 204 (1962).
45Bickel, Foreword 'The passive virtues, the Supreme Court, 1960 Term' (1961) 75
Harv LR 40 at 75-6.
46504 US 555, 112 S Ct 2130 (1992) at 560-61 & 2136 respectively.
separate injury flowing from that failure. The court reiterated its consistency in holding that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an article III case or controversy. It was held that the respondents failed to demonstrate that one or more of their members would thereby be directly affected apart from the members' special interest in the subject since, in the words of Scalia J:

> [v]indicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirements has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officer's compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed", Art. II §3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department", and to become "virtually continuing monitors of the wisdom and soundness of Executive action". We have always rejected that vision of our role ...

In another recent environmental protection litigation, *Steel Co aka Chicago Steel & Pickling Co v Citizens for a Better Environment* where the question was whether an environmental protection organisation had standing under the Emergency Planning & Community Right-To-Know Act 1986 (EPCRA) to seek a declaration that the Steel Company had violated a legislative reporting requirement by failing to report timely toxic and hazardous-chemical storage and emission reports for past years. The Supreme Court held that the respondent association lacked standing to maintain the suit and the courts correspondingly lacked the jurisdiction to entertain it on the ground that none of the relief sought (declaratory and injunctive relief) would likely remedy the respondent's alleged injury. Justice Scalia, who delivered the opinion of the court took the opportunity to reiterate the three 'irreducible constitutional minimum of standing' constituting the core of article III, §2, 'case or controversy' which he had enunciated in *Lujan* to comprise the following elements:

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48 *Sierra Club v Morton* 405 US 727 at 735 & 739 (1972).


51 504 US 555 at 560–561.

• Injury in fact: the plaintiff must have suffered an injury in fact, that is, an invasion of a legally protected interest which is concrete, particularised (an injury is particularised if it affects the plaintiff in a personal capacity) and actual or imminent rather than conjectural or hypothetical;\(^{53}\)

• Causation: there should be a causal connection between the injury and the conduct complained of so that the injury is fairly traceable to the challenged action of the defendant and not the result of independent action of some third party who is not before the court;\(^{54}\) and,

• Redressability: that it be likely, as opposed to merely speculative, that the injury will be redressed by a favourable decision, that is, that there be a likelihood that the requested relief will be capable of redressing the injury.\(^{55}\)

The respondent in this case was unable to discharge the burden of proof imposed on anyone seeking to invoke the federal jurisdiction of the court of proving its existence, for the court found that even if the hurdles of injury and causation were scaled, the respondent's case failed on the redressability test, namely: a declaratory judgment that petitioner violated EPCRA; injunctive relief authorising respondent to make periodic inspections of petitioner's facility and records and requiring petitioner to give respondent copies of its compliance reports; and orders requiring petitioner to pay EPCRA civil penalties to the Treasury and to reimburse respondent's litigation expenses.

Australia

The term 'matter' in ch III of the Australian Constitution is to the Australian High Court what article III section 2 of the United States Constitution is to the Supreme Court of the United States. The question whether an applicant can invoke federal jurisdiction in the light of his cause of action; whether he has standing\(^{56}\) to pursue the matter which he has brought to the attention of the court; and other factors which sometimes militate against the exercise by the courts of their judicial power, stem from these chapters of the two constitutions. It has thus been construed that 'matter' in chapter III of the Constitution of Australia contemplates that the party before court must possess the locus standi to initiate the litigation impugning the constitutionality of the

\(^{53}\)Whitmore v Arkansas supra at 155. See also Los Angeles v Lyons 461 US 95 at 101–2 (1983). It was held in Sierra Club, supra, at 734–5 that the 'injury in fact' test requires more than an injury to a cognisable interest. It requires that the party seeking review must himself be among the injured.


\(^{55}\)As it was stated in US v Students Challenging Regulatory Agency Procedures 412 US 669 at 688 (1973) that standing is not 'an ingenious academic exercise in the inconceivable'.

legislation in question.\textsuperscript{57} In Australia, as in most countries where the traditionalist approach to standing holds sway, it would appear that the courts do not draw any distinction between standing to challenge legislation and standing to impeach executive action. Similarly, no appreciable difference is discernible in the consideration whether a person lacks \textit{locus standi} with regard to the remedy he/she seeks to obtain from the court whether it is a declaration or an injunction or any of the prerogative remedies.\textsuperscript{58}

The requirement of standing in Australian constitutional adjudication is in such a state of flux\textsuperscript{59} that judges have in recent times questioned its applicability in their constitutional landscape. Their first criticism of the doctrine of \textit{locus standi} fundamentally questions the common law notion of the Attorney General as the protector of public good and the inordinate role that law officer, a political appointee, is made to play in initiating litigation in the public interest. The scepticism of the judges relates to the question whether the Attorney General is the person best fitted to determine whether public interest

\textsuperscript{57}The significance of this expression is illustrated by the recent case of \textit{Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Ltd} (2000) 200 CLR 591, 169 ALR 616 where the question before the High Court of Australia was whether the legislature could empower a litigant to institute proceedings even though the litigant had no direct or special interest in the 'matter'. In other words, could the court exercise judicial power in the absence of a 'matter', that is, a justiciable controversy, since such a justiciable controversy does not arise unless the person who seeks to bring the action has sufficient interest to do so. The argument in this case was that by using the words 'any other person' in s 83(1) and 'a person' in s 163A, the Trade Practices Act 1974 had purported to confer standing on a person who had neither a direct nor special interest in the subject matter of the proceedings. It was held that in making laws with respect to a subject specified in s 51 of the constitution, the Commonwealth Parliament might allow a person not injured or affected by a breach of those laws to institute proceedings in respect of the breach. There is no requirement that a person must owe a duty to the person who institutes such proceedings for there to be a 'matter' within Ch III. In the opinion of Gaudron J (at 611): 'Once it is accepted that neither the concept of 'judicial power' nor the constitutional meaning of "matter" dictates that a person who institutes proceedings must have a direct or special interest in the subject matter of those proceedings, it follows as was pointed out in \textit{Bateman's Bay n 11 above} at 262 that, for the purposes of Ch III of the constitution, "questions of standing", when they arise, are subsumed within the constitutional requirement of a 'matter'.\textsuperscript{58}' \textit{Per} Gummow J (at 637 par 122): 'The notion of "standing" is an implicit or explicit element in the term 'matter' throughout chapter III, identifying the sufficiency of the connection between the moving party and the subject matter of the litigation.' On his part, Kirby J (at 63-9 par 127) said: 'The meaning of the word "matter" in Ch III of the Constitution, is elusive (\textit{Abebe v The Commonwealth} (1999) 197 CLR 510 at 583-4). These proceedings require examination of the extent to which the concept imports a particular requirement about standing to sue. The doctrine of standing is itself "a house of many rooms" (\textit{Bateman's Bay n 11 above} at 280 \textit{per} McHugh J). This court should not accept the attempt to use the constitutional notion of "matter" to erode significantly the legislative powers of the Federal Parliament and to import a serious and unnecessary inflexibility into the Constitution (\textit{Abebe} (1999) 197 CLR 510 at 590).' Accordingly, ss 80 and 163A of the Trade Practices Act 1974 were held to be constitutionally valid in so far as they purported to confer standing to any applicant.

\textsuperscript{58}Per Gibbs J in \textit{Australian Conservation Foundation Inc v The Commonwealth of Australia \\& Others} (1980) 146 CLR 493 at 526-7.

\textsuperscript{59}Per North J in \textit{Victorian Council for Civil Liberties Inc \\& Another v Minister for Immigration \\& Multicultural Affairs \\& Others} (2002) 1 LRC 189 par 133.
will be served on occasions by not enforcing the public law. As it was stated in *Bateman's Bay*: 'At the present day, it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney General's fiat for protection against *ultra vires* action of statutory bodies for the administration of which a ministerial colleague is responsible.' Their lordships accordingly proposed that:

In a case where the plaintiff has not sought or has been refused the Attorney-General's fiat, it may well be appropriate to dispose of any question of standing to seek injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed. A suit might properly be mounted in this way, but equitable relief denied on discretionary grounds. Further, declaratory rather than injunctive relief may be sufficient.

The second objection concerns the 'not altogether satisfactory' formulation of the 'special interest' doctrine in *Boyce*. In many recent cases, including *Bateman's Bay*, in which standing to sue has been raised, the High Court of Australia has reconsidered the *Boyce* formulation and found it to be too restrictive and narrow. Essentially, it has been found that there are 'particular deficiencies in the *Boyce* model which may linger to constrain the application of the criterion which has been settled upon in this Court.'

As observed in the joint judgment of Gaudron, Gummow & Kirby JJ in *Bateman's Bay*:

> A critical matter in this litigation has been whether, having regard to the terms of the legislation under which they are constituted, the appellants have the legal capacity to undertake the activities, involving recourse to public moneys, of which the respondents complain. The second appellant was in a financial position to subsidise the ALC Fund because of the guarantee of a percentage of land tax revenue provided by s 29 of the Land Rights Act. Such a circumstance was not present in the controversies in which equitable relief was sought in *Australian Conservation Foundation v The Commonwealth* and *Onus v Alcoa of Australia Ltd*, and is significant for the application of the

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61 Per Gaudron, Gummow & Kirby JJ in *Bateman's Bay* n 11 above at 262–263; per Gibbs J in *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338 at 383.

62 Ibid at 263.


64 (1998) 194 CLR 247 at 256 par 22.

65 Ibid.


67 (1980) 149 CLR 27.
criterion "sufficient interest" and for consideration of the basis upon which equity intervenes in public law cases. 68 Although the courts recognise that 'the need for a wider gateway to standing in Australia is desirable where the role of the Attorney General is more administrative and political than the role of the Attorney General in Britain where the rules of standing were first developed' 69 yet, they appear contented to leave the resolution of the problem to the legislature 70 quite contrary to the progressive approach adopted by their Canadian counterparts over the last thirty years.

Meanwhile, the state of the law of standing in Australia was put in its proper perspective in the recent decision of the Federal Court in Victorian Council for Civil Liberties Inc & Another v Minister for Immigration & Multicultural Affairs & Others. 71 The question was whether a human rights organisation and a solicitor who wished to provide free legal advice had standing to seek mandamus and injunction compelling the Australian authorities to enforce the Immigration Act by allowing foreign rescues to be brought ashore on the Australian mainland and to apply for protection visas. This review application was made on behalf of certain foreign nationals who were rescued by a Norwegian ship off the coast of Australia, and who, because they were not allowed to land in Australia, did not have the opportunity of making an application for protection visas as refugees and could not bring these applications themselves. In deciding the issue of standing, North J had two particular judgments of the High Court to consider, follow or distinguish. The judge was particularly influenced by the principles relating to standing restated by Gibbs J in the Australian Conservation Foundation 72 where standing was denied the Foundation to challenge the decision of government and some ministers to approve a proposal to establish a tourist resort in Central Queensland. On the other hand, North J distinguished the High Court's decision in Bateman's Bay 73 where two organisations involved in providing funeral benefits for the Aboriginal community of New South Wales were held to have standing to question the legality of a new organisation financed by public funds from operating the existing funds.

North J came to the conclusion that the applicants in Victorian Council had no special interest to intervene in legal proceedings of this nature given the subject matter of the action. They therefore could not pursue their claims for injunctions and mandamus to enforce compliance with alleged obligations upon the respondents under the Migration Act 1958, to cause the rescues to be taken into detention and allowed the applicable rights, including the right to apply for protection visas as refugees, and to bring them to the mainland of

70Id at par 134.
71(2002) 1 LRC 189.
72(1980) 146 CLR 493 at 526-7; per Mason J at 547.
Justiciability and standing to challenge legislation

Australia.\textsuperscript{74} The postscript appended to the Full Court's judgment depicts the somewhat pathetic story of \textit{locus standi} in Australia. French J, concurring in the majority judgment of the court which, incidentally, did not deal with \textit{locus standi} on appeal, concluded his judgment on the note that:

The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so \textit{pro bono}. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In so doing, even if ultimately unsuccessful in the litigation they served the rule of law and so the whole community.\textsuperscript{75}

Nigeria

The Nigerian Constitution, more than any other constitution in the Commonwealth, is replete with expressions capable of being construed, and which have indeed been construed by the courts, as contemplating the requirement of \textit{locus standi}. To begin with, section 6(6)(b) of the constitution which vests judicial power in the courts, confines its exercise to 'the determination of any question as to the civil rights and obligations of that person'. Again, in vesting original jurisdiction in the State High Court, section 236(1), in a more comprehensive form, empowers the court to determine issues in which the 'existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue.' In order to ensure that cranks do not assert breaches of fundamental rights guaranteed in the constitution, section 42(1) entrenches the right to enforce these rights only to that person to whom the breach or infringement relates.\textsuperscript{76} It was in the interpretation and application of sections 6(6)(b), 33(1)\textsuperscript{77} and 236(1) that the Supreme Court based its decision to deny standing to a senator in \textit{Adesanya v President of the

\textsuperscript{74}Per North J (2002) 1 LRC 189 at 231-234, pars 127, 133 & 137. The issues for decision by the Full Court of the Federal Court before Black CJ (dissenting), Beaumont & French JJ (2002) 1 LRC 240 were: that North J erred in holding that the executive power of the Commonwealth did not authorise and support the expulsion from Australia of people rescued by the MV Tampa and their detention for that purpose; and that the people rescued by the ship were not relevantly detained. These led the court to consider whether there was lawful authority for the executive action taken; the sources of such executive power and, in the absence of such lawful authority whether the rescuees were subject to a restraint attributable to the Commonwealth and amenable to the remedy of habeas corpus. The \textit{locus standi} argument did not surface at this stage.

\textsuperscript{75}Id at 300 par 216.

\textsuperscript{76}Article 29(1), Constitution of Zambia 1973 is worded in terms similar to s 42(1) of the Nigerian Constitution. In \textit{Mwamba & Another v Attorney General of Zambia} (1993) 3 LRC 166 at 170g, the appellants had sought a declaration to the effect that the President had acted in breach of s 44(1) of the constitution by failing to act with dignity in the discharge of his executive duties when appointing certain members of the National Assembly as minister and deputy minister respectively. Ngulube CJ held that in considering the question of \textit{locus standi}, the court had to balance two aspects of the public interest; namely the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome private 'Attorney Generals' to move the courts in matters that do not concern them.

\textsuperscript{77}This subsection guarantees any person the right to a fair hearing within a reasonable time by an independent and impartial tribunal established by law in so far as 'the determination of his civil rights and obligations' are involved.
Republic of Nigeria. And, in spite of the protestation of the Chief Justice of Nigeria to the effect that: ‘any person, whether a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an obligation to see to it that he is governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is his civil right to see that this is so,’ the Supreme Court threw out the application of the senator who sought to set aside a presidential nomination to a federal commission after he, the senator, had lost the votes on the floor of the Senate on the ground that he had not shown that his civil rights or obligations were adversely affected by the appointment and so lacked the legal standing to be heard in court on the issue.

It must be noted, however, that the Supreme Court somewhat changed gear soon after its decision in Adesanya for, in Attorney General of Bendel State & Others v Attorney General of the Federation & Others, it approached the consideration of standing more liberally than ever before. For instance, Eso JSC was prepared to let the ‘floodgate’ open if that was what giving access to the courts to test the constitutionality of a law would import in the circumstances. But it must be pointed out that the court had on its side sections 1(2) and 4(8) of the constitution as the principal sources of its power to intervene at the behest of a state desirous of not being governed by an unconstitutionally enacted federal law. Furthermore, the court had extended the horizon of locus standi in constitutional litigation in criminal prosecutions, that is, the right of a private person to initiate criminal prosecution where the state had failed to do so: Attorney General of Kaduna State v Umaru Hassan and Fawehinmi v Akilu & Togun.

Unfortunately, this extension has not as yet been felt in challenges of unconstitutionality of legislation due principally to the fact that Military Decrees had in no uncertain terms ousted the jurisdiction of the courts in enquiring into the validity of laws made by the Federal Military government and the courts have upheld these Decrees as completely judicially unassail-

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79Id at 376 per Fatayi-Williams CJN.
82(1985) 2 NWLR (8) 483.
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able. Yet, it was held in addition to the court's lack of jurisdiction in the face of the hideous ouster clauses, that the applicant, a private legal practitioner, had no locus standi to institute action challenging a Decree proscribing a national newspaper in Onagoruwa v Babangida & Another. It was sufficient for the court to have disposed of the matter on the basis of ouster of its jurisdiction and, there was no need to rub the locus standi injury into an already hurting wound of lack of jurisdiction. A case taking the question of standing further than the Bendel State decision is yet to arise under the new constitutional dispensation in Nigeria.

Zimbabwe
Under section 24(1) of the Constitution of the Republic of Zimbabwe 1980 (as severally amended), any person who alleges that a right or freedom guaranteed under the Declaration of Rights has been breached or is likely to be contravened in relation to him, may apply to the Supreme Court for redress. The Supreme Court of Zimbabwe has held in a number of cases that by virtue of this subsection an applicant must have standing to seek redress from the court for a violation of a right guaranteed in the constitution if he can show a likelihood of his being affected by the impugned law. In effect, the violation must relate to him since he cannot bring an action on behalf of the general public or anyone else. In other words, a constitutional right infringed by a law may be challenged by a person affected by the law, only if that person is also entitled to the benefit of that right. If not so entitled, that person will be precluded from impugning the law.

For instance, in Re Wood & Hansard, it was held that the right to reside in any part of Zimbabwe within the context of section 22(1) of the Declaration of Rights, was vested in the minor child of Mrs Wood and not in her, hence no constitutional right afforded her was infringed by the immigration authorities' refusal to grant her a residence permit. On the other hand, where, as in Retrofit (Pvt) Ltd v Posts & Telecommunications Corporation & Attorney General of Zimbabwe, the applicant challenged a law that vested the Corporation with monopoly over the provision of telephone services in the country, Gubbay CJ held that although the right to the enjoyment of freedom of expression was conferred universally on everyone, individual and corporate personality alike, if the monopoly granted the defendant amounted to a hindrance of the right to freedom of expression, it was a hindrance committed

85Attorney General, Anambra State & Others v Attorney General, Federation & Others (1993) 6 NWLR (302) 692 where the court declined to exercise its constitutional original jurisdiction in inter-government disputes which was suspended along with the 1979 constitution and carefully modified by Decree 1 of 1984.
87United Parties v Minister of Justice, Legal & Parliamentary Affairs 1998 (2) BCLR 224 (ZS) 227E-F; 1998 3 SA 85 at 88H-89B; Post & Telecommunications Corporation v Minister of Justice 1998 2 SA 85 (ZS); Ruwodo NO v Minister of House Affairs 1995 (7) BCLR 903 (ZS).
881995 2 SA 191 (ZS) at 195G-I.
891996 1 SA 847 (ZSC) at 854C/D-855E.
in relation to everyone. Accordingly, the applicant, a corporate entity, was entitled not only to the shelter of section 20(1) of the constitution but also to protest its infringement notwithstanding that its (the applicant's) predominant motivation in challenging section 26(1) of the Postal & Telecommunication Services Act was not deep-felt anxiety over hindrance in the enjoyment of freedom of expression, but commercial self-interest and advantage in prospective financial gain.

Two recent cases from Zimbabwe illustrate that the current attitude of the Supreme Court toward constitutional adjudication in so far as locus standi is concerned is a mixture of the traditionalist and the progressive approaches. It had not totally been infused with the conservatism inherent in the common law tradition. While its decision in United Parties v Minister of Justice, Legal & Parliamentary Affairs smacks of the traditionalist approach, its latest decision in Law Society of Zimbabwe v Minister of Finance & Another falls squarely within the progressive approach. In United Parties, the Chief Justice of Zimbabwe held that the applicant, a political party, was not entitled under section 24(1) to carry 'the torch for claimants and voters generally'. The case failed the test of 'likely to be contravened' for all the court found, was that the applicant could only indicate in relation to itself, a fear of an occurrence, a remote possibility of a constituency registrar being prevented from acting upon an objection to the inclusion of a voter on a voters' roll. For a party to succeed in the circumstances: '(t)here must exist a realistic or appreciable probability — and not merely a reasonable possibility — for there to be the requisite basis to invoke a constitutional challenge'. In holding that neither section 25(1) nor section 26(5) of the impugned Electoral Act Chap 2:01 (Z) touched the applicant, Gubbay CJ held:

Under s 25(1) it is only during the period between the issue of the proclamation and the close of polling, namely thirty days, that the constituency registrar is barred from taking an objection against a claimant or voter. And in terms of s 26(5), he is not permitted to take any action upon an objection by a voter to the retention of any name on the voters roll of the constituency in which he is registered, should such objection be received during the thirty days immediately prior to the polling day. What then the applicant has to establish is both a realistic or appreciable probability of the constituency registrar being faced with the situations in which he is prohibited from taking action; and that a claimant or voter so affected may well be a member of the applicant party.

On the positive side, the Supreme Court did not only take a broad view of locus standi in Law Society of Zimbabwe v Minister of Finance & Another, it also adopted an interpretation which broadened rather than restricted the categories of plaintiffs who could raise constitutional breaches. Similarly, it extended its approach in Retrofit by holding that the association had a statutory interest to assist its members through legal proceedings as well as in

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90Chap 250 (Z).
911998 3 SA 85 (ZSC) at 90E-I.
its own interest. The Law Society, the court held, had a real and substantial interest under section 24(1) of the constitution as well as a right under section 53 of the Legal Practitioners' Act (Cap 27: 07) to obtain judgment on a doubtful or disputed point of law. More significant, perhaps, is the fact that the Supreme Court allowed this action, a potentially class action, to proceed in the absence but in anticipation of class action legislation in that country. McNally JA observed.

In this jurisdiction there has not yet been a great deal of development in the field of class actions or representative actions. The Class Action Act 1999 is not yet in force. But it would not be right for this court to make any ruling which would hinder the development of such actions. Therefore we are disposed to take a broad view of locus standi in matters of this nature, as indicated by the Chief Justice in Catholic Commission for Justice & Peace in Zimbabwe v Attorney General.

Glimpses of judicial activism

The progressive trends in public law adjudication witnessed towards the latter part of the last century, significantly affected the requirement of locus standi in that the courts in the Commonwealth began to re-think the concept with the result that this judicially imposed bug-bear to constitutional adjudication underwent some transformation. In England, the mother-land of the common law, Lord Denning MR, a foremost juridical reformer of the century, had visited the question of locus standi with that deft touch and influence that characterised his approach to public adjudication during his long spell on the English bench. In Blackburn and other cases of the late sixties and early seventies, this eminent jurist enunciated the principle that, in the exercise of its discretion, the court would grant standing to a rate-payer to challenge administrative decisions or a lack thereof of a public authority exercising a statutory power or function. Following upon this, the unanimous House of Lords, overruling R v Lewisham Union Guardians which for many years dominated the consideration of the subject, held in IRC v National Federation of Self-Employed & Small Businesses Ltd that standing would be granted to litigants for public interest actions if the action would vindicate the rule of law bearing in mind the nature of the breach of duty against which relief was sought. Thus, it was held that a pressure group, or even a public-spirited
individual or corporate body, acting in good faith could approach the court for an order of mandamus directing a public body or agency not to violate the law or to direct it to act in accordance with the law. Admittedly, it was the gradual but mild legislative and procedural reforms of the law relating to remedies through the revision of the court rules and the enactment of section 31 of the Supreme Court Act 1981, that combined with the Denning initiative to influence the law of standing in England in no small measure.

Locus standi would similarly be granted where the issues raised were important and there was a likely absence of any other challenger. And, in *R v Secretary of State for Social Services, ex parte Child Poverty Action*

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101 In *Seychelles National Party v Government of Seychelles & Another* (2001) 2 LRC 178 the Seychelles Constitutional Court held that since a political party registered under the Political Parties (Registration & Regulation) Act 1991 had rights to sue and be sued, it was in a position to aver that its interests had been contravened or likely to be contravened in accordance with section 130(1) of the Constitution of the Seychelles. Similarly, in *New Patriotic Party v Attorney General* (1999) 2 LRC 283 (Ghana SC) a registered political party was held to have the capacity to bring and defend actions in the Supreme Court under art 2(1) of the Constitution of Ghana 1992 since the term ‘person’ under art 297(e) of the constitution and s 32 of the Interpretation Act contemplates such artificial persons as a political party such as the plaintiff. See also *Societe United Docks v Government of Mauritius* (1985) LRC (Const) 801; *Attorney General v Antigua Times Ltd* (1975) 3 All ER 81 (PC), *Contra in Oute-Whisky & Others v Olawoyin & Others* (1985) 6 NCLR 156 where the Nigerian Court of Appeal held that the rights to register and to vote were rights to which only citizens were entitled so that a political party which is distinct from its membership had no standing to seek a declaration that there were irregularities in the voters’ register compiled by the Federal Electoral Commission, the appellants in this case.

102 In modern times, the Indian courts view the restrictive rules of locus standi as ‘inimical to a fair and healthy system of administration’ — per Chennakesan J, *Warang Chamber of Commerce v Director of Marketing* AIR 1975 AP 245 at 250. See also *Bangalore Medical Trust v Muddappa* (1993) 1 LRC 633. The Indian Supreme Court decision in *SP Gupta v Union of India* (1982) 2 SCR 385, (‘82) ASC 149 at 189–90 came on the heel of the House of Lords ruling in the *Self-Employed case* and Bhagwati J with whom the majority of the court concurred, adopted the celebrated speech of Lord Diplock and held that a writ of mandamus would lie to compel the licensing body to cancel licence illegally issued to certain persons at the instance of an aggrieved party or a public-spirited person acting in good faith to enforce the law. Bhagwati J observed that in a poor country like India, it is ‘absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective to adopt a flexible and broad approach to the question of standing to challenge governmental acts’ Again, in *Bangalore Medical Trust v Muddappa & Others* (1993) 1 LRC 633 (SC) at 646e–f Thommen J (Sabai J, concurring) held that the residents of the locality were persons intimately, vitally and adversely affected by an action of the Bangalore Development Authority and the government which is destructive of the environment and which deprives them of facilities reserved for the enjoyment and protection of the health of the public at large. The residents of the locality were naturally aggrieved by the impugned orders and they had the necessary locus standi to challenge the authority’s decision to allot an area reserved as open space for use as private nursing home.

103 Order 53 rule 3(5) of the RSC 1977.

104 See Wade & Forsyth *Administrative law* (7ed 1994) 708 on the new law of standing in English administrative law.
the court took into account the prominent role the applicants played nationally and internationally; the interest they had shown in promoting, assisting and protecting; and the expert advice they had given in matters concerning aid to underdeveloped nations. Granted that judicial attitude towards standing have sporadically shifted in several common law countries in favour of granting standing to taxpayers and ratepayers without insisting on the peculiar personal injury or damage requirement arising from the alleged wrongful conduct of the public authority, such developments have been incoherent, half-hearted and, most times, unpredictable. In addition to the glimpses of judicial activism discernible in constitutional adjudication in Commonwealth countries, it is worthwhile to consider a recent landmark decision of the Bangladesh Supreme Court.

The Bangladesh environmental lawyers’ case
Apart from the expressions ‘matter’, ‘case or controversy’, ‘in relation to him’, ‘civil rights or obligations’ which are said to import the requirement of *locus standi* in common law constitutional litigation, one other phrase notorious for attracting the requirement of standing as a criterion for initiating judicial

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105(1989) 1 All ER 1047 at 1048.
106All these factors were present in *R v Secretary of State for Foreign Affairs, ex parte World Development Movement* (1995) 1 All ER 611 at 620d-f and Rose LJ held that the applicants, a non-partisan pressure group concerned with the misuse of aid money, had sufficient interest in the litigation. See also *R v Inspector of Pollution & Ministry of Agriculture, Fisheries & Food, ex parte Greenpeace Ltd* (1994) 4 All ER 329 at 350-1; *R v Monopolies & Mergers Commission, ex parte Argyll Group plc* (1986) 2 All ER 257 at 265.
107In *Bangalore Medical Trust v Muddappa & Others* (1993) 1 LRC 633 (SC) at 647c-d SahaiJ of the Indian Supreme Court spoke in these words: ‘The restricted meaning of aggrieved person and narrow outlook of specific injury has yielded in favour of a broad and wide construction in the wake of public interest litigation. Even in private challenges to executive or administrative action having extensive fall out the dividing line between personal injury or loss and injury of a public nature is fast vanishing. The law has veered round from requiring a genuine grievance against order affecting prejudicially to sufficient interest in the matter. The rise in exercise of power by the executive and comparative decline in proper and effective administrative guidance is forcing citizens to espouse challenges with public interest flavour. It is too late in the day, therefore, to claim that petition filed by inhabitants of a locality whose park was converted into a nursing home had no cause to invoke equity jurisdiction of the High Court. In fact public-spirited citizens having faith in rule of law are rendering great social and legal service by espousing causes of a public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of *locus standi* or absence of personal loss or injury. Present day development of this branch of jurisprudence is towards freer movement both in the nature of litigation and the approach of the courts.’
108See also in *R v HM Treasury, ex parte Smedley* (1985) 1 All ER 589 where a taxpayer was allowed to challenge the Treasury’s proposal to pay a large sum of money to the European Economic Community; *Gillick v West Norfolk & Wisbech Area Health Authority* (1986) LRC (Const) 715 where a mother of five underage daughters challenged the legality of government-funded contraceptive advice to underage girls; *R v Secretary of State for Foreign & Commonwealth Affairs, ex parte Rees-Mogg* (1994) 1 All ER 457 at 461 where a life peer and former editor of The Times of London sought judicial review to challenge the government’s ratification of the Maastricht Treaty (Treaty on European Union, Maastricht, 7 February 1992 Cmd 1934) while his only stake in the issue was ‘his sincere concern for constitutional issues’.
review of legislation or administrative action is the term 'aggrieved person'. In Bangladesh and other south Asian superior courts 'the burning issue of locus standi' has become 'a focal point of attention ... in the dying decades of the twentieth century in preparation for the twenty-first'. But in the spirit of the Bangladesh Supreme Court's earlier decision in *Kazi Mukblesur Rahman v Bangladesh* which had brought about an 'unnoticed but quiet revolution ... on the question of locus standi after the introduction of the Constitution of the People's Republic of Bangladesh in 1972', and the Indian Supreme Court decision in *SP Gupta v President of India*, the appellate division of the Supreme Court of Bangladesh, in a complete fit of judicial activism, maintained a broad approach to the interpretation of the phrase 'any person aggrieved' in article 102 of the Constitution of Bangladesh.

In *Farooque v Secretary of the Ministry of Irrigation, Water Resources &

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109Cf art 18 (the right to administrative justice) and art 25(2) (confering the right of access to the courts for the enforcement of the fundamental rights and freedoms enjoyed in chapter 3) speak of 'persons aggrieved' and 'aggrieved persons' respectively, as persons who have the right or are entitled to seek redress in a competent court or tribunal for breach of the right to administrative justice or any right or freedom guaranteed in chapter 3 of the Constitution of Namibia 1990.


11126 DLJR (SC) 44 (1974).

112Per Kamal J in *Farooque* n 110 at 18a-b.

113AIR 1982 SC 149. Bhagwati CJ had held in this case that: 'We would therefore hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective.'

114Ordinarily, these expressions presuppose the common law requirement of sufficient interest having regard to the meaning assigned to that term by James LJ in *Re Sidebotham* (1880) 14 Ch D 458 at 465 where the Lord Justice defined 'a person aggrieved' as 'one who had suffered a legal grievance, one against whom a decision had been pronounced which wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something'. See also *per* Hoexter JA in *Francis George Hill Family Trust v South African Reserve Bank & Others* 1992 3 SA 91 (A) at 102C; *Jeeva & Others v Receiver of Revenue, Port Elizabeth & Others* 1995 2 SA 433 (SE); *Arsenal Football Club v Ende* (1979) AC 1; *Durayappab v Fernando* (1967) 2 AC 337; *Attorney General of the Gambia v N’jie* (1961) 2 All ER 504 (PC); *Namibian National Students’ Organisation & Others v Speaker of the National Assembly for South West Africa & Others* 1990 1 SA 617 (SWA); *Sibidzi v Administrator-General for South West Africa & Others* 1989 4 SA 631 (SWA); *Levy v Benator* 1987 4 SA 693 (ZS); *Geldenhuys & Neethling v Beutbin* 1918 AD 426. In *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 3 SA 369 (A) at 394 where the Appellate Division was considering the standing of the applicant to challenge the validity of legislation under the pre-independence Constitution of SWA, it was held that were the court to apply the Canadian exception (infra) to the situation in South West Africa, the present case would not be a proper one to do so since 'it would be unrealistic to hold that the respondent in the present case should be accorded locus standi on the ground that it is the only way in which the validity of (the statute in question) can be brought before the Court'.
Flood Control, it was held that the Bangladesh Environmental Lawyers Association (BELA), a group of environmental lawyers possessed of pertinent, bona fide and well-recognized attributes and purposes, and having a provable, sincere, dedicated and established status had sufficient interest and standing under article 102 to ask for judicial review of certain government activities under a flood action plan undertaken with foreign assistance on the grounds, inter alia, of alleged environmental degradation, ecological imbalance and violation of the law. BELA had alleged that activities would adversely affect the life, property, livelihood, vocation and environmental security of more than a million people in the district and the natural habitat of other flora and fauna. It contended that the government projects were anti-environment and anti-people and that no proper environmental impact assessment had been undertaken in relation to the projects in dispute. Adopting a meaningful but creative construction of the expression 'any person aggrieved', a term nowhere defined in the constitution, the absence of which definition turned out to be the tonic the appellate division needed in unanimously setting aside the trial court’s summary and outright rejection of the association’s claims for lack of standing to contest the matter within the meaning of article 102.

According to Afzal CJ, where a constitutional issue of grave public importance was raised, a petitioner qualified himself to be 'any person aggrieved' since that expression when given a liberal interpretation, approximates to 'sufficient interest'. In other words, any person other than an officious intervener, or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of Bangladesh, or a person with oblique motive, having sufficient interest in the matter was qualified to be a person aggrieved and could maintain an action for judicial redress of public injury arising from the breach of public duty, or for violation of the law or of a constitutional provision, and seek enforcement of such public duty and observance of such constitutional or legal provision in the courts. There can be no strict formula as to what amounts to 'sufficient interest'. The answer will essentially depend on the co-relation between the matter brought before the court and the person who brought it.

On his part, Kamal J held that the High Court should grant locus standi to a person who agitated a question affecting a constitutional issue of grave
importance or which posed a threat to his or her fundamental rights. Where a fundamental right was involved, the impugned matter did not have to affect a purely personal right, it was enough if the applicant shared that right in common with others. In interpreting the words ‘any person aggrieved’, it was relevant to consider the fundamental rights part of the constitution. It was a matter for the discretion of the court whether it would treat a person as ‘a person aggrieved’ or not. The High Court was therefore wrong to have adhered to the traditional concept that to invoke its jurisdiction under article 102 only a person who had suffered a legal grievance, injury, adverse decision, wrongful deprivation or wrongful refusal of his title to something was a person aggrieved. The rationalisation for this ruling is briefly stated:

This is not to say that art 102 has nationalised each person’s cause as every other person’s cause. The traditional view remains true, valid and effective till today in so far as individual rights and individual infraction thereof are concerned. But when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved it was not necessary, in the scheme of our Constitution, that the multitude of individuals who had been collectively wronged or injured, or whose collective fundamental rights have been invaded are to invoke the jurisdiction under art 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that particularised cause is a person aggrieved and has the right to invoke the jurisdiction. 121

For Rahman J, a person approaching the court for redress of a public wrong or public injury who was acting bona fide and not for personal gain, private profit, political motivation or ulterior motive had sufficient interest in the proceedings to constitute locus standi to move the High Court under article 102 of the constitution. 122 In most cases an ordinary individual could come to court if he had a sufficient interest, that test being left to the discretion of the court. The traditional rule as to locus standi is that a judicial remedy was

120Cf in Prasad v Republic of Fiji (2001) 1 LRC 665 at 679b-680b-c, where Gates J cited in approval the view expressed by Wade & Forsyth, Administrative law (7ed 1994) 712 that the real question ‘is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved’ and held that, the applicant, an indigent farmer who claimed to have lost rights by the purported abrogation of the Constitution of Fiji 1997 following an attempted coup d'état, was not a mere busybody nor was his application frivolous or vexatious. The claim was that the applicant be re-assured that the constitution was still in place so as to protect him and to maintain his cherished constitutional rights. In the circumstances where there was no alternative remedy open to the applicant and the issues raised were sufficiently grave, of sufficient public importance and involved high constitutional principle, the applicant was held to possess the necessary standing to seek the court’s intervention. Be it noted that the argument against the applicant’s standing was abandoned on appeal: Republic of Fiji v Prasad (2001) 2 LRC 743 (CA) at 752a.

121(2000) 1 LRC 1 at 23g.

122Id at 23b-24b-c.

123(2000) 1 LRC 1 at 31e.
available only to a person who was personally aggrieved.\textsuperscript{124} In public law, that doctrine could not be applied strictly as that would be tantamount to ignoring the good and well-being of citizens, more particularly from the viewpoint of the public good, for which the state and the constitution existed. Having not been defined in the constitution, the phrase ‘any aggrieved person’ must be interpreted against the background of the different provisions, scheme and objective of the constitution and bearing in mind that the constitution is a living document, its interpretation should be liberal to meet the needs of the time and demands of the people. The constitution recognised the welfare of the people in unambiguous terms. The time was ripe for the Supreme Court to do social justice to the large segment of the population by construing the question of standing liberally.\textsuperscript{125}

The relaxation of the strict rules of \textit{locus standi} could be two-dimensional — representative standing and citizen standing. The former related to the standing in a matter pertaining to a legal wrong or injury caused or threatened to be caused to a person or class of persons who, by reason of property helplessness, disability or economic inability could not move the court for relief. The latter related to standing in a matter in which breach of public duty resulted in violation of a collective right of the public at large. In the instant case the appellant was alleging that the action of the respondents constituted a public wrong or public injury and was causing damage to the environment and human health in Bangladesh, in which specific field BElA had sufficient interest in the matter.\textsuperscript{126} Furthermore, the operation of public interest litigation should not be restricted to the violation of defined fundamental rights. In this modern age of technology, scientific advancement, economic progress and industrial growth, socio-economic rights are subject to phenomenal change. New rights are emerging which call for collective protection and the judiciary must act to protect all the constitutional, fundamental and statutory rights contemplated within the four corners of the constitution.\textsuperscript{127}

The reasoning of Roy Choudhury J was not totally different from that of Rahman J. The absence of constitutional definition and the lack of any mention therein that the expression ‘person aggrieved’ meant that an applicant had to be personally aggrieved, renders it an elastic concept which ought to receive a progressive construction in the light of the scheme and the objectives enshrined in the constitution.\textsuperscript{128} In terms of the preamble to the

\begin{itemize}
\item \textsuperscript{124}Id at 27e.
\item \textsuperscript{125}Id at 30b-c.
\item \textsuperscript{126}Id at 30cn-e. Fertiliser Corp Kamagar Union v Union of India AIR 1981 SC 344; Benazir Bhutto v Federation of Pakistan PLD 1988 (SC) 416 approved. Indeed, Krishna Iyer J had said in Fertiliser Corp that: ‘Restrictive rules about standing are in general inimical to a healthy system of growth of administrative law. If a plaintiff with a good cause is turned away merely because he is not sufficiently affected personally that could mean that some government agency is free to violate the law. Such a situation would be extremely unhealthy and contrary to the public interest.’
\item \textsuperscript{127}(2000) 1 LRC 1 at 33a.
\item \textsuperscript{128}Id at 33g–b.
\end{itemize}
constitution, it was a fundamental aim of the state to realise through the
democratic process a socialist society, free from exploitation — a society in
which the rule of law, fundamental human rights and freedom, equality and
justice (political, economic and social), would be secured for all citizens.\textsuperscript{129}
It was unthinkable that the framers of the constitution had in mind that the
grievances of millions of people should go un-redressed, merely because they
were unable to reach the doors of the court owing to abject poverty, illiteracy,
ignorance and disadvantaged condition.\textsuperscript{130} It followed that the expression
'person aggrieved' in article 102 of the constitution meant not only
\textsuperscript{131}one personally aggrieved but extended to anyone who complained on behalf of his
less fortunate fellow-beings about a wrong done by the government or a local
authority in not fulfilling its constitutional or statutory obligations. In this case,
BELA was concerned with the protection of the people from the ill-effects of
environmental hazards and ecological imbalance. It had a genuine interest in
seeing that the law was enforced and that the people likely to be affected by
the proposed project were saved. That interest was sufficient enough to bring
the appellant within the meaning of the expression 'person aggrieved' and the
appellant should be given \textit{locus standi} to maintain the writ petition on their
behalf.\textsuperscript{131}

\textbf{The Canadian judicial initiative}\textsuperscript{132}

In \textit{Thorson v Attorney General of Canada et al} (No 2)\textsuperscript{133} — decided during the
regime of the Canadian Bill of Rights Act 1961 and in advance of the
adoption of the Canadian Charter in 1982\textsuperscript{134} — the Supreme Court enunci­
ated the principle for the liberalisation of \textit{locus standi} to challenge legislation in Canada. Laskin J (later CJC) rejected the traditional approach applied in the
lower courts\textsuperscript{135} as being incapable of 'wholesale transfer to a field of federal
public law concerned with the distribution of legislative power between

\begin{itemize}
\item \textsuperscript{129}\textit{Id} at 35\textbf{b–d}.
\item \textsuperscript{130}\textit{Id} at 36\textbf{e–g}.
\item \textsuperscript{131}\textit{Id} at 38\textbf{d–e}.
\item \textsuperscript{132}Hogg \textit{Canadian constitutional law} (1997) 56–3; Sharpe (ed) \textit{Charter litigation}
(1987) ch 1; Cromwell \textit{Locus standi} (1986); Blake 'Standing to litigate constitutional
rights and freedoms in Canada and the United States' (1984) 16 \textit{Ottawa LR} 66. For
a flurry of literature provoked by the Canadian developments see De Smith, Woolf
\item \textsuperscript{133}(1974) 43 DLR (3d) 1.
\item \textsuperscript{134}By s 24(1) of the Charter, 'anyone' whose rights or freedoms are infringed or
denied may apply to a competent court for an appropriate remedy. In its use of
'anyone', the Charter is familiar grounds with s 38 of the South African Constitution
but unlike the latter Constitution, the Charter does not go further to indicate the
categories of such persons. While it may be contended that the courts in South
Africa are duty bound to develop the law of standing along the line already
identified by the constitution, the matter in the Canadian situation largely remains
in the hands of the courts to develop the jurisprudence further, they, in any event,
started the revolution.
\item \textsuperscript{135}Smith \textit{v Attorney General for Ontario} (1924) SCR 331 at 337 \textit{per} Duff J; Grant \textit{v St
Lawrence Seaway Authority} (1960) OR 298 at 303; Cowan \textit{v Canadian Broadcast­
ing Corporation} (1966) 2 OR 309 at 311; Burnham \textit{v Attorney General for Canada}
(1970) 15 DLR (3d) 6 at 11–12.
\end{itemize}
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central and unit legislatures, and with the validity of the legislation of one or other of those two levels.  

In this, and the subsequent decisions of the court in *Nova Scotia Board of Censors v McNeil*[^136^] and *Minister of Justice, Canada v Borowski*,[^138^] the principle was firmly established that in public interest litigation it was in the court's discretion to determine whether any person seeking to challenge the constitutionality of legislation — whether regulatory or declaratory — had standing. In so formulating, Laskin J stated that:

where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the court must be able to say that as between allowing a taxpayer's action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case upon the merits.  

The court must be satisfied that the three criteria established for guidance in the exercise of its discretion to grant standing in public interest litigation exist. For instance, in addition to the requirement that there must be a serious issue as to the validity of the Act which must not only be justiciable but also of public importance, the applicant must be directly affected by the Act or at least should have a genuine interest in its validity so that denial would result in there being no other reasonable and effective way to bring the Act's validity before the court. In that way, the negative implications of liberalised standing such as the concern for the allocation of scarce judicial resources; the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government would, as explained by Le Dain J in *Finlay v Canada (Minister of Finance)*[^140^], be neutralised.

There are four broad categories under which a party seeking to invoke the Charter may be granted standing. [^141^] In the first place, there is standing as of right, that is, in applicant's own private interest, the so-called private interest standing. This represents the traditional situation which takes account of the effect the law impugned has or would have on the applicant personally, so differentiating him from other members of the public. Thus the majority of the Court of Appeal of Saskatchewan held in *604598 Saskatchewan Ltd v Saskatchewan Liquor & Gaming Authority*[^142^] that a nightclub was not entitled to standing as of right to challenge section 54(1)(b) of the Alcohol Control Regulations 1994 as contravening section 2(b) of the Charter because the impugned regulations did not affect it any differently than any other holder.

[^136^](1974) 43 DLR (3d) 1 at 10.
[^137^](1976) 55 DLR (3d) 632.
[^138^](1981) 130 DLR (3d) 588.
[^139^](1974) 43 DLR (3d) 1 at 18.
[^140^](1986) 2 SCR 607 at 631-33, 33 DLR (4th) 321.
[^142^](1998) 157 DLR (4th) 82.
of a liquor licence. The fact that the club faced a threat of suspension for
count, an event did not vest it with standing as of right. 143

The second category is the problematic public interest standing which was
also denied the nightclub in the above case for insufficient evidence. 144

Category three had grown out of the decision of the Supreme Court in R v Big
M Drug Mart Ltd 145 whereby a party who would ordinarily be caught by the
first category requirement of sufficient interest would be granted standing if
he had been dragged to court on a criminal charge or in defence of a civil suit
not of his own accord. Finally, the court reserves some residual discretion to
grant standing in the light of the circumstances of a particular case.

Post-Charter public interest litigation

As much as a party's ability to attack the constitutional validity of legislation on
Charter grounds is more difficult to establish in a civil suit than in a criminal
prosecution since the party bears the burden of establishing his standing to
raise Charter issues, 146 the courts in Canada have broadened the scope of
their pre-Charter approach to standing to include non-constitutional
challenges of administrative authority. 147 It has equally been emphasised
that the criteria guiding the exercise of the courts' discretion are not merely

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143In his dissenting opinion (at 133), Cameron JA could not see how the club owner
in these circumstances could be denied private interest standing to challenge the
regulations as a person adversely affected by the law. Similarly, the owner could
have been granted public interest standing since the issue of the validity of the
regulation had no prospect of coming to court through any other means. A similar
split occurred in Kulchyski v Trent University (2001) 204 DLR (4th) 364 where the
majority of the Ontario Court Appeal refused two faculty members standing to
challenge the university's decision to close down two downtown satellite colleges
of education for, although the decision might have personally affected and
inconvenienced them, they neither suffered in their legal rights nor privileges.
Neither were they entitled to judicial intervention in the public interest. In his
dissenting opinion, Sharpe JA would grant standing to the applicants to contest the
university's decision on the basis of public interest because: the application raised
a serious justiciable issue; the applicants were either directly affected by the
decision or had a genuine issue as citizens in its legal validity; and there was no
other reasonable or effective manner to bring the issue before the court. Contra in
where the Court of Appeal of Newfoundland held that a law firm had standing to
challenge the constitutionality of s 488.1 of the Criminal Code even if the section
adequately protected the privilege between the firm and its client in the particular
circumstance. Again, the law firm affected as it was

144It could happen that the court may grant standing on public interest ground but
denies the same on private interest basis — French Estate v Ontario (Attorney


146Per Major J in Hy & Zel's Inc v Ontario (Attorney General); Paul Magder Furs Ltd
v Ontario (Attorney General) (1993) 3 SCR 675 at 690;

147Finlay v Canada (Minister of Finance) (1986) 2 SCR 607; (1986) 33 DLR (4th) 321;
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technical requirements to be applied in a mechanical fashion.\textsuperscript{148} It should not be interpreted as 'a mechanistic application of a technical requirement' since the basic purpose of allowing public interest standing 'is to ensure that legislation is not immunized from challenge'.\textsuperscript{149} The Supreme Court had reconsidered the necessity of expanding the criteria governing the grant of public interest standing and decided in favour of maintaining its earlier approach.\textsuperscript{150}

Indeed, Cory J stressed in \textit{Canadian Council of Churches v Canada}\textsuperscript{151} that the recognition of the need to grant standing beyond the traditional strand and in accordance with the new Canadian constitutional dispensation did not amount to 'a blanket approval to grant standing to litigate to all who wish to litigate an issue' for what is necessary is to strike a balance between ensuring access to the courts and preserving judicial resources. In any event,

\begin{quote}
it would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organisations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.
\end{quote}

The court denied the applicant, a federal corporation representing the interests of a broad group of member churches including the protection and settlement of refugees, standing to challenge the constitutional validity of a number of provisions contained in the amended Immigration Act 1976.

Cory J for the court, held that public interest challenge on Charter grounds was the same as in the challenges under the 1867 Constitution, that is, the equivalent of section 52 of the current Constitution of 1982 hence the principles established in \textit{Thorson, Nova Scotia Board of Censors} and \textit{Borowski} were applicable to the present claim. The judge took the opportunity to restate the factors to be considered: first, 'is there a serious issue raised as to the invalidity of legislation in question?' If that question is answered in the affirmative, the next question is whether it has been established that the plaintiff is directly affected by the legislation or whether the plaintiff has a genuine interest in its validity? Finally, is there another reasonable and effective way to bring the issue before the court?\textsuperscript{152} The court had no doubt

\begin{thebibliography}{99}
\bibitem{} Following \textit{per} Martland J in \textit{Borowski} (1981) 130 DLR (3d) 588, Cathy JA of the Ontario Court of Appeal held in \textit{Energy Probe v Canada (Attorney General)} (1989) 58 DLR (4\textsuperscript{th}) 513 that the applicants who were a public interest group rather than victims of nuclear incident were entitled to standing to bring an application for a declaration that particular provisions of the Nuclear Liability Act, RSC 1985 were inconsistent with the Canadian Charter.
\bibitem{} \textit{(1992)} 1 SCR 236 at 252–3, 88 DLR (4\textsuperscript{th}) 193.
\bibitem{} \textit{Id} at 253. See also \textit{Hy & Zel's Inc v Ontario (Attorney General); Paul Magder Furs Ltd v Ontario (Attorney General)} (1993) 3 SCR 675 at 690. Applying these principles in \textit{CCH Canadian Ltd v Law Society of Upper Canada} (2000) 179 DLR (4\textsuperscript{th}) 609 (FC, TD) at 690–1 par 188 where the appropriateness of legislation and a course of
\end{thebibliography}
that the Council had raised a serious issue of invalidity and had demonstrated a genuine interest in the subject of challenge, but that its case had failed on the third criterion since it was clear that the individual claimants for refugee status, who had every right to challenge the legislation, had in fact done so, therefore, the very rationale for public interest litigation had, in this instance, disappeared.

The applicants in *Re Canadian Bar Association v British Columbia (Attorney General)*, a provincial bar association and law society, and *Vriend v Alberta*, an individual and gay and lesbian organisations, all non-profit organisations, representing the interests of their members, were successful in securing public interest standing where the Council of Churches and the Civil Liberties Association had failed. In the Canadian Bar Association case, the provincial Bar Association had challenged the validity of the Social Service Tax Amendment Act 1992 (SBC) for imposing tax on legal services and placing an obligation on lawyers to collect the tax, and breach of the obligation could result in convictions and fines. The Association brought the challenge under the 1867 Act as well as under section 7 of the Charter. The Attorney General raised the preliminary point of lack of standing on the part of the applicants either to attack the legislation on the basis that the legal services tax was a tax within the province or on the basis that the impugned legislation was inconsistent with the Charter. The Attorney General, more or less, conceded that the applicants could be directly affected by the legislation in the sense of being subject to payment of tax in connection with legal services provided in this litigation, but denied that they satisfied the requirements for public interest standing in that they failed, it was alleged, the test that there was no other reasonable and effective way to bring the issue before the court.

action in support of rights conferred by that legislation to obtain particular remedy such as a permanent injunction were in issue, an attack of less tangible nature, Gibson J, held that there was another more effective means of addressing the Charter issues raised on behalf of the defendant. In effect, it simply would not constitute an effective and efficient use of the judicial resources to entertain the defendant’s Charter submissions in the context of this matter, particularly in the circumstances where the ‘library exception’ added to the Copyright Act RSC 1985 by Parliament was not before the court.

153 (1992) 1 SCR 236 at 255–6. In *Harris v Canada* (2000) 187 DLR (4th) 419 (FCA) all three ingredients necessary to grant a public interest litigation were found to be present where a taxpayer and member of a group formed to deal with a variety of public issues including governmental fiscal and budgetary matters, relying on the Auditor General’s report, sought a declaration that the minister was obliged to use all available measures to collect any income tax due and owing to government. It was held that the statement of claim disclosed a reasonable cause of action. It did not simply seek a statutory interpretation, but alleged favourable and secret tax treatment for certain taxpayers, which led the plaintiff to have reasonable apprehension of bad faith administration and to conclude that the Crown acted from ulterior motives. The Minister of National Revenue does not have any discretion about how the Income Tax Act RSC 1985 should be applied, but must apply it equally and fairly to all taxpayers. Accordingly, the plaintiff had public interest standing to seek the relief because he sought to ensure maintenance and respect for the limits of administrative authority.


Distinguishing the Council of Churches and adopting the reasoning in Conseil du Patronat du Quebec v Quebec (Attorney General), Lysyk J granted the applicants public interest standing to challenge the impugned legislation because they satisfied the laid down requirements. It was held, first, that the association claimed as members of the legal profession engaged in private practice of law in the province, each of whom could expect to be directly affected by the legislation and, it was thus not necessary to wait for an individual lawyer to challenge the legislation; and secondly, challenges under section 7 of the Charter were not limited to enactments providing for imprisonment as a sanction for non-compliance. The potential subjection to penal proceedings leading to conviction and fine would be sufficient to constitute a violation of the liberty interest. Koenigsberg J applied these tests in Tenants' Rights Action Coalition v Delta Corporation and held that on the materials presented, the Coalition based on its incorporation under a provincial legislation, particularly its activity in gathering and disseminating information relevant to tenants' rights in relation to secondary suites and the handling thereof by municipal governments had public interest standing to bring the petition requesting the court to declare ultra vires and invalid the municipality's secondary suites by-law for discriminating between tenants without the authority, express or implied, of the enabling statute.

In Vriend, an individual's employment at a religious school was terminated when the employer realised that the employee was homosexual. The employee and groups representing gays and lesbians, sought to challenge the Individual's Rights Protection Act 1980 which had omitted sexual orientation in its protection of certain groups that must not be discriminated against. The applicants contended that such an omission was in violation of section 15 of the Canadian Charter. This case differs from the Council of Churches and the Canadian Civil Liberties Association cases in that all the three elements to enable the court exercise its discretion to grant standing to initiate public interest litigation were present. First, the applicants had raised a serious issue as to the constitutionality of the impugned provisions most of which had excluded sexual orientation from its enumeration of prohibited grounds of discrimination and in respect of those provisions defining the functions of the human rights commission. Secondly, they had a genuine, direct and valid interest in the validity of all the provisions of the impugned legislation with respect to the omission of sexual orientation in non-employment related forms of discrimination. Thirdly, the only other way the issue could have been brought before the court in respect of the other sections would have been to wait until someone was discriminated against on the ground of sexual orientation in housing, goods and services or the like before such a challenge could be initiated with the consequent waste of judicial resources, unnecessary delay, cost and personal vulnerability to discrimination for individuals involved in those eventual cases.

158Per Cory & Iacobucci JJ at 410-411 pars 45-47.
The split decision of the Ontario Court of Appeal in *Canadian Civil Liberties Association v Canada (Attorney General)* clearly indicates that standing to challenge legislation on public interest grounds as against the traditional sufficient interest requirement of the individual litigant is not necessarily granted as a matter of course. The trial judge had granted the applicant, a non-profit corporation, standing to challenge sections 12 and 21 to 26 of the Canadian Security Intelligence Service Act as being in violation of sections 2 and 8 of the Canadian Charter of Rights & Freedoms. The majority of the court held that the applicant had no standing to challenge the provisions because the applicant presented no relevant adjudicative facts establishing that the impugned provisions violated freedom of expression, freedom of peaceful assembly and freedom of association. What constitutes serious issue of invalidity is not easy to ascertain but there must be textual over-breadth of the impugned provisions sufficient enough to establish violation. This will involve an examination of the substantive merits, though not the ultimate merits, of the application hence whether the issue raised was of general public importance could not be ascertained in the abstract. Nor could it be argued here that public interest standing was necessary since a challenge to the impugned provisions has already been made. Clearly, therefore, the granting of standing in this case would be an unnecessary waste of limited judicial resources. Again, it could not be argued that there was no other means of bringing the issue of the constitutionality of these provisions to the attention of the courts since a private individual could initiate such challenge and would be in a position to present adjudicative facts concerning the impugned provisions.

**Party involuntarily brought to court**

A distinction should be drawn between a situation where the applicant voluntarily comes to court to challenge the validity of an enactment pursuant to the so-called ‘public interest litigation’, and that where a party has been

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159 See also the split decision of the Saskatchewan Court of Appeal in 604598 *Saskatchewan Ltd v Saskatchewan Liquor & Gaming Authority* (1998) 157 DLR (4th) 82, supra.


161 In *Stinson Estate v British Columbia* (2000) 182 DLR (4th) 407 (BCCA) at 411-2 pars 11-16 per Finch JA (Hall JA concurring) held that the estate of the deceased had no standing to pursue a claim based on section 15 of the Charter which protected the equality rights of ‘every individual’. These rights were personal and the power to enforce them resided in the person whose rights have been infringed. Because the equality rights were personal in nature, they terminated at the death of the affected individual. See also *Wilson Estate v Canada* (1996) 25 BCLR (3d) 181 (SC) at 186-7; *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 1 SCR 927 at 1004.

162 Dissenting on this point (at 260-1 pars 97-102), Abella JA was of the view that as standing was essentially a preliminary issue about access to the judicial process, it was improper, at that stage in the proceeding, to go into the merit of the case. To determine the merits at that stage would defeat the purpose of public interest standing. The requirements for standing were designed to keep out needless claims and claimants but not just unsuccessful ones. In effect, while there must be enough evidence to justify the conclusion that the issue raised is an arguable one, the evidence required must not be that which will demonstrate the likelihood of success. It must not be a determinative argument against granting standing.
brought to court by way of a criminal prosecution or in defence to a civil action. It is in this connection that the cases of *R v Big M Drug Mart Ltd*\(^{163}\) and *Canadian Egg Marketing Agency v Richardson*\(^{164}\) are of great importance. Both cases involved business corporations whose enjoyment of fundamental rights are often limited to those rights which artificial legal persons could enjoy.\(^{165}\) But that was not the issue in these cases. Indeed, the Supreme Court held in the Big Drug Mart that whether a corporation can enjoy or exercise freedom of religion was irrelevant for that argument confuses the nature of the respondent’s appeal which was that the law under which it was charged for contravening the Sunday closing legislation was in violation of section 2 of the Canadian Charter guaranteeing the freedom of conscience and religion. According to Dickson J (later CJC):

> If the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act. ... A law which infringes religious freedom is, by that reason alone, inconsistent with section 2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue.\(^{166}\)

The court held that the respondent was entitled to challenge the validity of the Lords Day Act, RSC 1970 on the basis that it violated the Charter guarantee of freedom of conscience and religion.

It must be borne in mind that the respondent in *Big Drug Mart* did not come to court voluntarily as an interested citizen seeking a declaration that a statute was unconstitutional. If it were engaged in such public interest litigation, it would have had to satisfy the requirements of standing laid down in the trilogy.\(^{167}\) In the *Egg Marketing* case, the Supreme Court took the opportunity to re-examine the rule governing standing granted to corporations in criminal proceedings instigated by the state or a state organ pursuant to a regulatory scheme within the context of the exception established in the *Big Drug Mart* case. Although the court was of the view that the constitutionality of the federal egg marketing scheme challenged by two corporations was clearly an issue of national importance warranting public interest standing on the residiary discretion basis, their lordships were unanimous in their decision that the egg producers should be accorded standing as of right through the extension of the rule established in the *Big Drug Mart*. The majority of the court, led by Iacobucci & Bastarache JJ could not see the logic in granting standing to a corporation only when defending a criminal charge

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\(^{163}\)(1985) 18 DLR (4th) 321.
\(^{164}\)(1999) 166 DLR (4th) 1.
\(^{165}\)In addition to the case cited in above on the rights of non-physical persons enforcing the bill of rights, see the judgment of Lewis CJ in the *Court of Appeal of the West Indies Associated States in Antigua Times Ltd v Attorney General of Antigua* (1972) 20 WIR 573 at 583 (CA); Sir Hugh Wooding CJ in *Collymore v Attorney General* (1967) 12 WIR 5 at 20.
\(^{166}\)(1985) 18 DLR (4th) 321 at 336.
\(^{167}\)Supra.
as the rule in *Big Drug Mart* tended to suggest\(^{168}\) whereas the civil suit brought against these two corporations similarly involved their being involuntarily brought to face civil claims. The egg producers having been brought to court involuntarily by a state agency as defendants in civil proceedings pursuant to a regulatory regime, were accorded standing as of right and in equal terms as those defending criminal charges under legislation of which its constitutionality was being contested.\(^{169}\) By parity of this reasoning, just as no one shall be convicted of an offence under an unconstitutional law, no one shall be subject of coercive proceedings and sanctions authorised by an equally unconstitutional law.\(^{170}\)

**Residual discretion: the last option**

The question posed in *United States of America v Stuckey et al*\(^{171}\) was whether the appellants, three corporations, could avail themselves of section 7 protection of the right to life, liberty and security of the person — rights ordinarily enjoyed by natural persons. The applicant corporations could not therefore claim standing as of right. They did not qualify for standing under the *Big M Drug Mart* exception as they were neither brought to court on account of criminal prosecution nor were they subjected to civil suit by an arm of the state within the *Egg Marketing* principle; public interest standing was not in issue. The last option for the appellants was whether the court would, in exercise of its residual discretion, grant them standing notwithstanding that they did not fit into any of the foregoing categories. This is in line with the principle enunciated in *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*\(^{172}\) to the effect that in the exercise of its discretion, the Supreme Court of Canada would be prepared to hear Charter arguments from parties who would not ordinarily have standing to invoke it.\(^{173}\)

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169Query: should a person being investigated of a criminal offence wait for the conclusion of the investigation and the institution of criminal charges against him before he could challenge the law under which his books and records are seized? Sopinka J of the Supreme Court of Canada has held that such a person quite apart from his interest as a possible accused, has a right as an interested bystander to attack such a law in the circumstances — *Kouriessis v MNR* (1993) 81 CCC (3d) 286 at 326.

170The question for determination in *Horsefield v Ontario Registrar of Motor Vehicles* (1999) 172 DLR (4th) 43 (Ont CA) and *R v F (S)* (2000) 182 DLR (4th) 336 (Ont CA) was: where the accused person had a personal stake in pursuing the constitutionality of the statute in question, could he still pursue its constitutionality after the charge against him had been withdrawn? The answer to this question as may be gleaned from these two cases must depend on: (a) whether the question raised constitutes an important constitutional issue which if not decided now would call for determination some time in the future; and (b) whether the parties were fully represented and the issues fully canvassed.


172(1990) 2 SCR 367 at 400.

173Section 7 of the Charter extends protection only to natural persons: *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 1 SCR 927 at 1004; 58 DLR (4th) 577.
The court had accepted a passage from the judgment of Aikins J in *Jamieson v Attorney General of British Columbia*\(^{174}\) to the effect that: 'where a case has been fully argued on the merits then, notwithstanding that in the general argument it may appear that the plaintiff has no status to maintain the action, if the question involved is one of public importance then the court has a discretion to decide the case on the merits'. Owen-Flood J refused to grant standing to the corporations in *Stuckey* on the ground that the appellants' argument that the extent to which the Governor in Council may abrogate constitutional rights without parliamentary approval lacked merit since it presupposes that the federal executive alone brought the Canada-United States Treaty into force domestically. Again, the assumption that an abrogation of constitutional rights was sufficient to grant standing was equally false. Having satisfied none of the criteria outlined above, the court refused to extend the right to challenge an alleged breach of the protection afforded by section 7 of the Charter.\(^{175}\)

If, as has been held, the provisions of the Canadian Charter may be invoked only by those who enjoy its protection\(^{176}\) and a corporation or an association cannot invoke those provisions of the Charter that provide protection to individuals, then could a trade union have standing to challenge a closed shop agreement between the employers and other unions for being an infringement of its member's freedom of association as guaranteed by section 2(d) of the Charter? Again, would the fact that the union applicants for judicial review as postulated above, acquire standing because they were recognised as the exclusive bargaining agents for their members pursuant to section 27(1) of the Labour Relations Code 1996 of British Columbia? Reiterating the foregoing principles governing standing, Hutchison J answered the questions posed in the negative in *Christian Labour Association of Canada et al v BC Transportation Financing Authority*.\(^{177}\) Drawing from a body of precedent that establishes that the right of freedom of association sought to be enforced by way of this litigation was an individual right and not a group right, it could

\(^{174}(1971)\) 21 DLR (3d) 313 at 323 (BCSC).

\(^{175}(2000)\) 181 DLR (4th) 144 at 179–181 pars 117–123. Similar faith befell an optical retail store in *Costeo Wholesale Canada Ltd & Others v Board of Examiners in Optometry* (1998) 157 DLR 725 (BCSC) at 734 when it joined two professionals cited by the Board of Examiners in Optometry for breach of its rules prohibiting business associations between optometrists and non-optometrists. Its petition for judicial review of the validity of the prohibitive rules was turned down. Lowry J found that the two professionals were perfectly within their rights to challenge the rules but that the operator of the retail outlet was not so entitled since it lacked standing in that it was neither directly affected by the rules nor was it a private party having status to challenge the rules because it was 'exceptionally prejudiced' by their application. Costco could not be cited for a violation and the impugned rules did not affect it any more than any other citizen, 'certainly not to the exceptional degree necessary for standing'. The company's plea that the court should exercise its discretion on its behalf was equally rejected since 'courts grant discretionary public interest standing only where no other private litigant could step forward to challenge the law... Here, Dr. Lee and Dr. Ing are fully able and better placed to challenge the Rules and have done so.'

\(^{176}\) *Canadian Egg Marketing* n 141 above.

\(^{177}(2000)\) 187 DLR 565 (BCSC).
only be invoked by those who enjoy its protection and that a corporation or an association could not invoke those provisions on behalf of its individual members, the court denied the union standing. Trade unions have had their expectations as to the implications of the constitutional concept of free association cut down to size by common law courts who have all along maintained that freedom of association does not incorporate the purpose for which the individuals associate, such as the right to be represented by a union of one's choice, the duty on the employer to recognise a particular trade union, the freedom to collective bargaining, or the right to strike.178

Speaking on individual as against group rights in the Charter, McIntyre J in the often-cited case of Reference Re Public Service Employee Relations Act (Alta)179 said that: 'The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity that has greater constitutional rights and freedoms than the individuals possess. Freedom of association cannot therefore vest independent rights in the group.' The Canadian Supreme Court Judge further held that an interpretation of section 2(d) which would seek to grant to the individual all the protection from the activities essential to the lawful goals of an association 'would be to accord an independent constitutional status to the aims, purposes, and activities of the association',180 and this would be contrary to the intent of the Charter. Justice McIntyre's opinion, as well as that of Sopinka J in Professional of the Public Service of Canada v Northwest Territories (Commissioners),181 has been consistently followed in Canada.182 In the latter case, Sopinka J provided a classic definition of the scope and implication of section 2(d) of the Charter:

... first, that s 2(d) protects the freedom to establish, belong to and maintain an association; second, that s 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s 2(d) protects the exercise in association of the lawful rights of individuals.

It was held that for the applicants to be granted standing to invoke the Charter: 'they must fit under one of (the) four broad heads' and having failed


179(1987) 1 SCR 313 at 397.
180Id at 404.
181(1990) 2 SCR 367 at 402.
to discharge that burden of proof, they were held not entitled to standing.\textsuperscript{183} The unions' attempt to found standing on the old labour law's ill-fated agency theory\textsuperscript{184} was likewise unsuccessful. The unions claimed that as agents or representatives of their members, they had standing to complain of illegality on their behalf. On this score, Hutchison J held:

An examination of the wording of ... section (44) makes it clear that the granting of a remedy is confined to benefit the applicant whose rights and freedoms are infringed or denied. Undoubtedly, the individual members of the plaintiff unions have rights to free association which are protected by s 2(d) of the Charter. However, the plaintiffs in this action are not members of the plaintiff unions, but the unions themselves. The statutory recognition of a union as agent for its employees in the Code does not encompass any automatic right to assert Charter violations on behalf of its members, nor does it create an entity which is automatically capable of having Charter rights. While, ... the unions might pursue standing to seek a remedy under s 52 of the Constitution Act 1982, in the case at bar relief is sought only under s 24 of the Charter. Thus, the unions cannot, in this case, fit themselves into the exception created in Big M Drug Mart.... \textsuperscript{185}

Conclusion
This study has demonstrated the ebb and flow of the attitude of the courts in common law jurisdictions to the determination of an applicant's standing to contest the constitutionality of legislation or executive conduct. It is clear that courts in common law countries still hold tenaciously to the anachronistic

\textsuperscript{183}(2000) 187 DLR (4th) 565 at 571–2 par 15.
\textsuperscript{184}The agency theory in the relationship between a trade union and its members for the purposes of collective bargaining has had a chequered history of rejection by the courts. One is here concerned with the attempts by trade unions to legally enforce collective agreements entered into between them on behalf of their members and the employer(s) as binding contracts. See Holland v London Society of Compositors (1924) 40 TLR 440 (CA); Edwards v Skyways Ltd (1964) 1 All ER 494. Yet, in Yashbin v National Hockey League (2001) 192 DLR (4th) 747 (Ont SC), Cunningham J refused a player standing to review a collective agreement reached between the National Hockey League and the National Hockey League Players Association because the player was not party to the agreement and, therefore, had no independent contractual status. Since there was no evidence of unfair representation by the union or a conflict of interest between the union and the player, there was no basis for granting standing nor would there be any drastic consequence in refusing to grant the player standing. This case should be contrasted with the South African case of Coetzee & Others v Comitis & Others 2001 1 SA 1254 (CPD) where Traverso J granted standing to a player in similar circumstances to challenge in his personal capacity and as a class action the National Soccer League (NSL) constitution, rules and regulations relating to the transfer of professional soccer players whose contracts had terminated were contrary to public policy and unlawful and/or inconsistent with the provisions of the 1996 constitution and invalid. Even if the differences in these two cases could be that the agreement between the football club and the NSL was incorporated into the individual player's contract and therefore personally enforceable by the player, the trial judge in Coetzee approached the matter from the point of view of s 38 of the 1996 Constitution which had liberalised the common law of standing; the fact that the rules were akin to treating players as goods and chattels thus rendering them at the mercy of their employers once their contracts had expired and violating the most basic values underlying the constitution; and the compensation regime constituted a restraint of trade which was unreasonable and that public policy required that it be declared inconsistent with the provisions of the constitution and therefore invalid.
\textsuperscript{185}(2000) 187 DLR (4th) 565 at 572 par 18.
doctrine of *locus standi* in the face of modern constitutions. In the process, they find themselves interpreting written instruments of modern government with the hindsight of a doctrine originally designed to curtail unwarranted interference with the administration of government business at the level of what today is known as administrative law. It was through the ingenuity of the common law judges, that this impediment to contemporary constitutional interpretation was incorporated into modern constitutional adjudication. Pronouncements by the judges through case law reveal that modern courts are aware of the need to move away from this crippling attitude toward constitutional litigation yet, they tend more often than not to relapse, from time to time, into the same conservative shell. The result has been that the modernisation of *locus standi* at the initiative of the courts has been sporadic, inconsistent and unsystematic.

In spite of the bold initiatives of the Supreme Court of Canada with its appreciable change in direction in the early seventies, it can hardly be claimed that the problem of *locus standi* has been totally eliminated from the corpus of that country's constitutional adjudication. One continues to encounter irreconcilable decisions. In the same vein, it cannot be successfully maintained that the Canadian judicial initiative has opened the judicial floodgates. Rather, it has given vigilant individuals, persons, groups and organisations the opportunity of bringing to the attention of the courts the constitutional failings of the government, its departments and public authorities in circumstances where they would have been turned out at the instance of preliminary objections on the ground of *locus standi*. This, the courts have achieved at the expense of the traditionally dreaded cranks, meddlesome interlopers and professional litigants against whom the doctrine was originally developed. Consequently, genuinely concerned constitutional purists can now initiate legal proceedings and, indeed, obtain judgment on constitutional matters without having to labour to link their rights to litigate, or interests in the litigation, however fanciful, to the subject matter of litigation. This is the proper reflection of contemporary Canadian constitutional adjudication which the courts in America, Australia, Nigeria and Zimbabwe are yet fully to grasp or incorporate into their respective constitutional jurisprudence.