
NOTE: RE STANDING

1. You have asked me to give you my thoughts on the issue of standing. In this brief Note, I have set out the following:
 - a) First, the normative arguments in favour and against 'broad' standing;
 - b) Second, the position under the Human Rights Act 1998 ('the HRA') and in UK judicial review cases;
 - c) Third, the position under the Canadian Charter of Rights and Freedoms;
 - d) Fourth, the position under the New Zealand Bill of Rights;
 - e) Fifth, the position under the South African Constitution; and
 - f) Sixth, the position under the Irish Constitution.

A. The Normative Debate

2. The normative arguments in favour of broad standing are as follows:
 - a) It can lead to better administration, as it may be desirable to hold executive actors to account if they do not act in accordance with the law, even where there is no individual 'victim' of their actions.
 - b) Similarly, 'broad' standing can ensure compliance with the rule of law, and may provide a better incentive for administrative actors to comply with human rights.

- c) 'Broad' standing can ensure better democratic participation in judicial decision-making. By allowing the participation of interest groups, 'broad' standing can facilitate the presentation of a broader range of viewpoints to the court. This may be particularly important in a human rights context, where the 'answers' to the problems posed are not often not obvious, straightforward or without controversy
- d) Certain rights, particularly the type of 'third generation' environmental, cultural and socio-economic rights which may be found in the new Bill of Rights, will not always affect any one individual sufficiently for that individual to be a 'victim'. Alternatively, even the individual could arguably be a 'victim', the breach of the rights will not have a sufficient impact on the individual to encourage him or her to initiate litigation. This can be particularly prevalent in the context of environmental rights.
- e) Interest groups will have better expertise, better organization and better resources than an individual 'victim' and as such, the evidence placed in the litigation may more accurately reflect the complexities of the particular problem. The presentation of such evidence before the court may also assist the court in making decisions which have a more carefully tailored impact on future problems

3. In favour of 'closed' or 'narrow' standing, it is often argued as follows:

- a) Broad standing can result in excessive litigation which results in a distraction from the business of governance. It can lead to an increase in litigation generally, with resulting increase in legal expenditure and perhaps even more far-reaching consequences, such as administrators seeking to make decisions 'judge-proof'. It should be noted however that the argument relating to excessive litigation can be mitigated by careful policing of jurisdiction by the courts: such as for instance, a

power on the courts' power to strike out cases which appear to be frivolous or vexatious; or the power to award costs against vexatious litigants.

- b) Perhaps less easily overcome is the argument that granting standing to interest groups for instance can have an impact on the nature of the litigation. Interest groups are more likely to make arguments related to the impact of particular decisions on the community at large, reflecting their own expertise. Analysing such arguments or evidence is a task for which judges are not necessarily well-equipped, particularly given the traditional common law model of focusing on the particular facts of a particular case.

B. The HRA and Judicial Review

- 4. As you are aware, the HRA grants only 'narrow' or 'closed' standing to the 'victim' of the human rights breach: HRA, section 7. This directly incorporated the ECHR the standing test found in Article 34.
- 5. This position has been criticised by quite a few commentators; and indeed, is much narrower than the position taken in judicial review proceedings in the UK. In the judicial review context, the test is set out in Section 31(3) of the Supreme Court Act 1981 and a 'sufficient interest' is required to seek judicial review. The phrase 'sufficient interest' has been interpreted generously by the courts.
- 6. In addition to individual standing, both associational and public interest standing have been recognised in judicial review cases. The term 'public interest' standing refers to situations where citizens, merely in their capacity as taxpayers or electors, can challenge governmental action; while associational standing refers to situations where interest groups have standing to challenge governmental actions.
- 7. Examples of public interest standing are found in the following cases:

- a) In R v HM Treasury ex p Smedley [1985] QB 657, an individual, in the capacity of a taxpayer and elector was able to dispute (though unsuccessfully) the legality of the government's undertaking to pay a contribution of £121 million to the European Community
- b) In R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees Mogg [1994] QB 552, it sufficed for Rees-Mogg to have a 'concern for constitutional issues' to have standing to challenge the decision of the Foreign Minister to ratify the Maastricht Treaty.

8. Associational standing has been granted most notably in the following cases:

- a) In R v Inspectorate of Pollution, ex p Greenpeace (No 2) [1994] 4 All ER 329, standing was granted to Greenpeace to challenge the authorisation of a nuclear generator.
- b) The Child Poverty Action Group has been granted standing to review cases of benefits wrongfully refused, contrary to social security regulations: R v Secretary of State for Social Services, ex p Child Poverty Action Group [1990] 2 QB 540.

9. Thus, as is evident, the 'sufficient interest' test allows for greater flexibility in the scope of standing rights than the HRA 'victim' standard.

C. The Canadian Charter

10. There are two categories of claimant under the Canadian Charter: first, those whose own interests are distinctly affected by the alleged violation ('private standing'); and second, those who act in support of a public interest that is so affected ('public interest standing').

(i) Private Standing

11. Section 24(1) states that:

'Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'

12. A number of comments are made here:

- a) Most obviously, to qualify for the right of standing, persons must be themselves affected by the alleged action.
- b) There is no discretion granted to the courts here, and 'the court must entertain the application of anyone who falls within this category': G-A Beaudoin and E Mendes The Canadian Charter of Rights and Freedoms (3rd edn, 1995) p.19-7. Beaudoin and Mendes also note that although the court has discretion whether or not to grant relief, the very fact of having a right of audience can provide an extremely effective safeguard of human rights in a jurisdiction where there is freedom of the press, even if it is only to ensure that pressure may be created for a political solution to the problem.

13. Examples of the situations in which private standing have been granted include the following:

- a) A resident of Venezuela was granted standing to challenge a ruling denying him Canadian citizenship: Crease v Canada (1994) 21 CRR (2d) 347 (Fed TD).
- b) Where a newspaper reporter was denied access to a trial, the newspaper had standing to challenge the ruling: R v Southam Inc (1982) 141 DLR (3d) 341 (Ont HC).
- c) A reporter had standing to challenge an order banning the publication of evidence presented at a preliminary hearing: R v Harrison (1984) 14 CCC (3d) 549 (Que SC).

d) A lawyer was accorded standing to attack the constitutionality of procedural rules permitting costs to be assessed against solicitors: Dawson v Ontario (AG) (1985) 20 DLR (4th) 288 (Ont HC).

14. However, the interest must be substantial, and for instance, a grandmother was held not to have standing on the basis of her freedom of association with her grandchild to question the constitutional validity of a statute under which an order of wardship was made concerning the child: W (PM) v Director of Child Welfare (1985) 40 Alta LR (2d) 31 (QB).

Public Interest Standing

15. On public interest standing, until 1974, private parties were seldom if ever recognized as having standing to defend purely public interests in Canadian courts, unless they did so with the consent and in the name of the Attorney General.

16. However, in a series of major cases, the Court accepted significant relaxation of the standing rules to make challenges to the constitutionality of laws:

a) In Thorson v Canada (Attorney General) [1975] 1 SCR 138, the Court recognized discretionary public interest standing, allowing Thorson to challenge the constitutionality of official bilingualism. Interestingly, Laskin J held that the court's ability inter alia to impose costs was a factor that would prevent the litigation floodgates from opening too widely.

b) In McNeil v. Nova Scotia (Board of Censors) [1976] 2 S.C.R. 265. McNeil, a newspaper editor, was granted public interest standing to challenge the censorship of the film Last Tango in Paris.

c) In Canada (Attorney General) v Borowski, [1981] 2 S.C.R. 575. Borowski, an anti-abortion activist, was granted public interest standing to challenge certain exculpatory sections of the Criminal Code relating to abortion.

d) In Finlay v Canada (Minister of Finance), [1986] 2 S.C.R. 607, Finlay was granted public interest standing to challenge Manitoba's alleged violation of a federal-provincial cost-sharing program.

e) Further, anyone charged with a criminal offence has standing to challenge the constitutionality of the law under which they were charged even if their own rights had not been violated: R v Big M Drug Mart [1985] SCR 295 (Can.)

17. Since these cases were decided, commentators note that in many Charter cases the Court has become a multilateral forum with many, and more nuanced, positions than the traditional purely adversarial and bilateral process.

18. That said, standing to bring cases under the Charter is not unlimited, and the Supreme Court has also expressed the position that broad public interest standing should only really be permitted where 'no directly affected individual might be expected to initiate litigation': Canadian Council of Churches v. Canada (Minister of Employment and Immigration) [1992] 1 SCR 236.

D. New Zealand Bill of Rights

19. The New Zealand Bill of Rights does not have an express 'standing' provision (and also does not have an express 'remedies' provision). I also struggled to find analysis of this particular issue in commentaries on the Bill of Rights. However, section 29 states:

'Application to Legal Persons - Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of legal persons as well as the benefit of all natural persons.'

20. Two Court of Appeal cases (R v Bruins (1994) 11 CRNZ 656 and R v Wilson unrep, 18 August 1994, CA 128/94) have held that the rights affirmed in the Bill of Rights are those of the persons to whom they are granted. Consequently it is not possible for

one person to claim a remedy for a breach of the Bill of Rights which rightfully belongs to another.

21. These cases were decided in the context of the Section 21 protection against unreasonable search and seizure, and there have been some indications that the Court of Appeal may re-think its position in that context: R v Pointon (1999) 5 HRNZ 242 (CA), discussed in P Rishworth, G Huscroft, S Opticon and R Mahoney The New Zealand Bill of Rights (2003).
22. Overall though, it appears that standing pursuant to the New Zealand Bill of Rights is generally narrow.

E. South Africa

23. The South African Constitution includes broad provisions for standing to enable people to act either on their own behalf or on behalf of others in situations where their fundamental constitutional rights have been infringed or threatened. By Article 38, it provides that anyone may approach the court who is acting:
 - (a) in his or her own interests;
 - (b) on behalf of another person who cannot act in his or her own name
 - (c) as a member of, or in the interest of, a group or a class of persons;
 - (d) in the public interest; or
 - (e) as an association acting in the interests of its members.
24. This provision introduced class actions into South African law with respect to constitutional violations of the South African Bill of Rights. It has been used for example by ratepayers who have been discriminated against in terms of property rates and taxes imposed upon them by a local authority: Beukes v Krugersdorp Transitional Local Council, 1996 (3) SA 476 (W) (this case was decided under the interim Constitution but based on the same wording as that found in the final Constitution). The court went on to say that no unnecessary restrictions should be placed on the application of the constitutional provisions concerning class actions: ibid.

25. The South African Constitutional Court has held also that it is unconstitutional under an identical section of the interim South African Constitution (S. Afr. Const. (Interim Constitution of the Republic of South Africa Act 200, 1993) § 22) for the South African government to try to limit claims against it by imposing very short notice and prescription periods on litigants seeking to enforce their rights: Mohlomi v Minister of Defence, 1997 (1) SA 124 (CC). Such provisions are in breach of the right of access to the South African courts: ibid.

F. Ireland

(i) The Constitution

26. The position of 'standing' under the Irish Constitution has no express formulation, but a position has been developed in the jurisprudence of the courts. In short, 'broad' public interest standing is likely to be granted by the courts where it is unlikely that an appropriate 'victim' will emerge; by contrast, in those cases where it is likely that an appropriate 'victim' will emerge, the courts are more reluctant to grant public interest standing.

27. The position has been summarised best by Mr Justice Keane in Jarnród Éireann v. Ireland [1996] 3 IR 321 4 [1980] IR 269 at 279–280:

It is clear from these authorities that the cases in which questions of locus standi have arisen tend to fall into two broadly different categories. In the first ... the nature of the constitutional challenge is such that it is extremely improbable that a plaintiff will emerge whose interests may be said to be either immediately or prospectively affected in a manner specific to him or her. Such claims typically arise in the context of purported changes to the structure of Government itself or its relationship to other sovereign governments. In such cases, the courts have a readiness to afford locus standi to concerned citizens so as to ensure that constitutionally suspect legislation does not remain on the statute book because of the absence of a suitably qualified challenger.

The second category consists of cases ... in which the impugned legislation is of such a nature that it is probable that a plaintiff will emerge of whom it can be said that he or she is affected by the legislation in question in a manner peculiar to him or her. In such a case, the courts are unwilling to afford locus standi to a plaintiff unless they are satisfied that his or her interests, although not

necessarily his or her constitutional rights, are either immediately or potentially affected by the application of the challenged provision.

28. In general, the Irish courts have tended to favour 'individual' standing for constitutional challenges, and this approach was confirmed in the recent case of Construction Industry Federation v Dublin City Council (Supreme Court, March 18, 2005). They have often reasoned, relying on separation of powers concerns (akin to those highlighted above about the appropriateness of courts as a forum for broad-reaching representations). However, the courts have indicated that they would be prepared to accept representative or associational standing where there are 'good practical reasons why, in the discretion of the Court, the applicant ought to be allowed to make the application': ibid. It has been suggested that such reasons would include, for example, a particular rather than hypothetical application, or the ability to identify a lack of potential challengers.

(ii) European Convention on Human Rights Act 2003

29. Standing also appears to be narrow under the ECHR Act 2003. The Act is only intended to be used where no other remedy is available, and section 3(2) reads as follows:

A person who has suffered injury, loss or damage as a result of a contravention of subsection (1) [which imposes the obligations to comply with the Convention, may, if no other remedy in damage is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.

30. If you have any queries about this Note, please do not hesitate to contact me.

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