

ADMINISTRATIVE LAW: LOCUS STANDI IN JUDICIAL REVIEW PROCEEDINGS

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I. Introduction

Locus standi or 'standing' denotes entitlement to institute legal proceedings. In any proceeding, the rules of standing answer the question of whether *this* applicant is entitled to commence this particular action or other proceeding.

Not everyone is entitled to invoke the court's jurisdiction to review allegedly illegal administrative action; standing generally turns upon the nature of the applicant's interest in the matter. If the applicant is found to lack standing, then, irrespective of the merits of the case, the court will not proceed to adjudicate the claim.

II. Common Law Approach to *Locus Standi*

Perhaps the two most notable features of the law of *locus standi* for judicial review (as well as its most frequently-lamented shortcomings) are:

1. the existence of different rules of standing for the various forms of relief available, and
2. the lack of consistency and certainty in the formulation of those rules.

In spite of admonitions that "[g]eneralizations about standing to sue are largely worthless as such",¹ characterizations of *locus standi* as a "hodge-podge of special instances and contradictions"² or "a can of worms",³ and warnings that "[i]n administrative law the question of *locus standi* is the most vexed question of all",⁴ an attempt will be made to outline briefly the traditional common law approach to standing as well as recent judicial developments.

A. Standing of the Attorney-General

Traditionally, it has been for the Attorney-General, in his role as guardian of the public interest, to institute proceedings involving alleged violations of public rights. Included within the function of protecting the public interest is the Attorney-General's entitlement to institute proceedings where a public body exceeds, or threatens to exceed, its statutory powers. Absent special circumstances,⁵ private individuals do not have standing to commence proceedings respecting the infringement of public rights.

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1. Mr. Justice Douglas in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 at 151 (1970).
2. L. Jaffe, "Standing to Secure Judicial Review: Private Actions" (1961), 75 Harv. L. Rev. 255 at 258.
3. L.A. Stein (ed.), *Locus Standi* (1979) ix.
4. Lord Denning, *The Discipline of Law* (1979) 144.
5. Discussed below, under "Individual Standing".

The Attorney-General may proceed either *ex proprio motu* — acting on his own initiative — or *ex relatione*. In a relator action, the proceedings are brought in the name and on behalf of the state, but upon the information and instigation of a private individual, who is called the relator. The relator need have no particular personal interest in the subject matter of the proceedings.

The Attorney-General's consent is required for relator proceedings, and the granting or withholding of the requisite consent is within his absolute discretion.⁶ In practice, once consent is granted, the proceedings are in general conducted by the relator.

In light of his absolute discretion with respect to the initiation of relator proceedings, in those cases where an individual lacks the requisite standing, the Attorney-General has complete control over whether an action to protect public rights will reach the courts.⁷

B. Individual Standing

1. Injunctions and Declarations

The injunction is historically a private law equitable remedy, developed to restrain unlawful or unauthorized interference with private rights. Similarly, the declaratory judgment arose in the Court of Chancery as a private law remedy. While both now serve important roles in administrative law, their origins may account to some degree for the relatively strict *locus standi* requirements which accompanied their adoption in the public law field.

Only in special circumstances do private individuals have standing to institute declaratory or injunctive proceedings with respect to public rights, without seeking the Attorney-General's consent to relator proceedings. The classic statement of the law is found in *Boyce v. Paddington Borough Council*,⁸ where Buckley, J. said of the injunction:

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with . . . and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

In the first arm of the test, "private right" denotes a right, the invasion of which gives rise to an actionable wrong within the categories of private law (e.g., commission of a tort, breach of contract). With respect to the second arm, an analysis of the cases suggests that the "special damage" must be distinct from that sustained by the general public, whether the difference is one of kind or degree.⁹ An obvious shortcoming of this test is that the more widespread and general the effects of the impugned legislation or

6. *Cowan v. Canadian Broadcasting Corporation* (1966), 56 D.L.R. (2d) 578; [1966] 2 O.R. 309 (C.A.).

7. However, while the Attorney-General's refusal to consent to relator proceedings is not reviewable by the courts, several recent Canadian decisions have indicated that, in certain circumstances, the Attorney-General's refusal may be one factor to be considered in determining whether the court should allow an individual to commence proceedings in the public interest. See *infra* p. 211 et seq.

8. [1903] 1 Ch. 109 at 114; rev'd [1903] 2 Ch. 556 (C.A.); rev'd [1906] A.C. 1 (H.L.).

9. S.M. Thio, *Locus Standi and Judicial Review* (1971).

administrative act, the less likely there is to be a plaintiff who can claim special injury.¹⁰

The *Boyce* test was adopted by the Ontario Court of Appeal in *Cowan v. C.B.C.*¹¹ as applicable to claims for declarations and injunctions, and recently confirmed in England by the House of Lords in *Gouriet v. Union of Post Office Workers*.¹²

In 1908, the Supreme Court of Canada recognized another situation in which a private individual could bring suit, upholding the right of a municipal taxpayer to seek declaratory relief where an illegal expenditure was allegedly made by a municipal council.¹³ The 'ratepayers' cases have been recently reviewed by the Supreme Court with apparent approval, although the ostensible justification for allowing standing — that the ratepayer suffers special damage in the form of increased taxes — was characterized as "unreal".¹⁴

A further development in the law of standing has arisen recently from a series of judgments by the Supreme Court of Canada respecting challenges to the constitutionality of legislation. In *Thorson v. The Attorney-General of Canada (No. 2)*,¹⁵ the plaintiff brought an action on his own behalf as a taxpayer of Canada, and also on behalf of other taxpayers of Canada, seeking declarations respecting the constitutional validity of the federal *Official Languages Act*. The question of his standing was raised: the plaintiff suffered no peculiar damage nor did he suffer any actionable wrong in private law.

Several important features emerge from the decision. First, standing in taxpayers' actions was viewed as a matter for the Court's discretion, having regard to the nature of the legislation under attack. Secondly, it was emphasized that the issue raised — that of the constitutionality of legislation — was a justiciable one, traditionally within the scope of the judicial process. Thirdly, the plaintiff had asked the Attorney-General to act in his public capacity to challenge the constitutionality of the statute; the Attorney-General had declined. That refusal, coupled with the directory nature of the legislation which affected all members of the public alike, meant that, under the traditional tests, no one could come forth to challenge the legislation. This consideration weighed heavily with Laskin, J. (as he then was) who viewed the prospect of immunizing this justiciable issue from judicial review as "strange and, indeed, alarming".¹⁶

In exercising the discretion to allow the plaintiff to proceed with his suit, Laskin, J. held for the majority:

10. See for example, *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331, involving declaratory proceedings respecting the validity of temperance legislation, where the plaintiff failed to show that he was "exceptionally prejudiced", having no interest beyond that of "hundreds of other citizens".

11. *Supra* n. 6.

12. [1977] 3 All E.R. 70 (H.L.).

13. *MacIreith v. Hart* (1908), 39 S.C.R. 657.

14. *Thorson v. Attorney-General of Canada (No. 2)* (1974), 43 D.L.R. (3d) 1 at 19 (S.C.C.).

15. *Ibid.*

16. *Ibid.*, at 7.

... [W]here 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 taxpayers' action and denying any standing at all when the Attorney-General refuses to act, it may choose to hear the case on the merits.¹⁷

The *Thorson* decision was followed in *Nova Scotia Board of Censors v. McNeil*,¹⁸ where a taxpayer was held to have standing to apply for a declaration respecting the validity of provincial legislation which empowered the Board of Censors to ban films. As in *Thorson*, the Attorney-General would not agree to challenge the legislation. This case established that the *Thorson* principle was not confined to directory legislation; here the legislation was regulatory in nature. Furthermore, the fact that the legislation more directly affected business enterprises which were regulated thereunder, did not preclude an action by a citizen where the general public was also affected, given that there was no other practical means to test the legislation.

The question of a citizen's standing to challenge the validity of legislation again arose before the Supreme Court of Canada in *The Minister of Justice of Canada v. Borowski*.¹⁹ The majority reviewed the *Thorson* and *McNeil* decisions, and recognized the plaintiff's standing to challenge the therapeutic abortion provisions of the *Criminal Code*:

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.²⁰

Various provincial courts have applied the *Thorson* and *McNeil* decisions to cases involving challenges to the validity of legislation. In *Dybikowski and British Columbia Civil Liberties Association v. R. in Right of British Columbia*,²¹ *McNeil* was interpreted as requiring that the plaintiff be directly affected, although it was not necessary that he demonstrate a particular interest or peculiar injury. Accordingly, the president of a civil liberties association, who sued as a taxpayer and on behalf of all B.C. taxpayers and persons concerned with civil liberties violations, was denied standing to challenge the *Heroin Treatment Act*, despite his real and genuine concern. Similarly, the Civil Liberties Association itself lacked standing. However, a new plaintiff, a heroin addict, was allowed to be added and was accorded standing. The Court held that she was directly affected in that she faced a potential danger of being dealt with under the Act. This somewhat narrow interpretation may be contrasted with the bold assertion in *Re Clark and Attorney General of Canada*²² that *Thorson* and *McNeil* are "sufficient authority for the proposition that every citizen has the right to challenge the validity of a statute or a Regulation".

17. *Ibid.*, at 18.

18. (1975), 55 D.L.R. (3d) 632 (S.C.C.).

19. [1981] 2 S.C.R. 575.

20. *Ibid.*, at 598.

21. [1979] 2 W.W.R. 631 (B.C.S.C.).

22. (1977), 81 D.L.R. (3d) 33 at 43 (Ont. H.C.).

The Manitoba Court of Appeal in *Forest v. Attorney General of Manitoba*²³ allowed the plaintiff to challenge *The Official Language Act*, relying on *Thorson*. The Court viewed the Attorney-General's refusal to bring proceedings as a controlling relevant factor in the exercise of its discretion, and recognized that a denial of *locus standi* to the plaintiff could in effect immunize the Act from judicial review. The Court held that the plaintiff's "prolonged effort in an important cause lawfully merits the judgment of this court".²⁴ The issue of standing was not raised in the Supreme Court of Canada.

In *Re University of Manitoba Students' Union Inc. and Attorney-General of Manitoba*,²⁵ the court recognized that it had a discretion to grant standing to an applicant seeking a declaration as to the validity of legislation. However, it was stated that

... such a discretion must be exercised carefully. It is not everyone who comes to court who will or should be permitted to claim a declaration that certain legislation or a Regulation enacted pursuant to such legislation is invalid. Important to the exercise of the Court's discretion are the questions whether the applicant seeking standing is directly affected by the resolution in question or whether the applicant has a real stake in the validity of such legislation, and whether there is any other practical way to subject the challenged legislation to judicial review.²⁶

The Union was denied standing: its interest was only that some of its members might be affected by the Regulation respecting students' eligibility for social allowance, an interest labelled "remote and indirect". Clearly, in Manitoba *Thorson* and *McNeil* have not removed all obstacles to representative public interest actions.

In addition to having extended the rules of *locus standi*, the series of cases beginning with *Thorson* has marked a departure from the traditional approach to standing as a discrete, threshold issue. Particularly in *McNeil*, the Supreme Court indicated that it was preferable for the question of standing to be determined along with the merits of the case. It would appear that the question of standing is becoming fused, to some degree at least, with the issue of justiciability and the substantive merits of the case.

Some commentators have hailed the *Thorson* and *McNeil* decisions as a significant step forward: "[s]tanding in constitutional challenge cases has been freed from the shackles of precedent and analogy, so that the procedural tail should no longer wag the substantive dog".²⁷ Others have viewed the discretionary aspect of standing which emerges from these cases as contrary to legal principle, creating an "undesirable conceptual hodge podge",²⁸ and have suggested that the interests of clarity and rationality

23. [1979] 4 W.W.R. 229 (Man. C.A.); aff'd [1980] 2 W.W.R. 758 (S.C.C.).

24. *Ibid.*, at 231.

25. (1979), 101 D.L.R. (3d) 390 (Man. Q.B.). Note that this case did not involve a challenge to the constitutionality of the legislation, but rather raised the issue of whether the regulation in question was *ultra vires* the powers of the Lieutenant Governor in Council. This distinction, however, appeared to be of no significance to the Court in this case.

26. *Ibid.*, at 392.

27. J.M. Johnson, "Locus Standi in Constitutional Cases After Thorson", [1975] Public Law 137 at 159. See also P.P. Mercer, "The Gouriet Case: Public Interest Litigation in Britain and Canada", [1979] Public Law 214.

28. D. Lunny, "Notes" (1978), 12 U.B.C.L. Rev. 320 at 342.

are best served when issues of standing are clearly separated from issues of justiciability.²⁹

Do the principles emerging from the above series of decisions have any application to non-constitutional cases? As suggested by Mullan, "an extension of the *Thorson* approach to an administrative law context would not be out of place".³⁰

Some Canadian courts, most notably the Supreme Court in British Columbia, have taken a restricted view of *Thorson*, confining its scope to constitutional challenges to legislation. In the *Islands Protection*³¹ case, the Court applied the traditional 'particular interest' or 'injury peculiar' test of standing to applicants who sought declaratory relief with respect to the exercise of licensing power by the Minister of Forests. *Thorson* was deemed to be of no application to non-constitutional cases. The same restrictive view was taken in *Re Village Bay Preservation Society and Mayne Airfield Inc.*³² (application to quash a resolution of the Agricultural Land Commission) and *Re Greenpeace Foundation of British Columbia and Minister of the Environment*³³ (application for an order restraining and enjoining importation of killer whales). Similarly, in *Rosenberg v. Grand River Conservation Authority*,³⁴ the Ontario Court of Appeal denied standing to two members of the defendant Authority who sought to restrain the Authority from acting *ultra vires*. The court held that the plaintiffs lacked the pecuniary or proprietary interest necessary for standing and that "the 'discretion to permit' principle of the *Thorson* case does not extend to a case like the present".³⁵

Other courts have afforded *Thorson* a more broad application. In *Carota v. Jamieson*³⁶ a private individual sought an injunction restraining the expenditure of federal funds on a development project for Prince Edward Island. Collier, J. held the plaintiff had standing, despite the defendant's claim that the Attorney General of Canada was the proper plaintiff:

I am not convinced that in Canada's federal legal and political system (in contradistinction to a historical unitary system) the *ex relatione* type of suit is as often or as freely brought as it is thought to be in the United Kingdom. In the *Thorson* and *McNeil* cases the Supreme Court of Canada has, I consider, expressed the view that a court has a discretion, to be exercised in proper circumstances, giving an individual person standing to bring an action which might otherwise be traditionally brought by the appropriate legal officer of the Crown.

Counsel for the defendants took the position that the *Thorson* and *McNeil* cases must be confined to the situation where an individual is attempting to attack legislation as *ultra vires* the particular legislative body which purported to enact it. That was undoubtedly the factual situation in the two cases referred to. Nevertheless, the general observations through Laskin J. of the majority in the Supreme Court of Canada in the *Thorson* case, and the unanimous

29. P. Cane, "The Function of Standing Rules in Administrative Law", [1980] Public Law 303.

30. D. Mullan, "The Declaratory Judgment: Its Place as an Administrative Law Remedy in Nova Scotia" (1975), 2 Dal. L.J. 91 at 107.

31. *Islands Protection Society, Edenshaw, Naylor and Young v. R. in Right of British Columbia*, [1979] 4 W.W.R. 1 (B.C.S.C.).

32. (1982), 136 D.L.R. (3d) 729 (B.C.S.C.).

33. (1981), 122 D.L.R. (3d) 179 (B.C.S.C.).

34. (1976), 69 D.L.R. (3d) 384 (Ont. C.A.).

35. *Ibid.*, at 395.

36. [1977] 1 F.C. 19 (T.D.); *aff'd* [1977] 2 F.C. 239 (C.A.).

opinion in the *McNeil* case, to my mind at least, indicate the discretion to allow standing is not necessarily confined to an attack on legislation as *ultra vires*.³⁷

The Manitoba Court of Appeal has also extended *Thorson* beyond constitutional challenges. In *Stein v. City of Winnipeg*,³⁸ the plaintiff sought a declaration and an injunction restraining the defendant municipality from proceeding with its programme of insecticide spraying. The court noted that the relevant legislation was designed to protect the environment and revealed an express intention to encourage citizen participation. By analogy with *Thorson*, the court held that a resident had standing to challenge the municipality's intended course of action, and that participation by the Attorney-General was not required. Nova Scotia courts have also demonstrated a willingness to consider *Thorson* principles beyond the constitutional setting.³⁹

In view of the conflicting judgments in various jurisdictions, the precise scope and impact of the *Thorson* and *McNeil* principles with respect to actions for declarations and injunctions in the administrative law field await further clarification. It is to be noted that even in Manitoba, the home of the 'liberal' *Stein* decision, a court has recently suggested that the principles are of "questionable application" where no constitutional issues arise.⁴⁰

2. Certiorari and prohibition

In contrast to the declaration and injunction, the writs of certiorari and prohibition originally served the role of supervising the activities of lower courts to ensure they did not over-extend their jurisdiction. Their focus lay upon protecting the royal prerogative, rather than protecting individual rights. For largely historical reasons therefore, having regard to the original purposes of the remedies, the rules of *locus standi* developed in a more liberal manner for certiorari and prohibition than for the remedies of declaration and injunction.

An attempt briefly to summarize and reconcile judicial pronouncements respecting standing for certiorari and prohibition is a difficult task.⁴¹ To some extent, the question of entitlement to institute proceedings for certiorari and prohibition has been intertwined with the question of entitlement to relief.⁴² It has been said that anyone can apply for the remedies. Where the applicant is a "mere stranger", relief is purely discretionary.⁴³

37. *Ibid.*, at 24-25.

38. (1974), 48 D.L.R. (3d) 223 (Man. C.A.).

39. See *Fraser v. Town of New Glasgow* (1977), 76 D.L.R. (3d) 79 (N.S.S.C.); *A.G. for Nova Scotia v. Bedford Service Commission* (1977), 72 D.L.R. (3d) 639 (N.S.S.C. App. Div.), where the Court suggested that the Ontario Court of Appeal in *Rosenberg*, *supra* n. 34, construed *Thorson and McNeil* too narrowly. The Court expressly deferred, however, from deciding whether the principles extended beyond constitutional challenges to attacks on the legal validity of acts of public bodies.

40. *Burke v. The City of Winnipeg* (1982), 18 Man. R. (2d) 134 (Q.B.). However, the Court nevertheless did exercise its discretion broadly to grant the plaintiff standing.

41. See Thio, *supra* n. 9 and Stein, *supra* n. 3 for a thorough review and analysis of the case law.

42. There is some authority which suggests that entitlement to institute proceedings for prohibition and entitlement to the remedy also vary depending on whether the defect complained of is latent or patent. It is questionable, however, whether this remains an effective distinction. See for example, de Smith, *infra* n. 49, at 416.

43. *R. v. Thames Magistrates' Court, ex p. Greenbaum* (1957), 55 L.G.R. 129. See also *Thorson v. Attorney-General of Canada* (No. 2), *supra* n. 14 at 18. However, as noted by S.M. Thio, *supra* n. 9, an examination of the cases which have granted relief to a "stranger" indicates that, while the applicant may have been a stranger in the sense of not being directly involved in the impugned proceedings, (s)he always had some interest in, or was in some way affected by, the proceedings.

However, if the applicant is a "person aggrieved", (s)he will be entitled to the remedy *ex debito justitiae* ("as a matter of right"),⁴⁴ unless relief is precluded by his or her own conduct.

There are cases which have afforded the term "person aggrieved" a very narrow interpretation. In *Ex parte Sidebotham*, it was held that:

[T]he words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.⁴⁵

In general, however, courts have tended to define "person aggrieved" in a liberal fashion. Recently, Lord Denning offered the following statement on the question of standing:

The writs of prohibition and certiorari lie on behalf of any person who is a "person aggrieved", and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him. . . .⁴⁶

This interpretation has been favourably received in several Canadian decisions.⁴⁷

3. Mandamus

Mandamus is a prerogative remedy, utilized to compel the performance of public duties by public authorities. Historically, it was developed to serve the dual purposes of protecting the citizen and supervising inferior tribunals in the interests of good government. As pointed out by Stein,⁴⁸ the courts have relied on these historical foundations either to support relaxed standing rules (by emphasizing the public law purpose) or to impose strict standing requirements (by emphasizing its role to protect private interests).

Traditionally, it has been said that the rules of standing for mandamus are more stringent than those for the other prerogative remedies of certiorari and prohibition. However, "[t]he nature of the interest required to support an application for an order of mandamus cannot, in the existing state of the authorities, be defined with any degree of confidence".⁴⁹

A fairly recent application of the traditional approach is to be found in *Hughes v. Henderson and Portage la Prairie (City)*,⁵⁰ where the applicant

44. *R. v. Thames Magistrates' Court*, *ibid.* See also *R. v. The Justices of Surrey* (1870), 5 Q.B. 466; *Young v. Attorney-General of Manitoba* (1960), 25 D.L.R. (2d) 352 (Man. C.A.); *R. v. Vancouver Zoning Board of Appeal; Ex p. North West Point Grey Home Owners Assn.* (1966), 60 D.L.R. (2d) 331 (B.C.C.A.).

45. (1880), 14 Ch. D. 458 at 465, where the phrase was interpreted in a statutory context.

46. *Re Liverpool Taxi Owners' Association*, [1972] 2 All E.R. 589 at 595.

47. *Re Doctors Hospital and Minister of Health* (1976), 68 D.L.R. (3d) 220 (Ont. Div. Ct.); *Re City of Kingston and Mining and Lands Commissioner* (1977), 18 O.R. (2d) 166 (Div. Ct.). See also *John Graham and Co. v. C.R.T.C.*, [1976] 2 F.C. 82 at 93 (C.A.); *W.A.W. Holdings Ltd. v. Summer Village of Sundance Beach*, [1980] 1 W.W.R. 97 at 105 (Alta. Q.B.), *rev'd* on other grounds [1981] 1 W.W.R. 581 (Alta. C.A.).

48. *Supra* n. 3, at 86.

49. *de Smith's Judicial Review of Administrative Action* (4th ed. J.M. Evans 1980) 550.

50. (1963), 46 W.W.R. 202 (Man. Q.B.). See also, *The Queen v. Guardians of the Lewisham Union*, [1897] 1 Q.B. 498; *Watson v. Cobourg* (1924), 55 O.L.R. 531; *R. ex rel. Connelly v. Publicover*, [1940] 4 D.L.R. 43 (N.S.S.C.) per Chisholm, C.J.

ratepayers sought mandamus to compel the City to commence an action for specific performance with respect to an agreement for the sale of property. The Manitoba Court of Queen's Bench reviewed the authorities and denied standing, quoting with approval, *inter alia*, the following:

The legal right to enforce the performance of a duty must be in the applicant himself. The Court will, therefore, only enforce the performance of statutory duties by public bodies on the application of a person who can show that he has himself a legal right to insist on such performance . . . but the mere fact that a person is interested in the performance of a duty as a member of a class of persons, all of whom may be regarded as equally interested, but himself having no particular ground for claiming such performance, or that he has some ulterior purpose to serve, but no immediate interest on his own or any other person's behalf, will not be sufficient grounds for granting a mandamus.⁵¹

Also:

Under the law, a mandamus is not granted unless the applicant can 'show that he has a clear legal specific right to ask for the intervention of the Court.' . . . 'The Court has never exercised a general power to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus shall have a legal specific right to enforce the performance of those duties' . . .⁵²

The "legal specific right" test is not without its shortcomings. The term is itself confusing and ambiguous, capable of several interpretations.⁵³ Often, the cases display a confusion between the issue of *locus standi* and the question of whether the duty in question is merely owed to the Crown and therefore not amenable to mandamus irrespective of the nature of the applicant. Furthermore, the test may be viewed as little more than a tautology: "mandamus will lie to secure the enforcement of a legal duty on the application of one who is recognized by law as being entitled to apply for its enforcement by this remedy".⁵⁴

To add to the confusion, other tests have been advanced by the courts. Some have suggested that the applicable test is either that of interference with a private right or "special damage peculiar to himself",⁵⁵ which are the tests normally associated with the injunction and declaration. On the other hand, Thio has concluded that in practice, courts most often accord standing to persons who have a direct and substantial interest at stake, or who are adversely affected, and questions if in fact the test for mandamus is more stringent than for prohibition and certiorari.⁵⁶

In general, a liberalizing trend is evidenced by recent cases respecting standing for mandamus. In *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, Lord Diplock rejected the "legal specific right" test, characterizing it as "no longer cor-

51. 9 Halsbury, 2nd ed. p. 770 as quoted in *Hughes v. Henderson, ibid.*, at 205.

52. *Re Provincial Board of Health for Ontario and Toronto (City)* (1920), 46 O.L.R. 587 at 596 (App. Div.), as quoted in *Hughes v. Henderson, supra* n. 50, at 206 (citations deleted).

53. See Thio, *supra* n. 9.

54. de Smith, *supra* n. 49, at 551. See also S.M. Thio, "Locus Standi in Relation to Mandamus", [1966] Public Law 133 at 139.

55. *R. ex rel. Connelly v. Publicover, supra* n. 50, per Graham, J.; *W.A.W. Holdings Ltd. v. Summer Village of Sundance Beach, supra* n. 47.

56. *Supra* n. 9.

rect".⁵⁷ Cane has concluded that as a result of this case, "it is now probably safe to say that to the extent that standing is a matter of rule rather than discretion, the standing rule for mandamus is the same as that for certiorari and prohibition".⁵⁸

In Canada, as well, more relaxed standing requirements appear to be evolving. In *National Indian Brotherhood v. Juneau*,⁵⁹ the court refused to apply the traditional narrow tests, and recognized the standing of various organizations, representing the interests of Native Canadians, to apply for mandamus to compel a public hearing of a complaint under s. 19(2)(c) of the *Broadcasting Act*. In *Re North Vancouver and National Harbours Board*,⁶⁰ adjacent property owners and a municipality were found to have standing to compel the National Harbours Board to enforce legislation relating to illegally-moored houseboats, on the basis of *Thorson* and *McNeil*. And recently in Manitoba, local residents challenged the City's approval for the construction of a private approach from their street to a church, citing concerns about an increased volume of traffic and the resulting danger to children.⁶¹ The court noted that "while the applicants may not be 'aggrieved persons' in any strict sense, they do have an interest that . . . [is] genuine and that is peculiar to them".⁶² On that basis, standing was recognized for, *inter alia*, an application for mandamus.

C. Conclusion

A summary of the present common law position respecting *locus standi* in judicial review proceedings is in order. It must be emphasized that an attempt to summarize runs the risk of both over-simplification and misinterpretation of apparent trends.

The general rule of *locus standi* remains: the Attorney-General, acting *ex officio* or *ex relatione*, has the necessary standing to commence proceedings involving alleged public wrongs. An individual has standing to seek judicial review without joining the Attorney-General if:

1. for declarations and injunctions,
 - (a) the plaintiff can establish interference with a private right of his or special damage peculiar to himself from the interference with the public right, or
 - (b) the plaintiff is a ratepayer challenging allegedly illegal municipal expenditure, or
 - (c) the plaintiff is challenging the constitutionality of legislation or, perhaps, the legality of administrative action, and the court in its discretion grants the plaintiff standing, having regard to the following factors:

57. [1981] 2 W.L.R. 722 at 736 (H.L.).

58. P. Cane, "Standing, Legality and the Limits of Public Law: The Fleet Street Casuals Case", [1981] Public Law 322 at 331.

59. [1971] F.C. 66 (T.D.).

60. (1978), 89 D.L.R. (3d) 704 (F.C.T.D.).

61. *Burke v. The City of Winnipeg*, *supra* n. 40.

62. *Ibid.*, at 145.

- i) the justiciability of the issue,
 - ii) the nature of the challenged legislation or of the legislation governing the impugned administrative act,
 - iii) the existence of another reasonable and effective way to bring the matter before the courts for review. *Quaere*, whether prior refusal by the Attorney-General to act is a condition precedent. *Stein*⁶³ appears to indicate that it is not,
 - iv) the degree to which the plaintiff is directly affected by, or has a genuine interest as a citizen in, the subject matter.
2. for certiorari and prohibition, the applicant is an "aggrieved person", in the liberal sense of being a person whose interests may be prejudicially affected. While dicta suggest that a mere "stranger" may apply for these remedies, it is unlikely that relief would be granted to a person with no interest whatsoever in the subject matter of the proceedings.
 3. for mandamus, the applicant can establish a legal right to insist on performance of the duty. However, recent decisions suggest that it is sufficient if the applicant establishes a substantial interest in the performance of the duty, or demonstrates that his interests will be adversely affected, making the test virtually indistinguishable from the "person aggrieved" test applied in the case of other prerogative remedies.

In conclusion, it may be said that, while the tests for standing for the various forms of relief are not uniform or without ambiguity, a review of recent case law does indicate a general trend toward the liberalization and standardization of *locus standi* requirements.

III. Reform in Other Jurisdictions

The past decade has witnessed a proliferation of interest in the issue of *locus standi* in judicial review proceedings, in the form of law reform studies, legislative intervention and academic commentary. Most agree that reform is necessary. Unfortunately, little consensus emerges as to the appropriate method and scope of such reform.

A. England

In 1971, The Law Commission published a working paper,⁶⁴ in which they proposed the establishment of a single procedure for obtaining judicial review. With respect to *locus standi*, they were of the opinion that a uniform test should be adopted for the various forms of relief available. They proposed that such a test should be broadly formulated, so that any person

63. *Supra* n. 38.

64. The Law Commission, "Remedies in Administrative Law", Working Paper No. 40 (1971).

who was adversely affected by administrative action would have standing to have that action reviewed.

In 1976, the Commission submitted its *Report on Remedies in Administrative Law*.⁶⁵ They briefly noted that the law of standing was in a state of development, and that "any attempt to define in precise terms the nature of the standing required would run the risk of imposing an undesirable rigidity".⁶⁶ Accordingly, they recommended that the standing required should be "such interest as the Court considers sufficient in the matter to which the application relates".⁶⁷

Although it appears clear that the Commission had intended for its recommendations to be implemented in primary legislation, the reform was effected by an amendment to the Supreme Court Rules.⁶⁸ Order 53 provides for a single application for judicial review, obtainable only with leave of the court. Rule 3(7) states that: "The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates".

Some writers characterized the Commission's approach to standing as "ambivalent"⁶⁹ and the reform itself as typical of "the expedient attitude of the United Kingdom Government towards administrative law".⁷⁰ Most agreed that the effect of the new rules on the law of *locus standi* was unclear.

The major concern focused on the limited nature of the rule-making power, which extends only to matters of practice and procedure. It is at least arguable that the law of *locus standi* is part of the substantive law, which the rules of court would be powerless to change.⁷¹ The old common law tests would therefore prevail, unaffected by rule 3(7), although some writers were hopeful that the rules would at least encourage the development of uniform standing requirements, in keeping with the spirit of the new procedure.⁷²

A second major criticism was levied at the formula "sufficient interest", which is a relative term and arguably serves only to beg the question. Some hypothesized that it merely restated the existing law; a "sufficient interest" was an interest sufficient under the old common law rules and accordingly

65. Law Com. No. 73, Cmnd. 6407 (1976).

66. *Ibid.*, at 21-22.

67. *Ibid.*, at 22.

68. *Rules of the Supreme Court (Amendment No. 3)*, 1977, S.I./77 — 1955, as am. by the *Rules of the Supreme Court (Amendment No. 4)*, 1980, S.I./80 — 2000.

69. J. Beatson and M. Mathews, "Supreme Court Rules — Reform of Administrative Law Remedies: The First Step" (1978), 41 Mod. L. Rev. 437.

70. C. Harlow, "Comment", [1978] Public Law 1.

71. For the position that the law of *locus standi* is substantive, see C. Harlow, *supra* n. 70; de Smith, *supra* n. 49, at 568; H.W.R. Wade, "The Judicial Review Procedure Act — Comment" in *Proceedings of the Administrative Law Conference, University of British Columbia* (1979) 164. For support that standing is at least arguably substantive, see P. Elias, "Remedies in Administrative Law — A Less than Modest Reform" (1978), 37 Camb. L.J. 205; Beatson and Mathews, *supra* n. 69; P. Cane, *supra* n. 29; H. Markson, "Applying for Judicial Review: Practical Points — II", [1978] S.J. 517. For the position that the law of *locus standi* is a matter of practice and procedure see Lord Diplock in *F. Hoffmann — La Roche & Co. A.G. v. Secretary of State for Trade and Industry*, [1975] A.C. 295 at 366 (H.L.).

72. P. Elias, *supra* n. 71; J. Lambert, "Administrative Law — Reform of the Public Law Remedies in England" (1978), 56 Can. Bar Rev. 668.

would vary depending on the nature of the relief sought.⁷³ On the other hand, if it was intended to introduce a new uniform test, the formula was so open-textured as to leave the difficult policy question of who should be able to uphold law in the public interest exclusively to the judiciary with no guidance from the legislature.⁷⁴

Another perceived problem was that the "sufficient interest" clause only appears in rule 3(7) which governs applications for leave. The question was raised as to whether *locus standi* was to be considered solely at the leave stage, or whether it was open to the respondent to raise the question of standing at the final hearing.⁷⁵ It was suggested that if the rules were intended to effect any real change in the law, the "sufficient interest" provision would have been included in relation to the hearing stage as well.⁷⁶ In general, therefore, it was widely questioned as to whether the rules had achieved the desired reform.⁷⁷

In *Covent Garden Community Association Limited v. Greater London Council*,⁷⁸ the court was of the view that, as was suggested by commentators, Order 53 could not change the substantive law as to *locus standi*. The requirement of sufficient interest at the leave stage served the purpose of filtering out completely frivolous actions, but left the respondent free to raise the question of standing at the hearing.

A few months prior to the *Covent Garden* case, the Court of Appeal had the opportunity to examine Order 53 in the landmark case of *R. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Business Ltd.*⁷⁹ (often referred to as "The Fleet Street Casuals" or "The Mickey Mouse" case). In that case, the question was raised as to the Federation's standing to apply for a declaration and an order of mandamus, with respect to the Revenue's decision to give "amnesty" to approximately 6,000 casual workers in Fleet Street for past tax frauds. At the Court of Appeal level, this decision was assumed to be unlawful for the purposes of dealing with the preliminary objection to standing.

Lord Denning noted that, had the Rules attempted to change the existing law, they would have been *ultra vires*, but he accepted that "sufficient interest" did indeed represent the existing legal test for standing. Lord Denning equated the "sufficient interest" test with that of a "person aggrieved", in the liberal sense of a person having a genuine grievance or concern, in contrast to a mere busybody. Ackner, J.L. also adopted the genuine grievance test. In dissent, Lawton, L.J. restricted standing for judi-

73. H.W.R. Wade, "Reform of Remedies in Administrative Law" (1978), 94 L.Q.R. 179; Beatson and Mathews, *supra* n. 69; P. Cane, *supra* n. 29.

74. Beatson and Mathews, *supra* n. 69.

75. Beatson and Mathews, *supra* n. 69.

76. P. Cane, *supra* n. 29.

77. This general tone of uncertainty amongst academics is to be contrasted with the optimism of Lord Denning, M.R. who, in his book, *supra* n. 4, heralded the rules as introducing one simple test of *locus standi* which he hoped would be interpreted to include all but mere busybodies.

78. [1981] J.P.L. 183 (Q.B.).

79. [1980] 2 W.L.R. 579 (C.A.); rev'd [1981] 2 W.L.R. 722 (H.L.).

cial review to those who had a connection with the subject matter greater than that which citizens generally may have.

In 1981, the "Fleet Street Casuals" case⁸⁰ reached the House of Lords, providing them with their first major opportunity to examine Order 53 to see what changes, if any, had been effected by the new Rules. "Administrative lawyers reading their Lordships' speeches for the first time and hoping to find overall symmetry in the decision should be warned that they may find the experience as frustrating and perplexing as grappling with the Rubik Cube".⁸¹

There was general agreement in the House of Lords that the "sufficient interest" test at the leave stage served the limited function of filtering misguided complaints by busybodies and cranks, and other simple cases where there was a clear absence of *locus standi*. There was also a majority consensus that the issue of standing at the hearing stage was not a question to be considered in isolation from the facts and merits of the case.⁸² *Locus standi* was to be examined in light of the nature and scope of the powers and duties in question and the character of the alleged illegality. It has been suggested that this approach, which merges issues of justiciability and the nature and degree of illegality with standing "contains within it the seeds of the death of standing as an independent requirement of success in an application for judicial review",⁸³ and introduces a great deal of uncertainty into the law.

Their Lordships, however, were divided on the following important issues: whether the law of *locus standi* is procedural or substantive; whether a single uniform test applies to all forms of relief sought under the new Rules; and whether the granting of *locus standi* is purely a matter of the courts' discretion. It is hoped that future decisions will serve to clarify these fundamental issues.

In January, 1982, the *Supreme Court Act 1981*⁸⁴ was proclaimed in force. Section 31(3) embodies the provisions of rule 3(7) with respect to the "sufficient interest" requirement for leave for judicial review. While enactment in primary legislation overcomes the substantive/procedural problem, it does not ensure that "sufficient interest" will be interpreted as introducing a single test for *locus standi*,⁸⁵ nor does it provide much guidance as to the substance of such a test.

Two important lessons emerge from the English experience. First, if reform of the present rules of *locus standi* is desired, such reform should be introduced in primary legislation to avoid the substantive/procedural

80. *Ibid.*

81. J. Griffiths, "Mickey Mouse and Standing in Administrative Law" (1982), 41 *Camb. L.J.* 6 at 7.

82. Lord Fraser of Tulleybelton was alone in holding that the question of standing was "a separate, and logically prior, question which has to be answered affirmatively before any question on the merits arises" (p. 741).

83. P. Cane, *supra* n. 58, at 332.

84. c. 54, s. 31 (U.K.).

85. Griffiths, *supra* n. 81, has noted that a similar provision in s. 18(4) of the *Judicature (Northern Island) Act 1978* has not been interpreted as introducing a uniform test of standing.

debate. Secondly, a relative term such as "sufficient interest", while perhaps commendable for avoiding undesirable rigidity, may be inadequate to compel the adoption of a uniform test of *locus standi* for the various forms of relief.

B. Canada

The *Federal Court Act*⁸⁶ empowers the Trial Division of the Federal Court to award the remedies of certiorari, prohibition, mandamus, injunction and declaration against federal administrative bodies, unless, in the circumstances of the case, the Court of Appeal has review jurisdiction. The question of standing to seek these remedies is governed by the common law.

Subsection 28(2) of the Act provides that "any party directly affected" by a decision or order to which s. 28 applies may apply to the Court of Appeal to review and set aside the decision or order. This statutory standing provision has been afforded liberal construction by the courts,⁸⁷ although it has been suggested that it is narrower than the common law standing rule.⁸⁸

The Law Reform Commission of Canada⁸⁹ has recommended that judicial review of all federal administrative authorities should originate in the Trial Division of the Federal Court, and that review proceedings should be initiated by a single application for review. With respect to *locus standi*, they recommended that all parties aggrieved should have standing in proceedings for judicial review, and that the court should in addition have a discretion to grant standing to any person who it concludes has a legitimate interest.

C. Ontario and British Columbia

In 1968, the McRuer Commission submitted the first of a series of reports on civil rights in Ontario.⁹⁰ Focusing on procedural reforms of administrative law remedies, the report left the question of standing undressed, merely recommending that "the standing of a person to apply for review should be governed by the present principles, e.g., interest, etc."⁹¹

Similarly, in 1974 the Law Reform Commission of British Columbia published a report advocating procedural reform of judicial review.⁹² The Commission was of the opinion that procedural reform is separable from, and may be considered independently of, substantive issues of judicial review including *locus standi*. Acknowledging that leaving the question of standing unresolved may be regarded as inconsistent with the intent to unify judicial review procedure, they nonetheless stated that they were content to adopt a passive approach to the substantial and complex issue of *locus standi*.

86. *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, ss. 18(a), 28(3).

87. See for example, *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228; *John Graham & Co. v. C.R.T.C.*, *supra* n. 47.

88. Law Reform Commission of Canada, "Federal Court: Judicial Review", Working Paper No. 18 (1977) 39.

89. Law Reform Commission of Canada, *Judicial Review and the Federal Court*, Report No. 14 (1980).

90. *Royal Commission Inquiry into Civil Rights*, Ontario (1968), Report No. 1, Vol. 1 (Hon. J.C. McRuer).

91. *Ibid.*, at 329.

92. Law Reform Commission of British Columbia, *Report on Civil Rights, Part 4 — A Procedure for Judicial Review of the Actions of Statutory Agencies*, Report No. 18 (1974).

Both reports were followed by the respective adoption of legislation providing for a single application for judicial review,⁹³ whereby the various forms of relief are available in one proceeding. The legislation made no mention of standing requirements.

In reviewing the Ontario legislation, Mullan⁹⁴ has suggested that the Act does not change the common law requirements of *locus standi*:

1. There is no express provision regarding standing.
2. The Act refers to the applicant's entitlement to the old remedies, suggesting that entitlement is governed by the old law.
3. The Bill was introduced as intending to affect procedure only, and an explanatory booklet, sent to all the members of the Law Society of Upper Canada when the legislation was proclaimed in force, indicated that the law of *locus standi* remained unaltered.

The case law bears out the prediction that the *Judicial Review Procedure Act* would have no discernible impact on the common law respecting standing.⁹⁵

Similarly, with respect to the British Columbia legislation, commentators have noted that the Act does not change the common law rules of standing.⁹⁶ Cases decided subsequent to the passage of the British Columbia *Judicial Review Procedure Act* support this view. Most cases appear to rely on the old common law tests: *Islands Protection Society, Edenshaw, Naylor and Young v. R. in Right of British Columbia*,⁹⁷ citing the requirement of "particular interest" or of "injury peculiar" to the petitioner for declaratory relief; *Re Greenpeace Foundation of British Columbia v. Minister of Environment*,⁹⁸ where the traditional *Boyce* test was applied to injunctive relief; *MacKenzie v. MacArthur and Attorney-General of British Columbia*,⁹⁹ where the petitioner was found to have standing to apply for certiorari under the Act because his "interests" were "affected".

However, there may be some indication that the availability of various forms of relief in one proceeding has indirectly led, in some cases, to a merging of the various tests. In *Re Village Bay Preservation Society and Mayne Airfield Inc.*,¹⁰⁰ which involved an application for an order to quash a resolution, it was held that the petitioner would have to demonstrate a "particular interest" or "injury or damage peculiar to itself", the test which

93. *Judicial Review Procedure Act*, R.S.O. 1980, c. 224 (first enacted as S.O. 1971, c. 48); *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, as am. by *Court of Appeal Act*, S.B.C. 1982, c. 7, s. 64 (first enacted as S.B.C. 1976, c. 25).

94. D. Mullan, "Reform of Judicial Review of Administrative Action — The Ontario Way" (1974), 12 *Osgoode Hall L.J.* 125.

95. See for example, *Re City of Kingston and Mining and Lands Commissioner*, *supra* n. 47; *Re Town of Durham and A.G. Ontario* (1978), 23 O.R. (2d) 279 (H.C.); *Noddle v. City of Toronto* (1982), 37 O.R. (2d) 421 (H.C.).

96. M.T. MacCrimmon, "The British Columbia Judicial Review Procedure Act: Procedural Means for Obtaining Judicial Review" in *Proceedings of the Administrative Law Conference, University of British Columbia*, (1979); M. Rankin and M. Horne, "Comment" (1980), 14 U.B.C.L. Rev. 205 at 208.

97. *Supra* n. 31.

98. *Supra* n. 33.

99. (1980), 25 B.C.L.R. 303 (S.C.).

100. *Supra* n. 32.

was applied in the *Islands Protection*¹⁰¹ case to declaratory relief. This decision may be compared with *Bailey v. Langley Local Board of Health*, concerning an application for an order setting aside a decision, where it was stated that

... the thread that seems to run throughout the various decisions dealing with the status of an individual, society or corporation to initiate proceedings in court under the Judicial Review Procedure Act, or in some other manner, is whether the petitioner, applicant or plaintiff has a definite interest in the subject matter of the proceedings, whether that interest be described as "particular", "special", "private", "sufficient" or "concrete".¹⁰²

Arguably, this dictum suggests a single test of standing for all applications, that of "definite interest".

The Ontario/British Columbia experience generally indicates that the varying common law tests of standing survive the merger of the different forms of relief into one proceeding. Any indirect effect the combined procedure may have on *locus standi* is at best unpredictable. To create a single test of standing for all judicial review applications, an express statutory formulation would be required.

The Law Reform Commission of British Columbia recently reviewed the issue of *locus standi* in public interest litigation.¹⁰³ The Commission concluded that reform was necessary, but rejected the course of devising a more relaxed uniform formula for standing. Their recommendation is summarized in the following extract:

We have concluded that subject to two qualifications any member of the public should have the right to bring proceedings in respect of an actual or apprehended violation of a public right whether the violation relates to public nuisance, repeated infractions of a statute, or a public body exceeding its powers. An individual who wishes to bring such proceedings should first request the Attorney General to take action. If the Attorney General refuses or neglects to take any action, the individual should be permitted to bring the proceedings in his own name on obtaining the consent of the court. It is our view that such consent should be given unless it can be shown that there is not a justiciable issue to be tried.¹⁰⁴

Since the constitutionality of legislation always raises a justiciable issue, they recommended that the right of any member of the public to seek a declaration as to the constitutionality of provincial or federal legislation be given by statute. Draft legislation relating to public interest proceedings was included in the Commission's Report.

These proposals would serve to meet the danger of an infringement of a public right going unchallenged where individuals lack standing and the Attorney-General exercises his absolute discretion to refuse consent to relator proceedings. However, the reform is of a limited nature, apparently intended to deal exclusively with public interest matters which can presently be brought *only* in the name of the Attorney-General.¹⁰⁵ While these types of actions are perhaps those most urgently calling for reform, the Commis-

101. *Supra* n. 97.

102. [1982] 2 W.W.R. 76 at 82 (B.C.S.C.).

103. Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest*, Report No. 46 (1980).

104. *Ibid.*, at 66.

105. *Ibid.*, at 73. But *cf.* the draft legislation at p. 74, esp. the proposed s. 50.

sion's proposed scheme does not address the broader problem of individual standing in judicial review proceedings. Furthermore, the prerequisite of applying for the Attorney-General's consent may, in some cases, lead to inordinate delay where relief is urgently required. This initial application is arguably an unnecessary step, given the court's proposed power to grant standing in case of the Attorney-General's refusal or neglect to give consent. It is suggested that a requirement of mere service of notice to the Attorney-General in public interest matters would afford a simpler and more efficient procedure, while still allowing for intervention when deemed appropriate.

Also, in one respect the Commission's proposed legislation appears to be too wide in scope. It seems unlikely that the Commission intended to narrow the circumstances in which an individual could institute proceedings without the Attorney-General's consent under the present common law rules, for example, by demonstrating peculiar injury, adverse effect on his interests, etc. However, it is arguable that, in circumstances where presently proceedings may be brought either by an individual or the Attorney-General, their draft legislation would require the individual to first seek the Attorney-General's consent. Such a result would severely restrict the affected individual's present right of direct access to the courts.

Bogart¹⁰⁶ has voiced the following additional criticisms of the B.C. Report:

1. Its recommendations allow the Attorney-General to maintain too great control of public litigation.
2. It does not address the fundamental question of how such litigation is to be conducted. In particular, questions of notice to and intervention by other interested parties and provision for giving *res judicata* effect to courts' decisions were inadequately addressed.
3. The report does not address the basic issue of how such suits are to be financed.

D. Nova Scotia

The Province of Nova Scotia adopted a new code of civil procedure in 1972.¹⁰⁷ Under the new Rules, all the traditional judicial review remedies can be sought together either by action or by application, the latter being the appropriate procedure where the principal issue involves a question of law or the construction of a document and where there is unlikely to be any substantial dispute of fact.

In evaluating the Nova Scotia Rules, Mullan observed the following:

The law of standing still depends on the varying standards of the different remedies. Of course, none of these matters have been dealt with satisfactorily in the Ontario or New Zealand legislation either.

On the problem of standing the judgment of Jones, J. in the *Lord Nelson Hotel* [(1973), 33 D.L.R. (3d) 98 at 107-109 (N.S.S.C., App. Div.)] case highlights the problem in that he

106. W.A. Bogart, "Book Reviews" (1981), 59 Can. Bar Rev. 868.

107. *Civil Procedure Rules*, Nova Scotia, effective March 1, 1972.

goes through the varying criteria that the courts have developed in relation to each of the remedies being sought by the applicants for relief in that case. From such discussion, it becomes abundantly clear that some sort of reform is necessary. The differing rules of standing as between the various remedies are largely the product of separate historical development, and there appears no compelling reason for allowing the situation to continue, particularly under a new remedial structure.¹⁰⁸

E. Alberta

In 1978, a working paper on administrative law remedies was prepared for the Alberta Institute of Law Research and Reform.¹⁰⁹ After reviewing the present law with respect to *locus standi* and various alternatives for reform, the working paper presented a solution which, in effect, would abolish any standing requirement for judicial review:

It is submitted that the right to expose invalid acts and decisions by public bodies should not be limited to persons "with an interest" whether described as persons aggrieved, persons directly affected, or persons with a legal right in issue. In the absence of a general supervisory system for overseeing administrative tribunals, and as long as the courts are unable to initiate review of illegal acts on their own motion, it seems essential that anyone should be able to bring proceedings to have these matters tested. Historically, this appears to have been the attitude of the courts in relation to certiorari and prohibition, and it is only recently that references to a requirement of a direct interest for these remedies has crept into the cases.

In short, what harm would result if anyone was permitted to apply for review? The danger that the courts would be swamped with applications from meddlesome individuals can be avoided in other more effective means — including:

- a) conferring on the court a discretion to refuse relief where the defect is minor or trivial;
- b) the imposition of costs;
- c) the power to order a stay where the proceedings are frivolous [sic] or vexatious.

The solution which would be simple, fair and would tend to uphold the rule of law, is one in which an application will not be denied for want of interest — though relief may ultimately be denied if the defect is minor or inconsequential. It is submitted that a formula that would achieve this result should be devised. The following is a possible version:

"An application for judicial review shall not be denied on the ground that the applicant lacks a sufficient interest in the subject matter of the application."¹¹⁰

In their 1981-82 Annual Report, the Institute indicated that they had decided to divide their project on judicial review of administrative action into two stages. The first stage would be devoted to the introduction of a single procedure for judicial review; the second stage would involve an examination of the substantive law governing the remedies available on judicial review of administrative action. The Report indicates that procedural reform will be recommended in the form of amendments to the Rules of Court. It appears likely, therefore, that a report addressing the issue of *locus standi* will not be forthcoming until the second stage of the project.*

108. D. Mullan, "Reform of Administrative Law Remedies — Method or Madness?" (1975), 6 Fed. L. Rev. 340 at 358. See also D. Mullan, *supra* n. 30.

109. Institute of Law Research and Reform, Working Paper on Administrative Law Remedies, July 1978 (as yet unpublished and unadopted by the Institute).

110. *Ibid.*, at 52-53.

* Author's note: The Institute issued a report proposing the introduction of a single procedure for seeking judicial review remedies in March, 1984: *Judicial Review of Administrative Action: Application for Judicial Review*, Report No. 40 (1984). In that Report, they indicated that substantive matters, such as standing, would be dealt with in later stages of the Institute's project.

E. Commonwealth of Australia

The Australian *Administrative Decisions (Judicial Review) Act 1977*¹¹¹ provides a single test of standing in judicial review proceedings, namely that the applicant be a "person aggrieved". Subsection 3(4) indicates that "person aggrieved" includes a person whose "interests" are or would be "adversely affected" by the decision or action of which he seeks review. This test is arguably stricter than the tests which now apply under the common law with respect to some of the judicial review remedies.¹¹²

The question of standing has been extensively reviewed by the Law Reform Commission of Australia;¹¹³ their final report is awaited. The Commission tentatively suggested the adoption of a general formula proposed by Dr. G.D.S. Taylor involving "matters of real concern to the plaintiff":

'Concern' is a word without definite legal connotations such as those possessed by 'interest'. Use of 'real', emphasizes that busybodies are not to have standing and the word is itself a flexible one which may operate as a regulator in this context: it transforms the concept of 'concern' into one which is clearly objective.¹¹⁴

The Commission concluded:

If some standing formula is needed this formula seems as good as any. It may be better expressed negatively, so as to limit restrictive interpretation, i.e., relief is not to be denied on standing grounds unless the court is satisfied that the issues sought to be raised are of no real concern to the plaintiff. The legislation should make clear that 'concern' is not to be judged by traditional rules and, particularly, that no property interest is necessary.¹¹⁵

The Commission did point out, however, that it was also attracted to an "open door" approach, as being more correct in principle, "since it recognizes and affirms the proper interest of all citizens in the performance of public duties".¹¹⁶

G. Victoria

Section 3 of the *Administrative Law Act 1978* of Victoria allows for "any person affected" by a decision of a quasi-judicial tribunal¹¹⁷ to bring an application for judicial review. Section 2 provides that:

"Person affected" in relation to a decision, means a person whether or not a party to proceedings, whose interest (being an interest that is greater than the interest of other members of the public) is or will or may be affected, directly or indirectly, to a substantial degree by a decision which has been made or is to be made or ought to have been made by the tribunal.

111. No. 59 of 1977.

112. L. Katz, "Australian Federal Administrative Law Reform" (1980), 58 Can. Bar Rev. 341; J. Griffiths, "Legislative Reform of Judicial Review of Commonwealth Administrative Action" (1978), 9 Fed. Law Rev. 42.

113. The Law Reform Commission (Australia), "Access to Courts — I — Standing: Public Interest Suits", Working Paper No. 7, (1977); The Law Reform Commission (Australia), "Access to the Courts — I — Standing: Public Interest Suits", Discussion Paper No. 4, (1977).

114. G.D.S. Taylor, "Defence of the Public Interest in Civil Litigation", Report to the Australian Attorney-General (1974), as quoted in Working Paper No. 7, *ibid.*, at 63.

115. Discussion Paper No. 4, *supra* n. 113, at 17.

116. Working Paper No. 7, *supra* n. 113, at 71.

117. More precisely, section 2 defines "tribunal" as "a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice".

In *Charlton v. Members of the Teachers Tribunal*,¹¹⁸ the applicant sought judicial review, in his capacity as a school principal and as the President of a principals' association, of a regulation which retrospectively rescinded the operation of an earlier regulation which had increased salaries of high school principals. As his entitlement to \$330 in salary was at stake, the court held that his own interest was affected to a substantial degree and he accordingly had standing. More interesting, however, was the court's recognition of his "representative interest" as also being sufficient to afford standing under the Act:

As President of V.H.S.P.A., the association approved by the Tribunal to represent High School Principals, Mr. Charlton also has a proper representative interest in the salaries of the High School Principals, numbering about 293, virtually all of whom belong to the association. O'Bryan, J. took a similar view of the standing of the President of an approved association to seek prohibition in *In the Matter of Jenkin and In the Matter of Kennedy, Barker and Vaughan* (24 August 1979 unreported).¹¹⁹

It is to be noted that the Act is of limited ambit, applying only to "tribunals" as defined. Arguably, the requirement of an interest "greater than the interest of other members of the public" is a formula too restrictive to be considered for adoption as a general test of standing in judicial review proceedings.

H. New Zealand

In 1972, New Zealand adopted the Ontario model of reform, introducing through primary legislation a single procedure for obtaining judicial review.¹²⁰ As in Ontario, no provision was made with respect to standing requirements.

In their Eleventh Report,¹²¹ the Public and Administrative Law Reform Committee indicated that, while they had hoped that the creation of a single procedure would remove differences in standing criteria for different remedies, it was by no means clear that the Act had effected such a change. Indeed, the case law would indicate that the old common law tests have survived the legislative reform.¹²²

After examining the present law of standing and various competing policy considerations, a majority of the Committee in their Eleventh Report proposed the adoption of general legislation on standing, with a view to establishing a uniform test, stripped of technicalities and unnecessary restrictions. They were in favour of the following amendment to the *Judicature Act 1908*, which they believed would do little more than recognize the results of recent decisions on standing:

56D. (1) On an application for review under Part I of the Judicature Amendment Act 1972, or for a writ or order of or in the nature of mandamus, prohibition or certiorari, or for

118. [1981] V.R. 831 (S.C.).

119. *Ibid.*, at 854.

120. *Judicature Amendment Act 1972*, No. 130 of 1972, as am. by *Judicature Amendment Act 1977*, No. 32 of 1977.

121. Public and Administrative Law Reform Committee, *Standing in Administrative Law*, 11th Report (1978).

122. *Environmental Defence Society Inc., v. Agricultural Chemicals Board*, [1973] 2 N.Z.L.R. 758 (S.C.); *Waikouaiti County Ratepayers and Householders Association Inc. v. Waikouaiti County*, [1975] 1 N.Z.L.R. 600 (S.C.); see also D.J. Mullan, "Judicial Review of Administrative Action", [1975] N.Z.L.J. 154.

a declaration or injunction, the Supreme Court, in exercising its discretion to grant or refuse relief, may refuse relief to the applicant if in the Court's opinion he does not have a sufficient interest in the matter to which the application relates.

- (2) Subsection (1) of this section shall have effect in place of the rules of law and of practice relating to standing in respect of any such application.
- (3) This section shall not limit the provisions of any other enactment under which the Court may grant relief in any proceedings.

While similar to the proposal put forth by the English Law Commission, the particular wording was chosen to stress that standing is not a purely preliminary matter, but is to be considered along with other issues in the context of the court's general discretion to refuse relief.

The Majority's proposal may be criticized in several respects:

1. The proposed amendment does not differentiate between the use of the declaration and injunction as supervisory remedies in administrative law matters and the private law and other public law uses of the remedies.¹²³
2. The introduction of the unstructured test of "sufficient interest" may serve to increase the uncertainty in the law. Also, it is possible that the courts will simply inquire whether the applicant's interest would be sufficient at common law, thus defeating the purpose of standardizing and liberalizing *locus standi* rules.¹²⁴ It is questionable whether the "sufficient interest" test has achieved the goal of uniformity in England, although the Majority's proposal to use primary legislation, and the inclusion of subsection (2) which refers to replacing the common law rules, may result in greater success than has been enjoyed in England.
3. It fails to deal with the important question of representational standing. It is by no means clear that organizations who represent the interests of groups of people would be afforded standing under the Majority test.¹²⁵
4. It is at least arguable that the question of *locus standi* (i.e., the right to be heard by the court) should logically be a threshold jurisdictional requirement rather than merely one aspect of the court's general discretion to refuse relief.

The Minority proposal recognizes standing as a preliminary point, to be determined independently of the merits. They suggest that, in "public interest" suits, an initial application be made to the Attorney-General, requesting his consent to commence proceedings. The court would be empowered to make "standing orders" in cases where the Attorney-General declines consent, having regard to such factors as whether the applicant genuinely represents the interests of at least a significant section of the

123. This deficiency has also been noted by J.A. Smillie, "Locus Standi — The Report of the Public and Administrative Law Reform Committee" (1978), 4 Otago L.R. 141.

124. This concern was expressed by the Minority. See also J.A. Smillie, *ibid.*

125. The Minority deals with this concern in the Report.

public, the nature of the statutory power in question and the public's relationship thereto. In applications not involving the "public interest", the common law rules of standing would prevail. The Majority regarded this proposal as cumbersome and time-consuming, depriving litigants of direct access to courts. It might also be noted that the proposal does not effect a standardization of standing requirements for the various forms of relief.

I. United States

Since 1946, the *Administrative Procedures Act* has contained a general standing provision which reads as follows:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.¹²⁶

In a series of decisions, the Supreme Court reformulated the standing doctrine, prescribing a two-part test: "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise";¹²⁷ the second is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question".¹²⁸

The "injury in fact" need not be economic: aesthetic or environmental harm is sufficient to lay a basis for a claim.¹²⁹ As well, it matters not that the harm is suffered by many, so long as the applicant is amongst those injured.¹³⁰

The recognition of non-economic values and the rejection of a need to prove injury greater than that suffered by other members of the public were welcome developments. However, they would appear to be the result of judicial formulation, rather than inherent in the wording of the statutory test of standing in § 702.

The liberalizing trend of the late 1960's and early 1970's, however, has given way to a new trend, one of judicial restraint. As one writer has commented, "[t]he present Burger Court has restrictively redefined standing to the extent that non-traditional litigants seeking to assert the public interest are virtually barred from the courts".¹³¹

It is perhaps interesting to contrast the views expressed by Chief Justice Burger with those voiced by Chief Justice Laskin respecting constitutional challenges by citizens. The former stated the following in *Schlesinger v. Reservist Committee to Stop The War*:

To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial

126. 5 U.S.C. § 702.

127. *Association of Data Processing Service Organizations v. Camp*, *supra* n. 1, at 152.

128. *Ibid.*, at 153. See B. Schwartz, "Recent Developments in American Administrative Law" (1980), 58 Can. Bar Rev. 319 at 333; L. Albert, "Standing to Challenge Administrative Action" (1974), 83 Yale L.J. 425.

129. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

130. *Ibid.*

131. D.L. Haskett, "Locus Standi and the Public Interest" (1981), 4 Can.-U.S. L.J. 39 at 64.

process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction".¹³³

He further held that a plaintiff should not be granted standing simply because the effect of denying him standing might be to preclude any other plaintiff from litigating the issue. Indeed, in *United States v. Richardson*¹³³ he argued that the absence of any plaintiff other than a citizen or taxpayer is indicative of the political nature of the issue and hence the impropriety of judicial intervention.

This may be compared with the concern expressed by Laskin, J. (as he then was) for the "strange and indeed alarming" consequences resulting if impugned legislation was immunized from constitutional challenge because no plaintiff was in a better position than any other to take up the cause.¹³⁴

IV. Considerations for Reform

A. A Single Test of Standing

Most commentators agree that the existence of different tests of standing for different remedies, largely a product of separate historical developments, is presently without justification.¹³⁵

... [I]t is a defect in administrative law that the various remedies should have differing rules as to standing. In a fully logical system there should be only one rule as to standing, which should be unaffected by the nature of the remedy which the court may ultimately award.¹³⁶

It has been suggested recently by Lord Wilberforce¹³⁷ that the stricter rule of standing for mandamus, as compared to certiorari, is a "rule of common sense", and that it is "obvious enough" that the required interest on the part of the plaintiff should be different for the two remedies. As pointed out by Cane,¹³⁸ however, it is not entirely clear why, in his Lordship's view, the applicant for mandamus should be treated differently from the applicant for certiorari.

Wade has concluded that no good reason has been given for this differentiation; the rule has merely been mechanically repeated:

As regards the standing of an applicant for mandamus, the law should in principle be no more exacting than it is in the case of other prerogative remedies. It should recognize that public authorities should be compellable to perform their duties, as a matter of public interest, at the instance of any person genuinely concerned; and in suitable cases, subject always to discretion, the court should be able to award the remedy on the application of a public-spirited citizen who has no other interest than a regard for the due observance of the law. The most recent decisions show that the law may indeed be reaching this position, despite earlier authorities laying down much more restrictive rules. One of the many anomalies which disfigure the law of remedies will then have been removed.¹³⁹

132. 418 U.S. 208 at 222 (1974).

133. 418 U.S. 166 (1974). See D.L. Haskett, *supra* n. 131, at 69.

134. *Thorson v. Attorney-General of Canada (No. 2)*, *supra* n. 14.

135. See for example, P. Cane, *supra* n. 29 at 326; D. Mullan, *supra* n. 108, at 358; J.A. Smillie, *supra* n. 123; Public and Administrative Law Reform Committee, *supra* n. 121.

136. H.W.R. Wade, *Administrative Law* (4th ed. 1977) 546.

137. *Supra* n. 79 (H.L.), at 728.

138. *Supra* n. 58, at 331.

139. *Supra* n. 136, at 608, endorsed by Lord Denning, M.R., *supra* n. 79 (C.A.), at 586.

With respect to declarations and injunctions, when used as administrative law remedies, there also appears to be no reason for imposing stricter standing requirements than for other supervisory remedies.¹⁴⁰

There being no apparent justification for retaining divergent rules of standing, the development of a single test for all forms of relief is desirable and would be consistent with the goal of simplifying and unifying the procedure for judicial review.

B. Liberalizing Standing Requirements

1. The role of the court

Before reaching a decision as to what the rule of standing ought to be, a theory or underlying philosophy respecting the function of administrative law remedies and the role of the court in judicial review must be developed. Two competing theories emerge, one calling for a restricted view of *locus standi*, the other for a liberalization or, indeed, abolition of the rules.

The narrow approach emphasizes the court's role as a protector of private rights and adopts a dispute-settling model for judicial review:

It is accepted, I believe, that the primary role of judicial review is the protection of interests specially affected by alleged illegal official action; its articulation for this purpose has been highly developed by the courts.¹⁴¹

[Courts] are dispute-resolving tribunals established to determine contested rights or claims between or against persons . . .¹⁴²

If the primary aim of the judicial system is to protect individual rights, the courts' concern with lawful administration arguably is limited to the extent that individual rights or interests are infringed. A person seeking judicial review, therefore, must demonstrate some personal interest before invoking the supervisory jurisdiction of the courts.

The broader approach emphasizes the court's function of upholding the rule of law and preserving legal order by confining the legislative and executive branches of government to a lawful exercise of their powers:

Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the 'public interest'.¹⁴³

In the face of ever-increasing government regulation of private action, the only legal protection available to the private citizen against arbitrary, oppressive or misguided use of governmental power lies in his ability to enlist the aid of the courts to compel administrators to comply with the restrictions imposed by Parliament to limit the scope of their discretions. To the extent that restrictive rules of *locus standi* reduce the opportunities for judicial enforcement of legislative checks upon administrative discretion, they insulate the administration from judicial supervision and increase its effective power. To the extent that liberal standing requirements increase the likelihood of unlawful governmental action being suc-

140. See I. Zamir, *The Declaratory Judgment* (1962) 272-275 for a criticism of the "special damage" test in relation to declarations.

141. L.L. Jaffe, *Judicial Control of Administrative Action* (1965) 459.

142. Laskin, C.J.C. in *Borowski v. Minister of Justice of Canada*, *supra* n. 19, at 579.

143. Schwartz and Wade, *Legal Control of Government* (1972) 291.

cessfully challenged in court, they operate as a deterrent against administrative illegality and enhance the prospects of lawful and accountable government.¹⁴⁴

By focusing on the courts' role as arbiters of what is legal and illegal, restrictive *locus standi* requirements can be viewed as impeding the judicial function. A citizen's general interest in administrative legality and the constitutionality of legislation would be sufficient to set the judicial machinery in motion.

The following guideline was endorsed by the English¹⁴⁵ and British Columbia¹⁴⁶ law reform agencies when making proposals for the reform of remedies in administrative law:

The remedies' primary object is not to assert private rights, but to have illegal public actions and orders controlled by the courts . . .

It is suggested that this guideline be adopted when formulating rules respecting *locus standi* to apply for these remedies.

2. Arguments against liberalization

(i) Opening the floodgates

Concern has been expressed that a relaxation of standing requirements would result in the courts being inundated by a flood of litigation. Courts have only limited resources, and public authorities should not be plagued with the cost and inconvenience of a constant stream of court proceedings:

If every taxpayer could bring an action to test the validity of a statute . . . it would in my view lead to grave inconvenience and public disorder.¹⁴⁷

Johnson has referred to this concern as "the sterile and hackneyed 'floodgates' argument, that hobgoblin of some judicial minds, the fear that too many people will approach the court seeking justice!"¹⁴⁸

The floodgates argument can be discounted for several reasons. First, as noted by the Public and Administrative Law Reform Committee,¹⁴⁹ wide standing rules in particular statutes or in other jurisdictions have not resulted in a spate of litigation. Secondly, it is unreal to assume:

. . . the existence of a shoal of officious busybodies agitatedly waiting, behind 'the floodgates', for the opportunity to institute costly litigation in which they have no legitimate interest.¹⁵⁰

Thirdly, the courts already have extensive powers to deal with unmeritorious proceedings. Fourthly, the doctrine of *stare decisis* would discourage a multiplicity of proceedings with respect to the same issue.

144. J.A. Smillie, *supra* n. 123, at 145.

145. The Law Commission, *supra* n. 64, at 56.

146. Law Reform Commission of British Columbia, *supra* n. 92, at 26.

147. *Thorson v. Attorney General of Canada (No. 2)* (1971), 22 D.L.R. (3d) 274 at 278 (Ont. H.C.); aff'd 25 D.L.R. (3d) 400 (Ont. C.A.); rev'd 43 D.L.R. (3d) 1 (S.C.C.), echoing the sentiments of Duff, J. in *Smith v. Attorney-General of Ontario*, *supra* n. 10.

148. *Supra* n. 27, at 152.

149. *Supra* n. 121, at 5-6. See also The Law Reform Commission (Australia), Discussion Paper #4, *supra* n. 113, at 6-8; The Law Reform Commission of Western Australia, "Working Paper on The Judicial Review of Administrative Decisions" (1981) at 90-91.

150. Dean, J. in *Phelps v. Western Mining Corporation Ltd.* (1978), 20 A.L.R. 183 at 189 (Aust.); see also I. Zamir, *supra* n. 140, at 272.

Laskin, J. as he then was, in *Thorson*, was unimpressed by the flood-gates argument and dismissed it thus:

I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder . . . The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; and as a matter of experience, *MacIlreith v Hart* . . . does not seem to have spawned any inordinate number of ratepayer's actions to challenge the legality of municipal expenditures.¹⁵¹

(ii) Separation of powers

It is sometimes suggested that restrictions on standing serve to restrain the courts from encroaching on the powers of the executive and legislative branches of government. To allow a person with no particular personal grievance to challenge administrative action is to lead the court away from its traditional adjudicative role and turn it into a second-tier administrative decision-maker.¹⁵² This argument is unconvincing:

Standing rules should not be used as a mechanism for restricting the activities of the courts to adjudication and for preserving to the administration and the legislature the role of weighing competing interests in society. They should be used only to ensure that an appropriate applicant is before the court. A doctrine of justiciability and the grounds of *ultra vires* are better mechanisms for keeping the courts within what is perceived to be their proper constitutional sphere of activity.¹⁵³

(iii) The proper plaintiff

Insofar as it is argued that only a plaintiff with some personal interest at stake will competently and thoroughly argue a case, the 'proper plaintiff' argument also is unconvincing:

Such contention . . . ignores the fact that many public interest litigants are similarly committed to their cause, and will fight for it just as vehemently and will prepare for its presentation just as, if not more, meticulously as private litigants.¹⁵⁴

At the very least, financial investment, if not ideological commitment, in litigation should ensure serious and proper presentation.

There is one respect, however, in which the 'proper plaintiff' argument does merit serious consideration. In situations where one party is more affected than other members of the public, should persons other than that party be entitled to obtain relief in judicial proceedings?

In an address delivered to members of the Law Society of Manitoba,¹⁵⁵ Professor Mullan cited a recent case from Nova Scotia in which a parents association challenged the dismissal of a school principal, citing violations of natural justice.¹⁵⁶ The principal himself did not seek judicial review. Professor Mullan questioned whether the parents association should have

151. *Supra* n. 14, at 6-7, adopted by the Manitoba Court of Appeal in *Stein v. City of Winnipeg*, *supra* n. 38, at 236.

152. See P.C. Weiler, "Of Judges and Scholars: Reflections in a Centennial Year" (1975), 53 Can. Bar Rev. 563; Burger, C.J. in *Schlesinger*, *supra* n. 132.

153. P. Cane, *supra* n. 29 at 327.

154. D.L. Haskett, *supra* n. 131 at 42.

155. Isaac Pitblado Lectures on Advocacy: Rights and Remedies — New Developments, February 26, 1983.

156. *Re Ratepayers of the School District of the New Ross Consolidated School* (1979), 102 D.L.R. (3d) 486 (N.S.S.C.T.D.).

been allowed standing to vindicate the principal's rights. If the party most directly affected chose not to challenge the decision to dismiss, why should 'outsiders' be allowed to interfere?

Similar concerns have been expressed by Laskin, C.J.C. in his dissent in *Borowski*¹⁵⁷ and by the New Zealand Public and Administrative Law Reform Committee.¹⁵⁸

There are, however, ways to deal with this problem other than by the retention of strict standing rules. Where the applicant is a person affected, albeit not as directly affected as another person, provision could be made requiring that notice be given to the party more directly affected, with further provision for intervention by such a party to ensure that his interests are properly represented. Furthermore, it is important to remember that the actual granting of relief remains within the discretion of the court. In *PPG Industries Canada Ltd. v. The A.G. of Canada*,¹⁵⁹ the Attorney General applied to quash a decision of the Anti-dumping Tribunal. The Attorney General had not been a party to the inquiry which resulted in the decision, nor had he attempted to intervene. None of the parties who had been adversely affected by the decision sought to attack it. In exercising discretion to refuse relief, the Court said:

There is also the fact that none of the parties affected by the decision took exception to it, nor are any of them lending their support to the Attorney General of Canada in the present case. Even if there be some taint in the decision . . ., I cannot regard it as sufficient to warrant a Court in quashing it at the instance of the Attorney General of Canada acting not from an aggrieved position but in purported protection of the public interest.¹⁶⁰

Such discretion to refuse relief, coupled with notice and intervention provisions, should provide an adequate check to ensure that the interests of parties more directly affected than the applicant receive due consideration.

3. The role of the Attorney-General as protector of the public interest

An expansion of the rules regulating the standing of individuals necessarily reflects upon the Attorney-General's traditional role as the proper plaintiff in actions regarding violations of public rights. As discussed previously, at present in cases where individuals lack standing to institute public interest proceedings, application may be made to the Attorney-General for his consent to relator proceedings.¹⁶¹ The Attorney-General's power to refuse such application, in effect, gives him control over whether proceedings to review illegal administrative action will reach the courts in those cases where individuals lack *locus standi*.

157. *Supra* n. 19.

158. *Supra* n. 121, at 7-9.

159. [1976] 2 S.C.R. 739.

160. *Ibid.*, at 749-750.

161. The Attorney-General's Department in Manitoba has indicated that in the past twelve years, there were only approximately three requests for the Attorney-General's consent to relator proceedings (letter from Director of Civil Litigation, Department of the Attorney-General to J. Tokar, Manitoba Law Reform Commission, February 8, 1983). Two such applications were made by municipalities with respect to the abatement of a public nuisance. The third application was presented by a group of residents seeking an injunction to prevent a public bus from travelling down their street. This latter application was refused. It appears, therefore, that the relator proceeding has not been widely used recently in Manitoba. The reason for such few applications is a matter of speculation, although the Manitoba courts' generous approach to individual standing may, in part, account for this situation.

The necessity to obtain the Attorney-General's consent for an action in the public interest has met with some criticism. Particularly with respect to constitutional challenges, it has been pointed out that the Attorney-General is put in the incongruous position of being asked to challenge the validity of legislation which it is his duty to enforce.¹⁶² Furthermore, criticism has been levied at the Attorney-General's role in proceedings involving allegedly illegal administrative acts of his own government.¹⁶³ His dual role as a member of the Cabinet and the guardian of public rights is a delicate one:

One of the main reasons normally advanced for the rigidity of the standing requirements where public rights were involved was the constitutional position of the Attorney-General as the protector of the public interest and thus the appropriate person to initiate litigation in such cases. This traditional role, however, is one that bears little relationship to reality, particularly where the legislation concerned or the decision in issue has been initiated by the government of which the Attorney-General is a member or where the matters complained of relate to the actions of Ministers of the Crown, government departments or agencies, or government-appointed tribunals. The practicalities of partisan politics and the ambivalence of his position as both a member of the Cabinet and a Law Officer of the Crown have virtually eliminated this function of the Attorney-General.¹⁶⁴

In light of these concerns, it is not clear that the Attorney-General is necessarily the only proper protector of the public interest. It is suggested that a widening of standing rules, which would allow individuals to bring proceedings respecting public rights which are presently within the Attorney-General's exclusive domain, would be justified. However, it is desirable that the Attorney-General continue to have an opportunity to participate in public interest suits, particularly to ensure a presentation of broad interests to the court. Accordingly, any widening of individual standing rules should be accompanied by provision for notice and intervention by the Attorney-General, where deemed appropriate.

V. Is Reform Necessary in Manitoba?

Locus standi for judicial review in Manitoba is governed by the common law rules which, as noted previously, vary from remedy to remedy (at least in their formulation, if not always in their application). However, recent decisions throughout the Commonwealth demonstrate a general trend toward liberalization of the rules, and the differences in the standing requirements for various remedies are becoming less apparent.

Manitoba courts in particular have displayed a relatively relaxed attitude toward *locus standi*. As was earlier noted, in the *Stein* decision¹⁶⁵ the Manitoba Court of Appeal extended the application of *Thorson* to an administrative law setting, allowing a resident to bring injunctive proceedings on behalf of himself and all Winnipeg residents, to enjoin pesticide spraying. This demonstrates a receptivity to public interest actions by individuals, at least with respect to environmental issues where an intention to encourage citizen participation is evidenced by the governing legislation.

162. J.M. Johnson, *supra* n. 27, at 144-146; see also Laskin J. in *Thorson*, *supra* n. 14 at 7.

163. I. Zamir, *supra* n. 140, at 273-275.

164. D. Mullan, *supra* n. 30, at 103.

165. *Supra* n. 38.

A similar liberalism has been demonstrated in Manitoba where individuals have sought review of decisions affecting their competitors. In *Re Swan River-The Pas Transfer Ltd. v. Highway Traffic and Motor Transport Board*,¹⁶⁶ the Court of Appeal granted standing to certain companies who wished to have an order, in favour of one of their competitors, construed pursuant to Rule 536 of the Queen's Bench Rules:

To argue that only the applicant's business interests and not their rights would be affected by an order of the Board . . . would emasculate the meaning of the word "rights". Nor . . . is Kleyson the only party who may apply to the Court because Kleyson is the only one named in the original Board order. The applicants, who have a vital interest in the extent of Kleyson's authority, because of the effect of competition, would also have the necessary status to invoke the Court's intervention.¹⁶⁷

In general, Manitoba courts appear to prefer to decide a case on its merits, rather than dismiss a case on a preliminary objection to *locus standi*. In *Central Computer Services Limited and Comcheq Services Limited v. Toronto Dominion Bank*,¹⁶⁸ an objection was raised as to the plaintiff's status to seek an injunction to restrain the defendant from continuing allegedly *ultra vires* business practices. Normally, only a shareholder or the Attorney-General (respecting functions of a public nature) has standing to restrain a corporation from acting beyond its powers. O'Sullivan, J.A. nevertheless concluded:

It would be a waste of time to require plaintiffs to acquire indisputable status, either by inviting the intervention of the Attorney-General, or by acquiring shares in the defendant corporation. Hence, in the circumstances of this case, I am prepared to deal with the issues as if it were clear that the plaintiffs have the status necessary to proceed with their suit . . .¹⁶⁹

Similarly, in the *Burke* case,¹⁷⁰ a resident was held to have standing to seek certiorari, mandamus and declaratory relief respecting the municipality's approval of the construction of a 'private approach'. Although the plaintiffs did not strictly satisfy the traditional standing tests, Kroft, J. held:

I have concluded that, in exercising my discretion, I ought not to take too narrow an approach in determining status. This conclusion is reinforced by my finding that the proceedings are brought *bona fide*, and are based on a concern that is peculiar to the residents of Norquay Street. I think it better to rule on the merits and substance of the main issues of the application than to dismiss on a narrow approach to standing.¹⁷¹

In light of the very liberal approach generally taken by Manitoba courts, it has been suggested that legislative intervention in relation to *locus standi* may well be unnecessary in Manitoba.¹⁷²

It is submitted that, particularly because of the relatively generous application of standing rules by our courts, reform in Manitoba should be

166. (1974), 51 D.L.R. (3d) 292 (Man. C.A.).

167. *Ibid.*, at 302. See also *Re I. Peters Transport Ltd. and Motor Transport Board of Manitoba* (1981), 128 D.L.R. (3d) 529 (Man. C.A.); cf. *Rothmans of Pall Mall Canada Ltd. v. M.N.R. (No. 1)*, [1976] 2 F.C. 500 (C.A.).

168. (1979), 107 D.L.R. (3d) 88 (Man. C.A.). It is to be noted that this case is not an "administrative law" case.

169. *Ibid.*, at 98.

170. *Supra* n. 40.

171. *Supra* n. 40, at 147.

172. M.B. Nepon, Faculty of Law, University of Manitoba, at a meeting with Ms. D.M. Miller of The Manitoba Law Reform Commission, Dec. 23, 1980.

approached with caution. To rework a metaphor developed by Vining,¹⁷³ under the present rules, there are a number of doors to the courtroom, and the Manitoba courts have been generous in providing plaintiffs with keys. In rebuilding with a new, single entrance, care should be taken to give a key at least to everyone who had one before.

However, while caution is in order, legislative reform of standing rules is nevertheless desirable.

To the extent that simplicity and rationality are viewed as laudable qualities in a legal system, the present formulations of *locus standi* rules fall far short of being adequate. There is no reason for the diversity of tests and, in some cases, the rules are unnecessarily restrictive. Courts should be freed from the shackles imposed by these rules, and no longer be forced to pay lip-service to diverse and stringent tests while nonetheless exercising a discretion to grant standing. Furthermore, while the Manitoba Court of Appeal did apply the *Thorson* principles in an administrative law context in *Stein*, it cannot be said that such application is as yet firmly rooted, particularly in light of the consistent refusal of certain other jurisdictions to apply *Thorson* beyond the constitutional setting.

VI. Recommendations for Reform

It was earlier suggested that the following guideline be adopted with respect to standing for judicial review:

The remedies' primary object is not to assert private rights, but to have illegal public actions and orders controlled by the courts . . .

The Australian Law Reform Commission's observation that an "open door" approach to standing is most correct in principle, since it recognizes the interest of all citizens in the lawful performance of public duties,¹⁷⁴ is not unattractive when viewed with this guideline in mind. Law reform agencies in Alberta¹⁷⁵ and to a lesser extent in British Columbia,¹⁷⁶ have also demonstrated an inclination to allow anyone to seek judicial review. J.A. Smillie has made the following observation:

Some commentators have argued for abolition of all *locus standi* requirements. They maintain that personal litigation costs and the risk of an order to pay the respondent's costs, together with the courts' existing 'avoidance' powers to strike out vexatious or hypothetical proceedings and deny relief in the exercise of their discretion, provide sufficient checks against officious meddlers. While the writer would preserve existing standing requirements for the private law and wider public law uses of the injunction and declaration, he sees *no real objection to complete abolition of all locus standi restrictions upon applications for review of exercises of governmental power by public officials* under The Judicature Amendment Act.¹⁷⁷ (emphasis added)

The argument in favour of abolishing *locus standi* requirements is not without merit and warrants serious consideration. However, as noted by

173. J. Vining, *Legal Identity* (1978) 41.

174. *Supra* n. 116.

175. *Supra* n. 109, although it should again be emphasized that the views presented in the working paper have not as yet been adopted by the Alberta Institute.

176. *Supra* n. 103.

177. *Supra* n. 123, at 160-161.

Smillie, "it is appreciated that such a proposal may be politically naive".¹⁷⁸ One should also not be unmindful of the danger of unforeseen potential abuse of the court by 'meddlesome interlopers' (although this danger should not be over-exaggerated). It may appear that costs of litigation, the power to strike vexatious proceedings, the doctrine of justiciability, the discretion to deny relief and provision for notice and intervention by other parties would provide adequate safeguards. Nevertheless, rather than flinging wide open the courtroom doors, it is suggested that a more prudent course would be to attempt to formulate a single, liberal rule of standing which would provide generous, but not unlimited, access to the courts. While it may be that such an approach compromises to some extent the principle that the primary object of judicial review is the control of illegal administrative action, strict adherence to principle must at times give way to caution and practical concern. Furthermore, liberalization, while perhaps not embodying the principle to its full extent, is certainly consistent with and an acknowledgement of the 'droit objectif' principle of judicial review.

It is suggested that the phrase "person aggrieved" be avoided, because of the myriad and diverse interpretations of that phrase throughout the centuries. Also, "sufficient interest" is not recommended, because of its inherent relativity. More commendable would be a provision allowing courts to deny standing to a person deemed to have no 'genuine concern' or 'genuine interest'¹⁷⁹ in the matter respecting which judicial review is sought. Such a phrase is relatively free from precedent and could afford generous access, while still leaving the court with room for discretion to deny standing to the busybody.

Another, somewhat more cautious, approach would be to adopt a two-tiered formulation for standing, first acknowledging standing as of right to those actually affected or aggrieved by administrative action and secondly, providing the court with discretion to confer standing on those not meeting the requirements of the first test.

A simple version of this option is that proposed by the Law Reform Commission of Canada:¹⁸⁰

All parties aggrieved should have standing in proceedings for judicial review, and the court should in addition have a discretion to grant standing to any person who it concludes has a legitimate interest.

A more detailed provision has been proposed by J.A. Smillie:

... [T]he writer feels obliged to attempt to draft realistic and workable rules which would provide (1) a single test of individual standing which would effect significant extension of standing rights to safeguard legitimate personal interests affected by governmental action, and (2) a simple but reasonably clear test which would extend locus standi to representatives of relevant public interests affected by administrative decision-making. It is submitted that inclusion in the Judicature Amendment Act 1972 of a provision along the following lines should secure these objectives.

178. *Supra* n. 123, at 161.

179. See Kroft, J. in *Burke v. The City of Winnipeg*, *supra* n. 40; Denning, M.R. in the *J.R.C.* case, *supra* n. 79 (C.A.).

180. *Supra* n. 89, at 41.

Standing to make application for review

- (1) Any person who claims that his interests may be affected by the action to which the application relates shall have standing to make an application for review under Part I of this Act.
- (2) In order to establish standing under subsection (1) of this section it shall not be necessary for an applicant for review to show that the nature of the interest which he claims may be affected by the action to which the application relates is distinct from interests shared by the public generally, or that the effect of the action on his interests will be different in kind or degree from the effect of the action on the interests of the public generally.
- (3) Any person who has standing under subsection (1) of this section may authorise any other person to make an application for review on his behalf.
- (4) Notwithstanding the foregoing provisions of this section, the Court may grant standing to make an application for review under Part I of this Act to any person who, in the opinion of the Court, will genuinely and competently represent an aspect of the public interest relevant to the action to which the application relates.

A broad definition of the term "interests" should be included in the definition section of the Judicature Amendment Act 1972: e.g. "'Interests' includes economic, property, educational, environmental, recreational, aesthetic, and spiritual interests". The term "person" is already defined broadly in section 2 of the Act as including "a corporation sole, and also a body of persons whether incorporated or not."¹⁸¹

It is this latter suggested scheme that commends itself most to the writer. It provides a single, liberal rule of standing, automatically conferring *locus standi* on those affected by administrative action. Furthermore, the discretion provision acknowledges the interest of members of the public in curbing illegal administrative activity, and authorizes the court to grant standing to responsible and competent persons and organizations to pursue that interest. Such an approach achieves the goals of uniformity and liberalization while least exposing the courts and administration to potential abuse of the judicial review process.

VII. A Sub-Issue: Standing of Incorporated and Unincorporated Associations

In *L'Association des Propriétaires des Jardins Tache Inc. v. Les Entreprises Dasken Inc.*,¹⁸² a nearby property owner and an incorporated association, whose objects were, *inter alia*, to preserve the predominantly residential character of Tache Gardens and to promote and safeguard the interests of property owners and tenants, applied for a declaration and injunction respecting an alleged zoning contravention. The individual plaintiff was held to have standing, based on his interest as a property owner in preserving the single-family residential character of his neighbourhood. The association was denied standing; it was not a nearby property owner and could not exercise the rights of its members.

Recently, in *Re Village Bay Preservation Society and Mayne Airfield Inc.*,¹⁸³ the petitioner was an incorporated society whose members were

181. *Supra* n. 123, at 161.

182. [1974] S.C.R. 2.

183. *Supra* n. 32.

land-owners and residents of the Village Bay area, and whose main object was "to preserve, protect and enhance the quality of the human and natural environment of the Village Bay area residents and property owners". It applied for an order quashing a resolution which granted approval for the development of an airstrip in the area. The court acknowledged that the concern of the members of the society "is obviously very real and is of long standing",¹⁸⁴ but denied the society standing:

In order to have the necessary standing to challenge the resolution in question, without the intervention of the Attorney-General, the petitioner must show that it has a particular interest or that it has suffered or will suffer injury or damage peculiar to itself . . . The petitioner is an inanimate incorporated society with a legal status separate and distinct from that of its members. There is no evidence that it owns property in the area. It has no senses to be adversely affected by the operation of the airfield. How can it be said that it, as a legal entity, has a particular interest distinct from that of other concerned citizens of the area? How can it be said that it, as a legal entity, has suffered, or will suffer, injury or damage peculiar to itself? Put at its highest, the society is in the position of a concerned corporate citizen — that is not sufficient to grant standing. It may very well be that some of its members have a particular interest which would give them standing — but the society is distinct from its members. I must hold that the society lacks the necessary standing.¹⁸⁵

This refusal to pierce the corporate veil has in many cases resulted in a denial of organizational standing.¹⁸⁶ Unincorporated associations face the further problem of their lack of legal personality.¹⁸⁷

The Federal Court in Canada has demonstrated a willingness to recognize the interests of representative groups,¹⁸⁸ and recently confronted the question of corporate standing head-on. In *496482 Ontario Inc. v. A.G. of Canada*,¹⁸⁹ a corporation incorporated for the purpose of promoting transport by rail sought an interim injunction respecting the suspension of rail service by Order-in-Council. The defendant argued that, while the commuters may be personally affected, the corporation itself could suffer no prejudice and therefore lacked standing. The court stated:

. . . [W]hile technically it may be said that the corporate plaintiff is not personally affected I believe it would be wrong not to allow the issue to be argued on its merits merely because the proceedings were brought by a corporation formed for this express purpose by the individuals personally affected, rather than by one or more of such individuals or by class action, and I exercise my discretion accordingly.¹⁹⁰

It is submitted that the Federal Court's decision marks a refreshing approach to the question of representative corporate standing.

What purpose is served by denying standing to groups whose objects are clearly related to the matters in issue? There is no reason to expect that

184. *Supra* n. 32, at 730.

185. *Supra* n. 32, at 733.

186. *Islands Protection Society, Edenshaw, Naylor and Young v. R. in Right of British Columbia*, *supra* n. 31, criticized by Rankin and Horne, *supra* n. 96; *Dybkowski and British Columbia Civil Liberties Association v. R. in Right of British Columbia*, *supra* n. 21; *cf. Sierra Club v. Morton*, *supra* n. 129, criticized in Sax, "Standing to Sue: A Critical Review of the Mineral King Decision" (1973), 13 *Nat. Resources J.*, 76.

187. *But see Re Ratepayers of the School District of the New Ross Consolidated School*, *supra* n. 156.

188. *National Indian Brotherhood v. Juneau*, *supra* n. 59; *Canadian Broadcasting League v. C.R.T.C.* (1979), 101 D.L.R. (3d) 669 (F.C.A.).

189. (1982), 25 C.P.C. 207 (F.C.T.D.) (under appeal).

190. *Ibid.*, at 214.

an organization would not present a case as competently and responsibly as an affected individual. Unmeritorious proceedings may be struck down as frivolous; hypothetical issues may be dealt with by the doctrine of justiciability. Furthermore, recognition of the organization's standing would eliminate the need to dredge up a "front man" or "dummy plaintiff", whose participation is limited to satisfying the technical standing requirement.¹⁹¹

It is suggested that, if legislative reform of *locus standi* is undertaken, consideration should be given to recognizing the standing of organizations whose objects, or members' interests, are related to the subject matter of the review proceedings.¹⁹² Such reform could perhaps be effected by including such organizations in the definition of "persons" entitled to bring proceedings.

191. Rankin and Horne, *supra* n. 96, suggest that this was what occurred in the *Dybikowski* case, *supra* n. 21, where it was necessary to find a drug addict to lend her name to proceedings to challenge the *Heroin Treatment Act*.

192. With respect to unincorporated associations who lack legal personality, some provision would have to be made for undertakings by legal persons should costs be awarded against the organization.

