THE LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

CIVIL LITIGATION IN THE PUBLIC INTEREST

LRC 46

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The Commissioners are:

Peter Fraser
Kenneth C. Mackenzie
Bryan Williams

Anthony F. Sheppard
Arthur L. Close

Anthony J. Spence is Counsel to the Commission.
Fred Hansford is Legal Research Officer to the Commission.
Sharon St. Michael is Secretary to the Commission.

The Commission offices are located on the 10th Floor, 1055 West Hastings Street, Vancouver, B.C. V6E 2E9.

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TO THE HONOURABLE L. ALLAN WILLIAMS, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission has the honour to present the following:

REPORT ON
CIVIL LITIGATION IN THE PUBLIC INTEREST

Your predecessor, The Honourable Garde B. Gardom, Q.C., requested that we examine the rule of law that the AttorneyGeneral is a necessary party to any civil action brought in respect of a violation or apprehended violation of a public right. This includes an action brought in respect of a public nuisance, to restrain by injunction a breach of statute or to restrain public bodies from exceeding their powers. Private individuals lack standing, in the absence of special circumstances, to bring such actions without the joinder of AttorneyGeneral.

In this Report we examine this rule of law and make recommendations that would enable private individuals, in certain circumstances, to bring such actions in their own name without the joinder of the AttorneyGeneral as a party. The implementation of our recommendations would result in private individuals gaining greater access to the courts to vindicate public rights.

CHAPTER I INTRODUCTION

In this Report, we examine the rule of law that the AttorneyGeneral is a necessary party to any civil action brought in respect of a violation or apprehended violation of a public right.

2. *Ibid*. This rule also applies to corporate bodies including local authorities: *see, e.g. Oak Bay* v. *Gardner*, (1914) 19 B.C.R. 391 (B.C.C.A.).

3. F. Calbert on Parties, 26 (2nd ed. 1847) cited in I. Zamir, The Declaratory Judgment 254 (1962). *See generally*, J. LL. J. Edwards, The Law Officers of the Crown, 286 (1963); *see also People's Holding Co*. v. *A.G. for Quebec*, [1913] S.C.R. 452.

4. Thus, for example, he does not have standing to apply for an injunction to restrain a private nuisance, *A.G*. v. *P.Y.A. Collieres Ltd*., [1957] 2 Q.B. 169, 182; or a breach of contract, *A.G*. v. *Poole Corporation*, [1938] 1 Ch. 23.

5. Generally speaking, the AttorneyGeneral may intervene in any action between private parties which affects the interests of the Crown either directly or indirectly, *Esquimalt and Nanaimo Ry. Co*. v. *Wilson*, [1920] A.C. 358; *R*. v. *Starkey*, (1891) 7 Man. R. 489; it has also been held in England that the AttorneyGeneral has a right of intervention at the invitation or with the permission of the Court where the suit raises any question of public policy on which the executive may have a view which it may desire to bring to the notice of the court, *see e.g. Adams* v. *Adams*, [1971] P. 188, *see also in re James An Insolvent)*, [1977] 2 W.L.R. 1. The AttorneyGeneral of British Columbia may also intervene in any private suit where the constitutionality of legislation is challenged, s. 8, *Constitutional Question Act*, R.S.B.C. 1979, c. 63, *see* e.g., *Weist* v. *Weist*, (1978) 30 R.F.L. 395 (B.C.S.C.).

6. *Anderson* v. *City of Victoria*, (1884) 1 B.C.R. 107, Pt. 2 (B.C.S.C.); *Affleck* v. *City of Nelson*, (1957) 10 D.L.R. 442 (B.C.S.C.); *see also Re: Save our Parkland Association et al*, (1964) 50 W.W.R. 92 (B.C.S.C.).

7. *Gouriet* v. *U.P.W*., [1978] A.C. 435 (H.L.); rev'g. [1977] Q.B. 729 (C.A.). Private individuals, in the absence of special circumstances, do not have standing to commence proceedings in the public interest to protect the public at large

from a wrongful invasion of its rights.[2] Traditionally it is for the AttorneyGeneral, as guardian of the public interest, to discharge this function:[3]

The AttorneyGeneral is by law the representative of the public interest. The reason is, that he is the officer of the Crown, and that, according to the principles of our law, the interest of the public is vested in the Crown.

The right of the AttorneyGeneral to invoke the aid of the courts in this capacity is limited to the protection of public rights or public interests, and he has no such standing in respect of matters that are essentially private in character,[4] except in certain limited circumstances.[5]

The AttorneyGeneral may initiate proceedings on behalf of the public either *ex officio* in his own name or on the relation of some other person, called the relator. In a relator action the action is brought in the name of the AttorneyGeneral at the request of a private individual or body. Examples of "*ex officio*" actions are rare, however, and it appears that most proceedings in the public interest are brought by way of relator actions. The genesis of such actions is the AttorneyGeneral's *fiat*, or consent, to use his name. This is a condition precedent to the suit.[6] The grant of this *fiat* is within the AttorneyGeneral's absolute discretion, and, as we point out later, his decision in this regard is unimpeachable in the courts.[7] Thus, in those cases where an individual does not have the requisite standing the AttorneyGeneral has complete control over whether an action to protect public rights will reach the courts.

In view of the AttorneyGeneral's absolute discretion, situations may arise in which public rights are not vindicated in the courts because he has refused his *fiat*. This raises questions whether the AttorneyGeneral's consent should be a prerequisite to an action in the public interest and whether it is necessary that he be a party at all in such actions. There is also the question whether the AttorneyGeneral's *fiat* is the most appropriate manner of controlling such actions so as to ensure that only those which are not frivolous or vexatious reach the courts. These and other questions are discussed later in this Report, after an examination of the present law. This examination includes a discussion of the nature of relator actions and the exercise of AttorneyGeneral's discretion in granting his *fiat*. It also includes a survey of those public rights in respect of which the AttorneyGeneral has been accorded standing to sue in the public interest, and an examination of the various circumstances in which a private individual may maintain such an action without joining the AttorneyGeneral. It is in the light of these discussions that we make recommendations for reform.

We should emphasize that in this Report we are concerned solely with the substantive law surrounding the ability of private individuals to commence actions in the public interest. Such actions should not be confused with the procedural device known as the "class action." It is true that there are certain elements shared in common by class and public interest actions:[8]

Both present to the Court issues which are larger than the individual interest of the litigant who appears in Court; and both seek to assure a just resolution of the controversy by genuine adverseness and adequate protection of the interests represented.

There are, however, basic differences between the two. Public interest actions are concerned with the implementation and enforcement of rights vested in the general public, whereas many class actions owe their "public" character not to the subjectmatter of the litigation, which may be strictly private, but to the mass effect of the judgment and the impracticability of maintaining separate actions.[9] In the United States, "class actions proceed on the theory or ... fiction, that all persons affected by the litigation are before the Court, either in person or by representation."

9. *Ibid*.

10. *Ibid*.

11. *Ibid*.

12. *Ibid* at 387388.

13. M. Cappelletti, *Public Interest Parties and the Active Role of the Judge in Civil Litigation* 108, n. 302 (1975). Hence, a decision for or against the class representative binds all members of the class insofar as the class has been adequately notified and represented.

In contrast, the public interest plaintiff does not purport to represent any particular individual but acts as a spokesman for the public at large or a segment of it. No problems of notice or *res judicata* therefore arise, "for if the plaintiff succeeds, the benefit of the judgment accrues automatically to the public through injunctive, declaratory or other relief, restraining or invalidating the ... action."[11] If the plaintiff does not succeed *stare decisis* rather than *res judicata* should discourage a renewed attack by another public interest plaintiff.[12]

The difference between class actions and public - interest actions has been neatly summarized as follows:[13]

To oversimplify: the thrust behind the growth of class actions is a liberal conception of representation, whereas the thrust behind the growth of public interest actions is an unprecedented loosening of the requirement of *locus standi*. ... The policy underlying the first phenomenon is to give otherwise unprotected group interests access to justice, whereas underlying the second is the policy of favouring effective citizen participation in guarding the public against illegal exercise of governmental power.

CHAPTER II NATURE OF RELATOR ACTIONS

While the AttorneyGeneral has complete control over the proceedings in a relator action, it is always open to him to authorize the relator to conduct the case and instruct counsel on his behalf. Indeed, in many instances, the relator in reality sustains and directs the action, and is considered answerable to the court and the parties for the propriety of the proceedings and their conduct.[2]

The very limited role that the AttorneyGeneral may play in a relator action was explained by Aikins J. in *Re Save Our Parkland Association et al,*[3] (which involved an alleged wrongful approval of a subdivision plan by the Vancouver Registrar of Titles) as follows:[4]

> On the application for certiorari coming on for hearing on the same day, E. A. Alexander, Q.C., appeared for the AttorneyGeneral and stated the position taken by the AttorneyGeneral as follows: Mr. Alexander said that if it appeared to the judge hearing the application for certiorari that the application could not be heard at all unless the AttorneyGeneral was joined, then he, Mr. Alexander, was instructed by the AttorneyGeneral to lend the AttorneyGeneral's name to the proceedings so that the matter might be heard, but that he, Mr. Alexander, was instructed to take no part in the proceedings either in support of or in opposition to the application. All

counsel concerned were unanimous in expressing the view that the motion for certiorari could not be heard unless the AttorneyGeneral was joined by lending his name to the proceedings, the reason being no one of the applicants was affected adversely by the approval of the subdivision plan to an extent any greater than the approval affected members of the public at large. On this point I was referred only to *Affleck* v. *Nelson (City)* (1957) 23 W.W.R. 396 and the authorities therein referred to. However, I reached the conclusion that submissions of counsel on this point were sound and that the application could not go forward without the Attorney-General lending his name to the proceedings. Then, Mr. Alexander consenting, the AttorneyGeneral was joined on the limited basis which I have already stated.

In view of the fact that the AttorneyGeneral may play a limited role, the relator action has been characterized by some as a "semiprivate" remedy,[6] and by others as a "legal fiction." Nevertheless, although the conduct of the proceedings may be left in the relator's hands, he cannot take any step in his own name independently of the AttorneyGeneral.[8] Any amendment to the statement of claim, for example, can only be made with the Attorney-General's consent.[9] Furthermore, the AttorneyGeneral can, at any time ask that the action be discontinued notwithstanding the opposition of the relator.

5. The case was thereafter captioned: "*In the Matter of an Application by the AttorneyGeneral for British Columbia ex rel Save our Parkland Association, Allan Mercer and Charles H. Wills for a Writ of Certiorari*", as is disclosed on the Court Registry File. *See also Re British Columbia Wildlife Federation and DeBeck et al.*, (1977) 1 B.C.L.R. 244 (B.C.S.C.) where the AttorneyGeneral for British Columbia lent his name to the proceedings to ensure that the applicant's possible lack of standing would not prevent the hearing of their case, the AttorneyGeneral, however, took no position in the action.

6. G.L. Williams, Crown Proceedings 1512 (1948).

7. *Gouriet* v. *U.P.W.*, [1977] Q.B. 729 *per* Ormrod L.J. at 776 and 778; on appeal in the House of Lords, Lord Wilberforce strongly disagreed with the suggestion that the relator action was a "legal fiction". *See* [1978] A.C. 435 at 481.

8. *Supra* n. 1; *and see* observations of Lord Wilberforce in *Gouriet* v. *U.P.W., supra* n. 7 at 481.

9. *See* G.S. Robertson, The Law and Practice of Civil Proceedings By and Against the Crown 488 (1908) who cites *A.G.* v. *Fellows*, (1820) 1 JAC. & W. 254, 37 E.R. 372 where an information amended without the AttorneyGeneral's sanction was ordered taken off the file with costs. *See also A.G.* v. *Wright*, (1841) 3 Beav. 447, 49 E.R 176 where a notice of motion had been given on behalf of the relator without the AttorneyGeneral's sanction, and it was held that the notice was irregular.

10. *AttorneyGeneral* v. *Wyggeston's Hospital*, (1853) 16 Beav. 313.

11. Robertson, *supra*, n. 9.

12. *AttorneyGeneral* v. Lo an, *supra*, n. 2; *AttorneyGeneral* v. *Crayford U.D.C.*, [1962] 2 W.L.R. 998, 10034.

13. *AttorneyGeneral* v. *Earl of Durham*, (1882) 46 L.T. 16, 20; *see also A.G.* v. *Booker*, (1900) 83 L.T. 245. *See also Attorney-General for British Columbia and Watt et al* v. *Corporation of Saanich* [1921] 1 W.W.R. 471

14. *See* discussion in S.M. Thio, *Locus Standi and Judicial Review*, 157160 (1971).

15. *See* e.g. *Attorney General* v. *Logan, supra*, n. 2, an application for an injunction to restrain a public nuisance. The coplaintiff was a local board whose path was affected by the defendant's copper smelting works. The board successfully claimed, in addition to an injunction, damages for injury to its property. As S.M. Thio, *ibid*, points out at 159, such an invasion of property rights forms the basis of an individual cause of action, and the joinder of the AttorneyGeneral as a party is inexplicable.

16. *A.G.* v. *Vivian, supra* n. 2; *A.G. ex rel Kent* v. *Ruffner*, (1906) 12 B.C.R. 299 (B.C.S.C.); A.G. for *British Columbia ex rel Vancouver* v. *C.P.R.*, (1905) 11 B.C.R. 289 (B.C. Full Ct.).

17. *A.G.* v. *Boucherett* (1855) 25 Beav. 116, 120, 53 E.R. 580. *See also* Daniell's Chancery Practice Volume 1, 57 (7th ed. 1901) where it is stated that relators have been named "through the tenderness of the [Law Officers of the Crown] towards the defendant, in order that the Court might award costs against the relator if the action should appear to have been improperly conducted." If on the other hand the relator action is successful, the relator is entitled to his costs, *R. ex rel Corea* v. *Knox et al.*, (1968) 1 0.R. 493 (Ont. H. Ct.). Likewise, if the relator wishes the proceedings to be stayed or discontinued, he must first obtain the AttorneyGeneral's consent.[11]

The relator need have no personal interest in the subjectmatter of the proceedings except his interest as a member of the public.[12] It is possible, however, for the relator to be joined as coplaintiff and claim relief in his own right if he has suffered special damage and his claim is not inconsistent with that of the AttorneyGeneral.[13] In such cases the relator has the right of active participation in the suit instead of being officially an onlooker. While it has been suggested that the interest sufficient to enable a

relator to sue as coplaintiff need not be equivalent to that required to invest him with standing to sue without the AttorneyGeneral,[14] it would appear that in many of the cases in which a relator has acted as coplaintiff with the AttorneyGeneral, the relator was a person who had sufficient interest in the subjectmatter to enable him to sue without the AttorneyGeneral.[15]

A significant feature of the relator action is that although the relator is not the plaintiff, he, and not the AttorneyGeneral, is liable for costs should the action be unsuccessful.[16] Historically, the Crown was immune from liability for costs in civil proceedings to which it was a party. This meant that a successful defendant would be left without costs should the AttorneyGeneral's action fail. The introduction of a relator therefore ensured that there would be some person or body answerable for costs if the action was unsuccessful.[17]

In England, the relator still fulfills this original function, for although the Crown is now generally liable for costs in civil proceedings in that country, it is not liable for costs in a relator action.[18] In British Columbia, by virtue of the *Crown Proceeding Act*,[19] the Crown is now also liable for costs in civil proceedings to which it is a party, section 11 of the Act provides:

> (1) In proceedings against the Crown and proceedings in which the Crown is a party the rights of the parties shall, subject to this Act, be as nearly as possible the same as in a suit between person and person, and the court may
>
> (a) make any order, including an order to costs, that it may make in proceedings between persons.

As the Act does not exclude relator actions from the operation of this section, it is arguable that if in the future a relator action is unsuccessful the AttorneyGeneral, as well as the relator, would be liable for costs.

Whether the AttorneyGeneral is now liable for costs in a relator action is not entirely free from doubt, and it may be some time before the issue arises in the courts. In an early Manitoba case it was held that while the AttorneyGeneral, if he sued without a relator, might have costs awarded against him, the introduction of a relator would absolve him from any liability for costs, The court argued that:[21]

> ... the object in having a relator is for the protection of the Crown against costs, and not for the protection of the defendant.

20. *A.G.* v. *Winnipeg Electric Ry. Co.*, (1912) 5 D.L.R. 823 (Man. K.B.).

21. *Ibid* at 827.

22. This was also the view taken by Vaughan Williams L.J. in *A.G.* vv. *Logan, supra* n. 2.

23. British Columbia Supreme Court Rules, Rule 5(21).

Any person may be a relator but before his name can be used he must have sworn a written authorization to his solicitor to use his name and that authorization must have been filed.[23] Apart from this requirement no formal requirements have been laid down in British Columbia either as to the manner in which application should be made to the AttorneyGeneral for his consent or the manner in which the proceedings are to be conducted. This is in contrast with the practice in England, where in order to obtain the AttorneyGeneral's consent to commence a relator action, a copy of the proposed writ of summons and statement of claim must be left with him, together with a certificate of counsel setting forth "that they are proper for the allowance of the AttorneyGeneral." The solicitor must also certify that the relator is a proper person to be a relato6r and is competent to answer the costs of the proposed action. A second copy of the writ and statement of claim must also be supplied

which, if the AttorneyGeneral sanctions the action, will be signed and returned to the relator's solicitor. The writ signed by the AttorneyGeneral must be issued as the original writ, and the signed statement of claim retained, and every copy of the writ or statement of claim served must bear a copy of the AttorneyGeneral's signature.[24]

It appears from discussions held with legal officers within the Ministry of the AttorneyGeneral that the practice in British Columbia is more informal than the English practice. Requests for the AttorneyGeneral's consent are usually made by the relator's solicitor, who is usually asked to supply the AttorneyGeneral with copies of all "relevant" documents. Most solicitors, however, accompany their request with an explanation as to why they believe it is necessary for the AttorneyGeneral to lend his name and why it is "proper" for him to do so. Once the AttorneyGeneral has sanctioned the use of his name, he may or may not become actively involved in the proceedings. In recent years it has been the practice of the AttorneyGeneral to leave the conduct of the proceedings entirely in the hands of the relator, who, apart from keeping the AttorneyGeneral informed of the progress of the action and supplying him with copies of all documents filed, has not had to comply with any additional procedural requirements. Indeed, the lack of strict formal requirements would appear to place a relator in British Columbia in a better position than his counterpart in England. It would appear, for example, that as there is no strict requirement that the AttorneyGeneral sign all the pleadings, his failure to do so will not nullify the action as it might in England.

25. *See, e.g.*, comments of Barry, J. in *A.G. of New Brunswick ex rel. University of New Brunswick* v. *City of Fredericton*, (1968) 68 D.L.R. (2d) 45 at 72 (N.B.S.C. App. Div.).

In British Columbia, therefore, it would seem that once the court is satisfied that the AttorneyGeneral's consent has been obtained, a relator action proceeds on the same basis as any other private action in the courts.

CHAPTER III THE ATTORNEYGENERAL'S FIAT

It is well established that the AttorneyGeneral has a discretion in granting his *fiat* to the institution of relator proceedings, and that this discretion is absolute and cannot be questioned by the courts.[1] In several recent cases, however, both in Canada and in England, the courts have had to consider the effect of a refusal by the AttorneyGeneral of his consent to the institution of such proceedings. As we point out later, although the courts have reaffirmed the absolute nature of the AttorneyGeneral's discretion, some have expressed a certain unease about the law in this regard, and this has led some to question the existing law on standing where it operates so as to prevent a justiciable issue reaching the courts.

While there are many authorities for the proposition that the AttorneyGeneral's discretion in this regard is absolute, the most frequently cited is the classic statement by the Earl of Halsbury, L.C. in *London County Council* v. *The AttorneyGeneral*[2] where he explained the law as follows:[3]

My Lords, one question has been raised ... which I confess I do not understand. I mean the suggestion that the courts have any power over the jurisdiction of the AttorneyGeneral when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the AttorneyGeneral ought not to put into operation the whole machinery of the first Law Officer of the Crown in order to

bring into court some trifling matter. But if he did, it would not go to his jurisdiction, it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the AttorneyGeneral and not for the courts to determine whether he ought to initiate litigation in that respect or not ... In a case where as a part of his public duty he has a right to intervene, that which the courts can decide is whether there is excess of power which he, the AttorneyGeneral, alleges. Those are the functions of the court; but the initiation of the litigation, and the determination of the question whether it is a proper case for the AttorneyGeneral to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. I make this observation upon it, though the thing has not been urged here at all, because it seems to me very undesirable to throw any doubt upon the jurisdiction, or the independent exercise of it by the first Law Officer of the Crown.

2. [1902] A.C. 165.

3. *Ibid* at 168169.

4. In *Grant* v. *St. Lawrence Seaway Authority*, [1960] O.R. 298 (Ont. C.A.), an individual who had unsuccessfully sought the consent of the AttorneyGeneral of Ontario to a relator action, brought his action without such consent naming the AttorneyGeneral as a defendant, apparently intending to secure a review by the court of the exercise of the AttorneyGeneral's discretion. The Ontario Court of Appeal dismissed the action, refusing to review such discretion, and in so doing relied primarily on the Earl of Halsbury's dicta in this regard. It has been held, however, that the AttorneyGeneral may be subject to an order of mandamus if he refuses to consider the matter at all, *Ex parte Newton*, (1855) 4 E&B 869, 119 E.R. 323.

5. *Gouriet* v. *U.P.W.*, [1977] Q.B. 729 (C.A.), *per* Ormrod, L.J. at 776.

In the past, the unreviewable nature of the AttorneyGeneral's discretion appears to have caused little or no concern.[5] In recent years, however, the courts both in Canada and in England have reexamined the nature of this discretion and the ramifications that flow from a refusal by an AttorneyGeneral to give his consent to a relator action. In British Columbia, the courts have suggested on occasion that the AttorneyGeneral's discretion is not as absolute as the judgments cited suggest, and that in certain circumstances the AttorneyGeneral may have a moral obligation to lend his name to a relator action. In *Affleck and McCandlish* v. *City of Nelson*,[6] Mr. Justice Wilson made some interesting observations on the proper role of the AttorneyGeneral in determining whether or not to lend his name to a relator action. The main issue in that case was the competence of the plaintiff ratepayers to bring an action for an injunction against the defendant municipality based on an alleged disregard or contravention of an existing bylaw. It was held that no such action could be brought unless the consent of the AttorneyGeneral was first obtained. The learned Judge went on to say however:[7]

> I may say that, especially since a learned local Judge of this Court had, by granting an injunction, recognized the existence of a *prima facie* case, I think that the AttorneyGeneral might well, in this matter, have adopted the attitude of his predecessor in office in Attorney General (*on the information of Anderson)* v. *Victoria* (1884), 1 B.C.R. 107, Pt. 2. There the AttorneyGeneral sanctioned the use of his name but announced that he would not interfere in any way - not actively - to urge the illegality of the proposed erections, nor negatively by forbidding the use of his name to the plaintiff on proper terms, since such negative interference would tend to impede the trial of the right. I suggest that this is, in civil matters, unless the AttorneyGeneral considers the action entirely frivolous, the proper attitude.

In *Anderson* v. *Victoria,*[9] Chief Justice Begbie made the following comment upon the role of the Attorney-General in relator actions:

8. This approach was apparently adopted by the AttorneyGeneral of British Columbia in lending his name in *Re Save our Parkland Association et al*, (1964) 50 W.W.R. 592 (B.C.S.C.); and in *Re British Columbia Wildlife Federation and DeBeck et al,* (1977) 1 B.C.L.R. 244 (B.C.S.C.).

9. (1884) 1 B.C.R. 107, Pt. 2 (B.C.S.C.).

10. *Ibid* at 108.

> ... It would, in my opinion, have been most improper in the AttorneyGeneral to have thrown any impediment to prevent the applicant from doing this. I conceive that any opposition on his part to the use of his name would have been quite unprecedented, and so, in a sense, unconstitutional; for a Minister of the Crown has no right to exert his influence except according to the accustomed methods. Whenever any question arises in which a civil right or remedy is sought by an individual, however humble, against any other person, however exalted, even the Crown, or against any corporation or body of men, however influential, it is the plain duty of the AttorneyGeneral, as of every person in authority - of course, receiving a proper indemnity as to costs - to act entirely without regard to any political or other influences, and to leave the doors of the established tribunals entirely open and unobstructed may, to remove any real or fancied impediments in the approaches to such tribunals. And though there is, of course, no precedent for such a case, it is probable that if any Minister should so far forget his duty and attempt to misuse his power, then the Court might hold that any individual inhabitant might sue on behalf of himself and all. Otherwise, by a combination on purely political or personal grounds, e.g. between a Minister and a Municipality (perhaps, his own constituents), the gravest and most enduring infractions of Acts of Parliament might be placed beyond redress.

In a recent decision,[11] Mr. Justice Murray, in the Supreme Court of British Columbia, suggested that Begbie C.J.'s reasoning in this regard might be invoked by a court to confer status on persons who would ordinarily have no status to bring an action.[12]

The fact that an AttorneyGeneral might abuse his discretion for political or personal purposes has in recent years led the courts, without imputing bad motives to particular AttorneysGeneral, to examine this discretion and the role of the AttorneyGeneral in relator proceedings. In England, the courts have had to consider those issues in two recent cases, *AttorneyGeneral ex rel. McWhirter* v. *Independent Broadcasting Authority*[13] and *Gouriet* v. *Union of Post Office Workers*.[14] In *McWhirter*, Lord Denning M.R. said *obiter* with regard to the AttorneyGeneral's discretion:[15]

> I am of the opinion that, in the last resort, if the AttorneyGeneral refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the court itself. He can apply for a declaration and, in a proper case, for an injunction, joining the AttorneyGeneral if need be, as defendant. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizens of the country; so that they can see that those great powers and influence are exercised in accordance with law. *I would not restrict the circumstances in which an individual may be held to have sufficient interest*.

and subsequently:[16]

> I have said so much because I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced. But this, I would emphasize, is only in the last resort when there is no other remedy reasonably available to secure that the law is obeyed.

Lord Denning M.R., noted, however, that this was not a case of last resort, in that McWhirter had "another remedy reasonably available to him, and he did not take it."

12. *See also British Canadian Securities* v. *Victoria*, (1911) 16 B.C.R. 441 (B.C.S.C.), where Gregory J. at 444 appears to suggest that the AttorneyGeneral can be made a party *without his consent* if it is manifest that the public interest would otherwise suffer.

13. [1973] Q.B. 629 (C.A.).

14. *Supra* n. 1.

15. *Supra* n. 13, 649, emphasis added.

16. *Ibid*.

17. *Supra* n. 13 at 650.

18. *Ibid* at 657. He could and should have requested the AttorneyGeneral to lend his name to a relator action.

Lord Denning M.R.'s *dicta*, however, did not receive the support of his brother Judges. Lawton L.J. expressed the view that the AttorneyGeneral's office and functions are reasonably adequate to protect the public "against abuses and misuses of power." [18] At the same time, however, he made the following observation:[19]

I agree with Lord Denning M.R. that if at any time in the future (and in my judgment it is not the foreseeable future) there was reason to think that an AttorneyGeneral was refusing improperly to exercise his powers, the courts might have to intervene to ensure the law was obeyed.

Cairns L.J. was less sympathetic to Lord Denning's position, although he did concede that:[20]

> If ever a case arose in which it appeared that the AttorneyGeneral had failed to give proper consideration to an application for his fiat, or had refused it on wholly improper grounds, then consideration would have to be given to the question of whether any remedy is available other than control of Parliament as envisaged by Lord Halsbury L.C.

The role of the court where the AttorneyGeneral refuses to consent to a relator action was also considered by the Supreme Court of Canada shortly after in *Thorson* v. *AttorneyGeneral of Canada*.[21] In this case a federal taxpayer was accorded standing to apply for a declaration that the *Official Languages Act* and its accompanying *Appropriation Acts* were unconstitutional, despite the refusal of the AttorneyGeneral of Canada to consent to a relator action. The extent to which this case may have widened or modified the law of standing is examined in Chapter V. We should like to point out, however, that one of the salient features of the *Thorson* case appears to be that the Supreme Court recognized, as did Lord Denning, that it is no longer necessarily true that the AttorneyGeneral is always a satisfactory guardian of the public interest who can be relied upon to commence proceedings in the public interest whenever the need arises, or who would at least lend his support to private citizens' challenges in relator proceedings.

Both Lord Denning in *McWhirter* and Laskin J. in *Thorson* cited Lord Halsbury's *dictum* in *London County Council* v. *AttorneyGeneral* that whether or not the AttorneyGeneral will intervene in a situation, either *exofficio* or by means of a relator action, is a matter within his sole discretion, which is not subject to the control of the courts. Neither suggested that this was incorrect or should be modified in any way but Laskin J. went on to say:[22]

Nevertheless, what was said by Lord Denning in the *McWhirter* case, *supra*, on the position of a member of the public where the AttorneyGeneral refuses without good reason to take proceedings, *ex officio* or to give leave for relator proceedings, is relevant to a distinction that I take and on which, in my opinion, the result in this case turns. I shall come to this later in these reasons.

Laskin J., in fact, does not refer to *McWhirter* again although in his conclusion he said:[23]

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

As one commentator has said:

20. *Ibid* at 654.

21. (1973) 43 D.L.R. (3d) 1 (S.C.C.).

22. *Ibid*.

23. *Ibid*.

24. J.M. Johnson, *Locus Standi in Constitutional Cases after Thorson*, (1975) Public Law 137.

25. *Supra* n. 1.

26. [1977] Q.B. 729, 771 (C.A.).

Thus it appears that while neither Laskin J. nor Lord Denning propose to modify the proposition enunciated by the Earl of Halsbury... and neither would have the court "control" the AttorneyGeneral's discretion, they will nevertheless look at the exercise of such discretion and may decide to accord standing in spite of the Attorney-General's refusal. The distinction is subtle but important, for a direct assault on the AttorneyGeneral's discretion might have constitutional ramifications in that the latter's powers in this regard derive from the royal prerogative, not statute, and are therefore thought not to be reviewable by the courts without the aid of specific statutory authority.

More recently, in *Gouriet* v. *Union of Post Office* Workers,[25] both the English Court of Appeal and the House of Lords reexamined the nature of the AttorneyGeneral's discretion to grant or withhold his consent to relator proceedings. In this case, the plaintiff, Gouriet, applied as a member of the public to the AttorneyGeneral for his consent to bring a relator action to seek an injunction against the defendants to restrain them from delaying the mails to South Africa for a week, as a political gesture of disapproval of apartheid. It is a criminal offence under the *Post Office Act, 1953* to delay the mail. The AttorneyGeneral refused his consent but the plaintiff nevertheless proceeded to apply for the injunction. The judge refused to grant the order sought on the ground that there was no reported authority giving him jurisdiction to grant such relief after the AttorneyGeneral had refused his consent to a relator action. The plaintiff thereupon appealed on the ground that the judge had wrongly held that he had no jurisdiction to allow the application in the absence of the consent of the AttorneyGeneral. The appeal was allowed, and an injunction granted for a period of 3 days or until the case was heard on a further application to court, whichever was later.

On the resumed hearing the plaintiff had amended his pleadings to claim permanent injunctions against both the Union of Post Office Workers and the Post Office Engineering Union, and a declaration that the AttorneyGeneral by refusing his consent had acted improperly and wrongfully exercised his discretion. The AttorneyGeneral attended the hearing in person and stated, *inter alia*, that by virtue of the prerogative vested in him on behalf of the Crown, and by long established constitutional practice his discretion to consent or refuse to act as plaintiff, in relator proceedings, was absolute and could not be reviewed by the courts. He argued further that he did not have to give

his reasons, and that the court was not entitled to inquire into them; and that if his decision was wrong he was answerable to Parliament alone.

At the end of the hearing the declaration sought against the AttorneyGeneral was provisionally amended to claim that notwithstanding his refusal to consent to relator proceedings, the plaintiff was entitled to proceed with his claim for final injunctions against the two unions.

In the Court of Appeal, both Lawton and Ormrod L.JJ. agreed that the AttorneyGeneral's exercise of his discretion to refuse his consent to the bringing of relator proceedings could not be reviewed by the courts. They held, however, that this did not mean that where the AttorneyGeneral's consent to relator proceedings had been refused, the court was without jurisdiction to provide a remedy Lawton L.J. commented as follows:[26]

> I accept the AttorneyGeneral's submissions, first, that considerations of public interest have to be taken into account in the discharge of his duties of law enforcement; secondly, that he has access to sources of information which are not, and could not, be available to the courts; and thirdly, that he may be in a better position to weigh the factors affecting public interest than the judges. What I cannot, and do not, accept is that he and he alone, in relation to law enforcement through the civil courts, is the sole arbiter of what is the public interest. I have never doubted that no one can question in the courts his discretion whether, and when, to prosecute. In that sphere, the citizen who disagrees can prosecute himself, unless Parliament has enacted otherwise. The difficulty lies in the exercise of the preventive side of his functions. He does not claim infallibility. He may be wrong. If he is, many members of the public may be inconvenienced or suffer material loss. I envisage that it will only be in the rare case in which, so far as the court can see, there is no discernible reason why threatened breaches of the criminal law should not be declared illegal and possibly restrained that the court will allow a plaintiff to proceed. If at any time, whether at the beginning of the case or at the final determination, the AttorneyGeneral elected to reveal the factors of public interest which were not discernible, the court in the exercise of its discretion would assess the new information and judge accordingly.

He went on to say, however:

28. *Ibid* at 776.

29. *Ibid* at 758.

I would have thought, too, that a condition precedent for applying to the court would be that an application for consent to a relator action had been made to the AttorneyGeneral and refused. I personally would regard the refusal of consent as strong evidence that the public interest was not involved.

Ormrod L.J. took the following view:[28]

> A complainant, with, on the face of it, a strong prima facie case for saying that the defendants were threatening to cause inconvenience, and even hardship, to the public by acts which appeared, equally clearly, to be illegal and, in fact, criminal, has been refused the AttorneyGeneral's consent to a relator action. Has he in these wholly exceptional circumstances, the right to come before the court himself and ask for relief or is he barred in limine from making any application?

> He is, in my judgment, in the absence of direct authority, entitled to ask the court to consider whether or not he can establish sufficient standing to proceed with his action. For that reason, an interim injunction was granted on the first hearing to preserve the position while this question was argued. He has now through his counsel put forward his contentions. The next question, therefore, is whether there is any jurisdiction in the court to grant him, not the AttorneyGeneral, any relief. If there is, the refusal of the AttorneyGeneral to allow him to proceed in relator proceedings will not bar him.

Both Ormrod and Lawton L.JJ. held that it would be open to the plaintiff to apply for a declaratory judgment that the apprehended action would be unlawful, and that if such a declaration had been claimed the court could, in its equitable jurisdiction, grant him an interim injunction pending the final determination of any application for a declaration. Accordingly, the court therefore had jurisdiction to grant the interim injunction which, it was pointed out, had been effective to restrain the proposed postal boycott and could therefore now be discharged. It was also held, however, that the plaintiff could not obtain final injunctions against the unions so long as the plaintiff was unable to add the AttorneyGeneral as plaintiff in relator proceedings.

Lord Denning in his judgment was prepared to go further than either Lawton or Ormrod L.JJ. He agreed that the discretion of the AttorneyGeneral is absolute, and could not be reviewed by the courts, but only where he has exercised it in granting his consent to his name being used:[29]

> Even if he gave his consent in a trifling or unsuitable matter, the courts will not review it. That was made clear by the Earl of Halsbury L.C. in his oftquoted dictum in *London County Council* v. *AttorneyGeneral* in the House of Lords (1902) A.C. 165, 168169. But that dictum does not cover a case when he has refused his consent. I am sure that Lord Halsbury L.C. did not have such a case in mind, for the simple reason that it had never arisen for consideration at that time; and it has never arisen since until now.

He went on to say:[30]

> ... his the AttorneyGeneral's) discretion to refuse is not absolute or unfettered. It can be reviewed by the courts. If he takes into account, or fails to take into account matters which he ought to take into account then his decision can be overridden by the courts. Not directly, but indirectly. If he misdirects himself in coming to his decision, the court can say: 'Very well then. If you do not give your consent or your reasons, we will hear the complaint of this citizen without it.'

Lord Denning then repeated his *dicta* in *McWhirter*, which in his view were supported by "no less authority than the Supreme Court of Canada" in the case of *Thorson* v. *AttorneyGeneral of Canada*.[31]

Lord Denning was also of the view, unlike Lawton and Ormrod L.JJ., that "if the court can grant a declaration, I see no reason why it should not grant a final injunction even though it is not sought to protect a right."

31. *Ibid* at 759.

32. *Ibid* at 762.

33. (1978) A.C. 435 (H.L.)

34. *Ibid* at 478.

In the result, the decision of the Court of Appeal appeared to establish the following principles. The AttorneyGeneral can either grant or refuse his consent to a relator action, in his unfettered discretion, and the courts have no power to interfere. They can neither prevent him from acting as a plaintiff in such proceedings, if he should choose to do so, nor compel him, if he refuses. Where he refuses, however, a member of the public is entitled to bring proceedings in the civil courts to restrain an impending breach of the criminal law, so that the law may be enforced.

The decision of the Court of Appeal was reversed, however, by a unanimous House of Lords[33] where it was held that as the plaintiff could establish no injury to himself as a result of this apprehended public wrong, the court had no jurisdiction to entertain the plaintiff's claim for an injunction or declaration. Only the AttorneyGeneral could maintain such an action, and the plaintiff could not come before the court if the AttorneyGeneral had refused to lend his name to the action.

While it was noted that the plaintiff no longer sought to question the propriety of the AttorneyGeneral's refusal to lend his name, the Law Lords felt obliged to reaffirm the absolute nature of the AttorneyGeneral's discretion. As we have pointed out, Lord Denning M.R. in the Court of Appeal had suggested that the Earl of Halsbury L.C.'s *dictum* did not extend to cases where the AttorneyGeneral had refused his consent, but in the House of Lords Lord Wilberforce, alluding to this suggestion pointed out that:[34]

To limit this passage to a case where the AttorneyGeneral has given his consent (as opposed to a case where he refuses his consent) goes beyond legitimate distinction: it ignores the force of the words 'whether he ought to initiate litigation ... or not.'

The other Law Lords were equally as certain that the passage was applicable to situations where the AttorneyGeneral had refused his consent.[35]

The Law Lords were not impressed by the argument that as the AttorneyGeneral had refused his consent to a relator action to deny the plaintiff standing would result in the courts being unable to enforce the law. In his interlocutory judgment, Lord Denning M.R. had posed the question, "Are the courts to stand idly by?" when the AttorneyGeneral refuses to take action himself or refuses his consent to a relator action: if they did "stand by[11] it was Lord Denning M.R.'s view that "the law becomes a dead letter." [37] With regard to this contention Viscount Dilhorne said:[38]

> With great respect the criminal law does not become a dead letter if proceedings for injunctions to restrain the commission of offences or for declarations that certain conduct is unlawful are not brought. The criminal law is enforced in the criminal courts by the conviction and punishment of offenders, not in the civil courts. The jurisdiction of the civil courts is mainly as to the determination of disputes and claims. They are not charged with responsibility for the administration of the criminal courts. The question "are the courts to stand idly by?" might be supposed by some to suggest that the civil courts have some executive authority in relation to the criminal law. The line between the functions of the executive and the judiciary should not be blurred.

Lord Denning M.R.'s *obiter* in *McWhirter* that a member of the public can apply to the court when the AttorneyGeneral refuses leave in a "proper case" for the institution of relator proceedings, was also specifically criticized in the House of Lords. Lord Wilberforce said that "there is no authority for this proposition and in my opinion it is contrary to principle."[39] Viscount Dilhorne was equally critical and said, "These *obiter* observations do not in my opinion correctly state the law."

37. *Ibid* at 761.

38. *Supra* n. 33 at 490.

39. *Ibid* at 483.

40. *Ibid* at 495.

While the House of Lords was adamant that they could not enquire into the exercise by the AttorneyGeneral of his discretion in this case, several Law Lords felt obliged to point out, "in justice to the Attorney General," [41] that, although it had been hinted that there could be no reasons that were not partisan for his refusal, there could very well have been proper legal considerations which the AttorneyGeneral may have taken into account. They emphasized, in particular, that the AttorneyGeneral's right to seek injunctive relief to restrain the commission of a criminal offence, is a right which should only be invoked in exceptional circumstances, for, as Lord Diplock pointed out:[42]

> ... When a court of civil jurisdiction grants an injunction restraining a potential of fender from committing what is a crime but not a wrong for which there is redress in private law, this in effect is warning him that he will be in double jeopardy, for if he is found guilty by the civil court of committing the crime he will be liable to suffer punishment of whatever severity that court may think appropriate, whether or not it exceeds the maximum penalty authorized by the statute and notwithstanding that he will also be liable to be punished again for the same crime if found guilty of it by a court of criminal jurisdiction. Where the crime that is the subject matter of the injunction is triable on indictment the anomalies involved in the use of this exceptional procedure are enhanced. The accused has the constitutional right to be tried by jury and his guilt established by reference to the criminal standard of proof. If he is proceeded against for contempt of court he is deprived of these advantages.

Lord Diplock took the view that the AttorneyGeneral may quite properly take such considerations into account in deciding whether to lend his name to a relator action. Lord Wilberforce also referred to such legal considerations, but took the view that this "exceptional" remedy may also involve a question of policy that only the AttorneyGeneral can decide upon. With regard to the right to seek an injunction to enforce the criminal law, he said:[43]

> These and other examples which can be given show that this jurisdiction though proved useful on occasions is one of great delicacy and is one to be used with caution. Further, to apply to the court for an injunction at all against the threat of a criminal offence, may involve a decision of policy with which conflicting considerations may enter. Will the law best be served by preventive action? Will the grant of an injunction exacerbate the situation? (very relevant this in industrial disputes). Is the injunction likely to be effective or may it be futile? Will it be better to make it clear that the law will be enforced by prosecution, and to appeal to the lawabiding instinct, negotiations, and moderate leadership, rather than provoke people along the road to martyrdom? All these matters to which Devlin J. justly drew attention in *AttorneyGeneral* v. *Bastow* 1 Q.B. 514, and the exceptional nature of this *civil* remedy, point the matter as one essentially for the AttorneyGeneral's preliminary discretion.

Viscount Dilhorne said:

42. *Ibid*.

43. *Ibid* at 481.

44. *Ibid* at 490491.

> Great difficulties may arise if "enforcement" of the criminal law by injunction became a regular practice. A person charged, for instance, with an offence under section 58 or 68 of the *Post Office Act, 1953* has the right of trial by jury. If, before he commits the offence, an injunction is granted restraining him from committing an offence under those sections and he is brought before the civil courts for contempt his guilt will be decided not by a jury but by a judge or judges. If he is subsequently tried for the criminal offence, might not the finding of guilty by a judge or judges prejudice his trial? This question is not to my mind satisfactorily answered by saying that juries can be told to ignore certain matters. It was suggested that this difficulty might be overcome by adjourning the proceedings for contempt until after the conclusion of the criminal trial. If that was done, the question might arise then as to the propriety of imposing a punishment in the contempt proceedings additional to that imposed on conviction for the same conduct in the criminal court.
>
> Such considerations may have been present to the mind of the AttorneyGeneral when he considered Mr. Gouriet's application on the Friday and may have provided valid grounds for his refusal of consent. Whether they did so or not, one does not know but I have mentioned them as they seem to me to suffice to show that even if good legal reasons for his decision were not immediately apparent, the inference that he abused or misused his powers is not one that should be drawn.
>
> An AttorneyGeneral is not subject to restrictions as to the applications he makes, either *ex officio* or in relator actions, to the courts. In every case it will be for the court to decide whether it has jurisdiction to grant the application and whether in the exercise of its discretion it should do so. It has been and in my opinion should continue to be exceptional for the aid of the civil courts to be invoked in support of the criminal law and no wise AttorneyGeneral will make such an application or agree to one being made in his name unless it appears to him that the case is exceptional.

It is also interesting to note that Lord Wilber observed that Lord Denning M.R. in his judgment, had invoked *Thorson* v. *AttorneyGeneral of Canada*. He pointed out, however, that *Thorson* recognizes English law on the enforcement of public rights, but distinguishes it where the constitutionality of legislation is concerned, and concluded that it was therefore "unimpressive support."

The courts in both Canada and England have therefore reaffirmed that the AttorneyGeneral's discretion whether to lend his name to relator proceedings is not reviewable by the courts. In England, in view of the decision of the House of Lords in *Gouriet* v. *U.P.W.*, the refusal by the AttorneyGeneral to lend his name to relator proceedings would preclude a private individual from maintaining an action in respect of a violation of public rights. In Canada, however, as a result of recent decisions, it is not certain that a private individual would be precluded from maintaining such an action if the AttorneyGeneral refused to lend his name to relator proceedings. As we point out in Chapter V, depending on the "public right" sought to be protected and the relief claimed, such an individual may be accorded standing to maintain such an action.

CHAPTER IV STANDING OF THE ATTORNEYGENERAL

The AttorneyGeneral, as the representative of the public as *parens patriae*, has the right to seek redress in the courts whenever a public right is infringed or is threatened with infringement. In this regard, the concept of pub-

lic rights is both large and flexible, and has never been clearly defined.[1] Despite this uncertainty it would appear that only an illegal act of a public nature can be considered an infringement of a public right,

2. *Ibid* at 403, *see also A.G.* v. *Oxford, Worcester, Wolverhampton Railway* , (1844) 2 W.R. 330, 332; *A.G.* v. *Shrewsbury Kingsland) Bridge Co*., (1882) 21 Ch. D. 752.

3. *See, e.g*., S.A. de Smith, *supra* n. 1 at 403406; S.M. Thio, *Locus Standi and Judicial Review* 141155 (1963); J.LL.J. Edwards, *The Law Officers of the Crown*, 286295; I. Zamir, *The Declaratory Judgment* 254262 (1962); 21 Halsbury 403404 (3rd ed.). We should like to point out that while such authors agree on the substance of the various categories listed, they vary on the precise heading for each category.

4. *Gouriet* v. *U.P.W.* [1978] A.C. 435 (H.L.); *see also Hooper* v. *North Vancouver*, (1922) 31 B.C.R. (B.C.C.A.); *Affleck* v. *Nelson*, (1957) 10 D.L.R. (2d) 442 (B.C.S.C.); *Fransden* v. *Lethbridge* (1963) 52 W.W.R. 620 (Alta S.C.); *Rosenberg* v. *Grand River Conservation Authority*, (1976) 69 D.L.R. (3d) 384 (Ont. C.A.); and discussion in Chapter V, *infra*.

5. *A.G.* v. *Shrewsbury (Kingsland) Bridge Co*., (1882) 21 Ch. D. 752; *A.G. for (British Columbia* v. *Kamloops Produce Co. Ltd*., (1939) 3 W.W.R. n. 303 ((B.C.S.C.); *A.G. of (British Columbia* v. *E1lsay et al*., (1959) 19 D.L.R.453 (B.C.S.C.).

6. *A.G.* v. *L. & N.W. Ry*., [1900] 1 Q.B. 78.

7. This dates back to Elizabethan times; *A.G.* v. *Richards*, (1788) 2 Anst. 603, 145 E.R. 980; S.A. de Smith, *supra* n. 1 at 402; S.M. Thio, *supra* n. 3 at 139.

8. *A.G. for Ontario* v. *Orange Productions*, (1971) 21 D.L.R. (3d) 257 (Ont. H.C.). and most writers agree that such an illegal act usually falls within one of the following categories:[3]

1. public nuisance

2. excess of power exercised by a public body where the excess of power tends to injure the public; and

3. breach of statutory provisions enacted for the benefit or protection of the public and which affect the public generally.

In all of these situations only the AttorneyGeneral may sue, either *ex officio* or on the relation of some other person. A private individual has no right to sue unless he has the requisite standing within the rules discussed in the following chapter.[4] The AttorneyGeneral may sue in such situations even though there is no evidence of actual injury to the public, but only that the acts complained of tend in their nature to injure the public.[5] Furthermore, there is authority for the proposition that he may sue even though the illegal act is of benefit to the public.[6]

A. Public Nuisance

The earliest and most familiar illustrations of the AttorneyGeneral intervening to protect the public from a wrongful invasion of its rights are actions brought to restrain a public nuisance.[7] Generally speaking, a public nuisance is an unlawful act which causes inconvenience or damage to, or interferes with, the reasonable comfort of Her Majesty's subjects in the exercise of a right common to all.[8] While private nuisance, at its simplest, is definable as an interference with a person s use and enjoyment of the land he occupies, public nuisance, as one writer has pointed out, refers to:

> ... a rather motley group of criminal or quasicriminal offences which involve actual or potential interference with the public convenience or welfare ... Since a public nuisance may be committed and its effects may be felt almost anywhere, it has no obvious connection with interferences with interests in land.

Examples of acts amounting to a public nuisance include interferences with such well established rights as the right to fish in public waters, the right to navigate public waters unobstructed, or travel public highways unhindered, as well as interferences with the health,[13] safety,[14] comfort,[15] and morals

14. *Ibid*. *See also A.G*. v. *Keily*, (1875) 22 Gr. 458 (street railway in disrepair held to constitute a nuisance).

15. *A.G. for British Columbia ex rel Eaton* v. *Haney Speedways Limited and District of Maple Ridge*, 1963 3 D.L.R. (2d) 48 (B.C.S.C.) where the operation of a speedway was held to be a public nuisance in that there was a material interference with ordinary physical comfort according to "plain and sober and simple notions obtaining among the people of the Province."

16. *Supra* n. 8. of the public.

A public nuisance can be a crime and if criminal action is deemed appropriate the offender can be charged under the *Criminal Code* with committing an indictable offence. Section 176 of the *Criminal Code* provides *inter alia* that:

> ... everyone commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
>
> (a) endangers the lives, safety, health, property or comfort of the public, or
>
> (b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

It appears that resort to this particular remedy has been rare in Canada despite the widely drawn language of the section.[17]

Although a public nuisance is a crime it has long been held that a civil action will lie at the suit of the AttorneyGeneral for an injunction to restrain a public nuisance.[18] The question often arises, however, as to whether the act complained of affects a sufficient number of the public so as to take on a public character and, in recent years, the courts have attempted to clarify this point. Although a public nuisance is an interference with some right or interest common to all, it is not necessary to show that every possessor of that interest is affected. In *AttorneyGeneral* v. *P.Y.A. Collieries*,[19] for example, the nuisance complained of constituted the projection of stones and splinters from a quarry beyond its limits, and the emanation of dust and vibrations. Only 30 persons, resident near the quarry, came within the sphere of this nuisance and the question arose as to whether they constituted the public so as to render the nuisance a public nuisance. Lord Denning M.R. after stating the difficulty in defining "the public" propounded a test which avoids the counting of heads as follows:[20]

> ... a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

Romer L.J. pointed out that it is not a prerequisite of a public nuisance "that all of Her Majesty's subjects should be affected by it; for otherwise no public nuisance could ever be established at all,"

18. This is one of the primary exceptions to the rule that "Equity will not enjoin a crime." For a history of the use of the injunction as a remedy for public nuisance, *see* H.E. Read, *Equity and Public Wrongs*, Part II, (1933) 11 Can. B. Rev. 158, 162-167.

19. (1957) 1 All E.R. 894.

20. *Ibid* at 908, cited with approval in *Prestatyn U.D.C*. v. *Prestatyn Raceway Ltd*., [1970] 1 W.L.R. 33, 42-43.

21. *Ibid* at 900.

22. *Ibid* at 902.

23. *Supra* n. 15.

24. *Ibid* at 54.

and he expressed the following opinion:[22]

> ... whether the local community within the sphere of the nuisance comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative crosssection of the class has been so affected for an injunction to issue.

Romer L.J. refers to "a class of the public" and not "the general public" which seems to suggest that the public on whose behalf the AttorneyGeneral may sue need not be the entire public, but a section of it.

In British Columbia, Romer L.J.'s terminology was cited and adopted by Brown J. in *AttorneyGeneral of British Columbia ex rel Eaton* v. *Haney Speedways Ltd. and the District of Maple Ridge*.[23] In that case seven families living in the vicinity of a racing track built in the middle of a rural area, who were disturbed by its operation, were held to comprise "a class of the public"[24] so as to entitle the AttorneyGeneral to sue to restrain the nuisance.[25]

B. Excess of Power by Public Body

It is well established that the AttorneyGeneral with or without a relator, is entitled to bring an action to restrain a public body from exceeding the powers conferred upon it by statute or charter.[26] One writer has explained the rationale behind this right of action as follows:[27]

Public bodies are organs of the state, which are established to carry out public functions. Local authorities are set up to deal with local administration, and public corporations to provide public services. The activities of these organs of government closely affect the public and hence the public has an interest in the proper discharge by public bodies of the functions vested in them as well as the due exercise of their statutory powers, for breach of which the AttorneyGeneral may properly sue on its behalf.

26. "The Attorney-General may always file an information to restrain a corporation from doing or continuing an act which is beyond the powers conferred upon it by law," *Standly* v. *Perry* (1879) 3 S.C.R. 346, *per* Strong J. at 372-373.

The AttorneyGeneral may therefore intervene and seek declaratory and injunctive relief against municipal corporations acting without legislative authority.[29] Thus, in England, actions have been brought for declarations that it was beyond the powers of a local authority to operate certain bus services,[30] or to carry on printing and stationery works[31] or the business of selling electrical equipment.

28. The same writer points out that the progenitor of this right of ction may be traced to the information brought by the Attorney-General in England, before the end of the seventeenth century, to secure the due administration of charitable and public trusts. This role was extended to cover the funds of public bodies which were deemed to be impressed with a charitable trust so that illegal expenditures of borough funds came to be checked by the Attorney-General. For examples in Canada of the Attorney-General playing such a role *see A.G.* v. *Municipality of Grey*, (1859) 7 Gr. 592; and *A.G. of Nova Scotia* v. *Axford* (1886) 13 S.C.R. 294, where it was held that the provincial Attorney-General was the proper person to intervene to protect charitable trusts. As is pointed out, it was only one more step in reasoning that empowered the Attorney-General to bring proceedings against public bodies for other excesses of power not involving public funds.

29. *The Wardon and Council of Lunenburg* v. *A.G. for Nova Scotia*, (1892) 20 S.C.R. 596.

30. *A.G.* v. *London County Council*, [1901] 1 Ch. 781, aff'd. [1902] A.C. 165.

31. *A.G.* v. *Smethwick Corporation*, [1932] 1 Ch. 562.

32. *A.G.* v. *Liverpool Corporation* [1922] 1 C. 211. For numerous other examples see 9 Halsbury, 69-71 (3rd ed.).

33. Kent District Corporation v. Storgoff & A.G. of British Columbia, (1962) 40 W.W.R. 278 (B.C.S.C.).

In British Columbia, the AttorneyGeneral has in the past sought a declaration that a municipality had exercised its power to make bylaws for the preservation of order on municipal streets in a way that conflicted with the *Criminal Code*.[33] He has also sought a declaration that a bylaw exempting all classes of shops from the provisions of another bylaw was not a valid exercise of a statutory authority to exempt "any class or classes of shops" from that bylaw.[34]

This right of action also exists with regard to private or quasipublic undertakings incorporated by virtue of a special Act, that exceed the powers conferred upon them by the Act.[35] A common example of such undertakings is the many railway companies incorporated by special Acts in the nineteenth century.[36] As we have pointed out, the AttorneyGeneral need not allege or prove any actual injury to the public whether he is proceeding against a public body or a private undertaking.[37] It is sufficient for him to show that the body in question has transgressed, or is about to transgress the powers conceded to it by the Legislature and that the public interest is affected.[38] Indeed, in England, the court has restrained an act even after it has been shown to be to the advantage of the public.[39]

Where the body is a private undertaking, however, it would appear that not every *ultra vires* act may be restrained in an action by the AttorneyGeneral. It is only those acts which affect or tend to harm the public interest which the AttorneyGeneral will be able to seek to restrain. This was illustrated in *AttorneyGeneral* v. *Great Eastern Railway Co.,*

35. *A.G. for Nova Scotia* v. *Bergen*, (1896) 29 N.S.R. 135 (C.A.); *A.G.* v. *Niagara Falls International Bridge Co.*, (1873) 20 Gr. 34.

36. *Ibid*.

37. *A.G.* v. *London County Council, supra* n. 5; *see also A.G.* v. *London and North Western Railway Co.*, [1900] 1 Q.B. 78, where many of the earlier cases are discussed and *A.G.* v. *Dean and Chapter of Ripon Cathedral*, [1945] Ch. 239, 251.

38. *A.G. for Nova Scotia* v. *Bergen, supra* n. 35.

39. *A.G.* v. *L.& N.W. Ry., supra*, n. 6; *see also A.G.* v. *Westminster Corporation*, (1924) 1 Ch. 437, 455, aff'd. [1924] 2 Ch. 416.

40. (1879) 11 Ch. D. 447.

41. Cf. the dissenting opinion of Baggally L.J. *ibid* at 499500.

42. R.S.B.C. 1979, c. 85. where the defendant had contracted to lease rolling stock from another railway company. The contract was *ultra vires* its governing statute. Bramwell L.J. separated those provisions in the company's charter which related to management and kindred matters from those relating to the services which the company provided for the public. He found that the *ultra vires* act did not fall within the latter class and that the AttorneyGeneral did not, therefore, have standing.[41]

In British Columbia it appears that the AttorneyGeneral has a statutory right under the *Crown Franchise Act*[42] to maintain such actions to the extent that an *ultra vires* act can be said to contravene or offend the statute in question. Section 3 provides:

The AttorneyGeneral may bring proceedings against a corporation

(a) contravening or offending against its Act of incorporation or an Act of this Province under which it has been incorporated;

(b) forfeiting its privilege or franchise by nonuser:

(c) for an act which is a surrender or forfeiture of its rights, privileges, or franchise;

(d) misusing a franchise or privilege conferred on it by law, or exercising a franchise or privilege not conferred by law.

Although it seems clear that this Act was intended to be a codification of the common law and early statutes surrounding writs in the nature of *quo warranto* and *scire facias*, section 5(d) provides that the court may adjudge that a corporation be "restrained from contravening or offending against its Act of incorporation," etc.

It should be noted, however, that if the AttorneyGeneral wishes to bring an action under this Act on behalf of or at the instance of a relator, the leave of the court must first be obtained by virtue of section 4 which provides in part as follows:

(1) The AttorneyGeneral may, by leave of the court, proceed under sections 2 and 3 for a relator, on terms as to security for costs by the relator as to the court seem just.

(2) On application made to the court for leave to bring the action, the court may direct notice to be given to the defendant, and may allow the defendant to show cause why leave should not be granted.

There appears to be only one reported case where such leave has been refused, *A.G. of British Columbia ex rel. The Kettle River Valley Railway Co.* v. *The Vancouver, Victoria and Eastern Railway and Navigation Co.*[43] In that case the defendant company had been originally incorporated by a Provincial Act but later its objects were declared to be for the general advantage of Canada and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the *Railway Act*. In setting aside an order allowing the Provincial AttorneyGeneral to bring an action at the instance of a relator under the *Crown Franchises Regulation Act* (a forerunner to the present Act), Irving J. said:[44]

> In my opinion, the AttorneyGeneral of this Province under this Act would only have power to institute an action in respect of companies incorporated by provincial authority for misusing a franchise or privilege conferred upon it by a statute of this Province. He acts for the Crown in the right of British Columbia. In this particular case, the legislation of the Parliament of Canada in 1898, has removed the defendant Company from the operation of the Act. That Act, applying as it can, and does, only to the powers of the Provincial AttorneyGeneral with reference to companies incorporated for Provincial objects within the authority of the Provincial Legislature, cannot effect or authorize the AttorneyGeneral of this Province to commence an action for the cancellation of its charter against a company which by Dominion legislation has been removed from the status of a Provincial company and has become in effect a Dominion company.

44. *Ibid* at 441.

45. As to the right of the Dominion AttorneyGeneral to take proceedings to forfeit a Dominion charter, *see Dominion Salvage and Wrecking Co.* v. *A.G. of Canada, (1892)* 21 S.C.R. 72; *see also A.G. of Canada* v. *Hellenic Colonization Association*, [1946] 3 W.W.R. 482 (B.C.S.C.)

It would appear, however, that in some instances a Provincial AttorneyGeneral could take proceedings to set aside a Dominion charter.[46] Furthermore, it was held in *AttorneyGeneral* v. *Niagara Falls International Bridge Co.*

47. (1873) 20 Gr. 34.

48. *Ibid* at 37.

49. This reasoning received the tacit approval of the Supreme Court of Canada, in *A.G. of Nova Scotia* v. *Axford*, (1886) 13 S.C.R. 294, per Strong J. at 299.

50. S.M. Thia, *supra* n. 3 at 144.

51. *A.G.* v. *Wimbledon House Estate Co.*, [1904] 2 Ch. 34. that a provincial AttorneyGeneral was the proper person to seek a declaration that a railway company exceeded its power as contained in its statute of incorporation, notwithstanding the fact that that statute was a federal statute. The defendants argued that the AttorneyGeneral for Ontario could not maintain such an action, as it was within the proper sphere of the AttorneyGeneral for the Dominion of Canada. Strong V.C. said, with regard to this objection:[48]

> The first objection is, in my opinion, without foundation. The AttorneyGeneral files this information, not complaining of any injury to property vested in the Crown, as representing the Government of the Dominion, but *in respect of a violation of the rights of the public of Ontario*. The *AttorneyGeneral* of this Province is the *officer of the Crown*, who must be *considered to be present in the Courts of the Province* to *assert the rights of the Crown* and those who are under its protection. If an *exofficio* information in respect of a nuisance caused by illegal interference with a railway, which is a public highway, were to be filed in a Court of Common Law, there would, I should think, be no doubt but that the Provincial AttorneyGeneral was the proper officer to prosecute ... I can *discover nothing incongruous or inconvenient in the AttorneyGeneral for the Province being admitted to sue on behalf of the public, even in respect of the violation of rights created by an Act of the Parliament of the Dominion*. So far from that being so *the whole system of the administration of criminal justice furnishes an analogy to the contrary* ... but it has never been doubted that the *AttorneyGeneral* of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of justice in the province. (495) (emphasis added)

C. Breach of Statutory Provisions Enacted for the Benefit or Protection of the Public

It is well established that the public has an interest in the observance of statutory provisions that impose duties or obligations intended to benefit the public,[50] since the corollary to the imposition of such duties or obligations is the conferral of corresponding rights on the public. Such duties and obligations are found, in particular, in public welfare legislation relating to public health or public safety, and the regulation of traffic and zoning. As was pointed out in one case:[51]

> There is ... the statutory obligation not to build without the written consent of the local authority, and if that is disobeyed - part from any question of penalty - there is a remedy by injunction, because it is a public general Act prohibiting certain matters in the interests of public health and in order to preserve uniformity in the width of the public streets, and that is a matter for which the AttorneyGeneral can sue.

Although equity has not asserted a general jurisdiction to restrain the commission of crimes,[52] the civil courts will intervene in certain circumstances to repress wrongful acts to which specific criminal sanctions are attached,[53] provided that the criminal sanctions are not made by statute the exclusive remedy.[54] A private individual cannot normally sue for an injunction in such cases unless there has been some interference with or threat to his proprietary rights[55] or unless the statute which has been violated is interpreted as conferring on him a private right of action.[56] This is equally true even if the private individual is merely seeking a declaration that a particular form of activity is illegal.[57] In the absence of express statutory authority, the same principle applies to a municipality seeking to restrain a breach of one of its bylaws by injunction.[58] In British Columbia, however, the *Municipal Act*[59] and the *Vancouver Charter*[60] gives municipalities and the City of Vancouver a statutory right to restrain a contravention of their bylaws by action, which includes the right to seek an injunction.[61]

Where the AttorneyGeneral is the plaintiff, however, the courts have on numerous occasions granted an injunction to restrain an infraction of a statute or bylaw. The right of the AttorneyGeneral to intervene to restrain the commission of a crime was explained and rationalized by Eve J. in *AttorneyGeneral* v. *Premier Line Ltd*.,[62] where the AttorneyGeneral, at the relation of certain motor coach owners, sought to restrain the defendants from operating a coach service without the necessary licence. He said:

53. *Cooper* v. *Wittingham*, (1880) 15 C. D. 501, where an injunction was granted to restrain a breach of copyright for which a penalty was prescribed by statute.

54. *Stevens* v. *Chown* [1901], 1 Ch. 894 *per* Farwell J. at 904 citing Turner L.J. in *Emperor of Austria* v. *Day*, (1861) 3 De G.F.&J. 217 at 253.

55. *Supra*, n. 54 *see also Gouriet* v. *U.P.W., supra* n. 4; *Stewart* v. *Baldrissi*, (1930) 38 O.W.N. 431; *Rubenstein* v. *Kumer*, [1940] 2 D.L.R. 691 (Ont. S.C.); *Re Multiferous Mines Regulation Act, Rabbitt* v. *Craigmont Mines Ltd*., (1963) 42 W.W.R. 157 (B.C.S.C.) where it was held that a declaration by a civil court on the interpretation of a statute was inappropriate where penal consequences may be involved, and when the statute in question provides a mechanism for enforcement; *see also McBean* v. *Wyllie*, (1902) 14 Man. L.R. 135 (Man. K.B.).

56. *Hamilton and Milton Road Co*. v. *Raspberry*, (1887) 3 0.R. 466 (Ont. H.C. Ch. Div.).

57. *Gouriet* v. *U.P.W., supra*, n. 4; *see also Re Metalliferous Mines Regulation Act, Rabbitt* v. *Craigmont Mines Ltd., supra*, n. 55; *Shore Disposal Ltd*. v. *Ed DeWolfe Trucking Ltd*., (1976) 72 D.L.R. (3d) 219 (N.S.S.C. App.)

58. *Oak Bay* v. *Gardner*, (1914) 19 B.C.R. 391 (B.C.C.A.).

59. R.S.B.C. 1979, c. 290, ss. 750, 751.

60. S.B.C. 1953, c. 55, ss. 334, 571; *see*, e.g., *Vancouver* v. *Kessler*, (1963) 43 W.W.R. 108, aff'd. (1964) 48 W.W.R. 622 (B.C.C.A.). Under s. 334, this right is also given to any "ownerelector[11] in the city.

61. It should be noted, however, that these sections would not appear to give a municipality or the City of Vancouver standing equivalent to that of the AttorneyGeneral in that they cannot rely upon it to sue in the public interest without proof of irreparable injury; *see Regional District of North Okanagan and Salt*; (1976) 34 Advocate 478 (Vernon County Court Registry No. 88176).

62. [1932] 1 Ch. 303.

63. *Ibid* at 313.

> The general rule is that where an Act creates an offence and provides a remedy the only remedy is that provided by the statut ... [But] the public is concerned in seeing that Acts of Parliament are obeyed, and if those who are acting in breach of them persist in so doing, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the AttorneyGeneral intervening for the purpose of asserting public rights, and if he does so the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land.

This judicial concession is probably limited to those situations where the criminal sanction has proved or will prove inadequate, or to cases of emergency.[64] The inadequacy of the statutory remedy is a common denominator of those cases in which the AttorneyGeneral has successfully obtained an injunction notwithstanding the availability of statutory penalties.[65] Thus an injunction has been granted to restrain successive infringements of building restrictions,[66] repeated infractions of rules regulating the practice of certain professions,[67] the continuing illegal operation of bus services,[68] and operating a business without a licencerequired by statute.[69]

In the leading case of *AttorneyGeneral* v. Harris,[70] injunctions were granted restraining a husband and wife who had been convicted more than one hundred times in three years for using a flower and fruit stall outside a cemetery and thereby obstructing the footway. In the Court of Appeal, Sellers L.J. said:[71]

> ... It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law. The matter becomes no more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it.

In England, once the AttorneyGeneral has decided to apply for an injunction, and a clear breach of the law has been shown, the court will be slow to refuse to grant the redress which he seeks. As Devlin J. said in *Attorney-General* v. *Bastow:*

65. S.M. Thio, *supra* n. 3 at 152.

66. *A.G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101.

67. *A.G. for Alberta ex rel. Rooney* v. *Lees and Courteney*, [1932] 3 W.W.R. 553 (Alta. S.C.).

68. *A.G.* v. *Sharp*, [1931] 1 Ch. 121; *A.G.* v. *Premier Line Ltd., supra* n. 8.

69. *A.G. for Ontario* v. *Grabarchuk*, (1976) 11 0.R. (2d) 607.

70. [1961] 1 Q.B. 74.

71. *Ibid* at 86.

72. [1957] 1 Q.B. 514, 521.

73. *A.G.* v. *Harris, supra* n. 70.

> ... the AttorneyGeneral being the first law officer of the Crown, is primarily responsible for the enforcement of the law. If he considers it necessary to come by way of a relator action to ask for the assistance of the court in enforcing obedience to a clear provision of the law, the court, although retaining its discretion, ought to be slow to say that the AttorneyGeneral should first have exhausted other remedies. In any doubtful case ... the court would be slow to interfere with the decision, which the AttorneyGeneral must have made in authorizing this action, that it was a case where the ordinary remedies would no longer prevail.

The court will not refuse an injunction on the ground that persistent breaches of the law being committed by the defendant are trivial or that the public has benefitted.[73] Furthermore, as Devlin J. pointed out, even where the statutory remedies have not been fully exhausted, the courts have still intervened to restrain persistent breaches of statutory provisions enacted for the public benefit.[74] Indeed, in recent English cases the courts have been willing to grant an injunction where a breach of a statute has not occurred but is merely anticipated, provided that it was a case of emergency.[75]

The Canadian courts in early cases appear to have been more cautious and more restrictive than the courts in England. Injunctions were refused in a number of cases on the ground that no public right was being infringed[76] or that the breach did not result in any injury to the public at large.[77] For example, in *AttorneyGeneral for British Columbia* v. *Wellington Colliery,*[78] the AttorneyGeneral sought an injunction to restrain the defendants from employing Chinese below ground in contravention of a provincial statute. It was held that this was not a question affecting the public or likely to affect the public to such an extent as to call for an injunction. Irving J. said:[79]

> ... This Court does not grant an injunction for the purpose of enforcing moral obligations, nor for keeping people without the range of the criminal law. There usually must be some right - a right of property, or some right at any rate - infringed

or likely to be infringed. The miner who is employed in that mine has no right to come here and ask for an injunction, because he has no right of property, he has no proprietary right which is being infringed. The AttorneyGeneral is not entitled to obtain an injunction from this Court, because there is no public right being infringed or likely to be infringed. The public are not concerned in this particular matter. To use the language that is referred to in some of the cases - the affidavit does not shew that the public interests are so damnified as to warrant the issuing of an injunction in this case.

In other cases, however, the courts have been unequivocal in stating that a particular statute is aimed at protecting the public and that breaches thereof can be restrained by injunction. In *AttorneyGeneral for British Columbia* v. *Cowen,*

75. *A.G.* v. *Wellingborough U.D.C.*, (1974) Times 29 March (C.A.); *A.G.* v. *Chaudry*, [1971] 1 W.L.R. 1614; *A.G.* v. *Melville Construction Co.*, (1968) 67 L.G.R. 309.

76. *A.G. for British Columbia* v. *Wellington Colliery*, (1903) 10 B.C.R. 397 (B.C.S.C.).

77. *A.G. ex rel. Richard Hobbs* v. *Niagara Falls Tramway Co.*, (1890) 19 O.R. 624; *aff'd* 18 O.A.R. 453; *A.G. for Ontario* v. *Canadian Wholesale Grocers Association*, (1923) 53 0.L.R. 627 (Ont. App. Div.).

78. *Supra* n. 76.

79. *Ibid* at 403404.

80. (1940) 55 B.C.R. 506 (B.C.C.A.); aff'd [1941] S.C.R. 321.

81. (1940) 55 B.C.R. 506 at 515 (B.C.C.A.).

82. *See also* comments of O'Halloran J.A. in *A.G. for British Columbia* v. *Cowen*, (1938) 53 B.C.R. 50, 61 (B.C.C.A.); *see also Re Egars and College of Dental Surgeons (B.C.)*, (V96549 D.L.R. 142 *per* Mclnnes J. at 148 (B.C.S.C.). for example, McDonald J.A. said of legislation controlling various professions:[81]

The object of such legislation is to protect the people of the Province, so far as is humanly possible, from the consequences of their own folly in seeking the services whether medical, legal or dental of the quack, shyster and the charlatan. (825)

The courts also assume that contravention, particularly if persistent, of these and other statutes enacted for the public benefit will of necessity produce injury, and actual injury to the public need not be proved.[83]

In a recent Ontario case, *AttorneyGeneral for Ontario* v. *Grabarchuk,* the Ontario Court of Appeal granted the AttorneyGeneral an interim injunction enjoining the defendants from carrying on a business without a licence contrary to the provisions of the *Public Commercial Vehicles Act*. It is interesting to note that both Keith and Reid JJ., with whom Donohue J. concurred, quoted section 5(d5) of *The Ministry of the AttorneyGeneral Act* of Ontario which reads:

5. The Minister,

(d) shall perform the duties and have the powers that belong to the AttorneyGeneral and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario ...

Keith J. said:[87]

It seems to me that the language of that statute ... is so applicable to bring into play and effect the English cases ...

Reid J. took the view that this provision firmly establishes the AttorneyGeneral's position as the guardian of the public interests and that the position "is the same whether one speaks of England, Australia or Canada.

87. *Supra* n. 69 at 609.

88. *Ibid* at 613.

89. R.S.B.C. 1979, c. 23, s. 2(e).

90. *Supra*, n. 69 at 613.

91. Cf. *Brown* v. *Town of Gananoque*, (1977) 17 O.R. (2d) 228 (Ont. H.C.).

92. *Supra*. n. 69 at 615. The *AttorneyGeneral Act*[89] of British Columbia contains a similar provision.

Reid J. cited English and Canadian cases as "ample authority" for the proposition that the AttorneyGeneral is entitled to obtain an injunction where a statute is being contravened even though the statute sets out penalties for violation of its provisions.[90] He also suggested that the "usual criteria," used by the court in exercising its discretion to grant an injunction, namely irreparable harm and the impossibility of adequate compensation and damages, should not be applied in such cases,[91] but was led to state that as the defendant had persistently flouted the law:[92]

> ... If irreparable damage to the public interest must be shown I agree with and apply the following.
> In *AttorneyGeneral* v. *Harris* [1961] 1 Q.B. 74 at p. 95, Pearce, L.J. observed:
>
> > ... a breach with impunity by one citizen leads to a breach by other citizens, or to a general feeling that the law is unjustly partial to those who have the persistence to flout it.

In the result, the court granted an interim injunction pending trial to restrain the violation.

The increased willingness on the part of the courts to award an injunction to secure due compliance with the law has not escaped criticism. Professor de Smith has said:[93]

> One feels some uneasiness about judicial deference towards the exercise of the AttorneyGeneral's discretion in some of these cases. Disobedience to an injunction may result in imprisonment of indefinite duration without the benefit of trial by jury, if existing statutory penalties are inadequate to secure compliance, the more appropriate course must surely be to increase them.

He did go on to point out, however, that:[94]

> There need be fewer qualms about the award of an injunction to the AttorneyGeneral to restrain the commission of an offence which would create a public danger or cause irreparable damage, even though the sanctions of the criminal law have not been exhausted or even resorted to, provided that a conviction would be highly probable and the matter is one of great urgency.

The concerns expressed by Professor de Smith were echoed by several Law Lords in the recent case of *Gouriet* v. *U.P.W.*

94. *Ibid* 406407.

95. *Supra*, n. 4.

96. *Ibid.* Lord Wilberforce, Lord Diplock and Viscount Dilhorne took the view that the right of the AttorneyGeneral to seek an injunction to restrain the commission of a criminal offence was an "exceptional" right, which should be confined in practice to cases where an offence is frequently committed in disregard of a usually inadequate penalty, or to cases of an emergency.[96]

CHAPTER V INDIVIDUAL STANDING

An individual's "standing" denotes a legal capacity to institute proceedings and is used interchangeably with terms such as "*locus standi*" and "*title to sue*." The purpose of the law of standing is to govern and guide who can raise questions for adjudication by the courts; it is not designed to control what questions may be decided by the courts, or how far the courts should substitute their judgment for that of legislators or administrators. The question of standing[1] however, precedes the determination of a case on its merits, and in the result a finding of no *locus standi* can prevent any judicial investigation into the substantive issue presented for determination.

Generally speaking, a private individual has no standing to institute proceedings to protect public rights unless he can either show a direct personal interest in the subject matter of the litigation or obtain the Attorney-General's consent to a relator action. The law surrounding the rules of standing therefore attempts to classify the types of interests which will give a private individual the right to maintain an action in respect of a violation of public rights.

The law of standing in this area has its roots in the rules developed in the context of public nuisance. These rules were over the years gradually extended to other situations where public rights allegedly were infringed.

2. *Ibid*.

3. S.M. Thio, Locus Standi and Judicial Review 78 (1971).

4. 17th ed. Book IV, 106, cited by Lord Denning M.R. in *A.G. ex rel McWhirter* v. *Independent Broadcasting Authority*, [1973] Q.B. 629, 638.

5. *Smith* v. *A.G. for Ontario* [1924] S.C.R. 331, 337.

6. *Baker* v. *Carr*, 369 U.S. 180 at 284. To this extent, the rules governing standing have, in the opinion of some writers, proved unduly restrictive.[2]

Various reasons have been advanced for restricting the right of a private individual to sue in respect of an infringement of public rights. One of the earliest was the fear that without such restrictions there would be a multiplicity of actions.[3] This fear was one of the principal reasons for restricting an individual's rights to sue in respect of a public nuisance. Sir William Blackstone in his *Commentaries* said:[4]

> ... it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common with the rest of his fellow subjects.

More recently, Duff J. echoed this fear when he said in effect that to relax the restrictions on an individual's standing "would lead to grave inconvenience." [5]

Allied to this fear is the view that access to the courts must be restricted to those who have a personal interest in the subjectmatter of the litigation if, in the words of the Supreme Court of the United States, the courts are "to ensure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." [6] Such a view is based on the assumption that the needs of the adversary system will not be met if a person has no personal interest in the outcome of a case, as he cannot possibly litigate with sufficient vigour to ensure that the issues are given a full hearing.

A third and probably more pervasive reason for restrictions on an individual's standing, is the desire to eliminate busybodies from cluttering up the judicial system. As one writer has succinctly pointed out:

8. *See generally* S.A. de Smith *supra* n. 1 Chapters 911 and S.M. Thio, *supra* n.2.

9. *See, e.g., Macllreith* v. *Hart* (1908) 39 S.C.R. 657 and text *infra*.

10. *Thorson* v. *A.G. of Canada et al*, (1974) 43 D.L.R. (3d) 1 (S.C.C.), and text *infra*.

11. *Re MacNeil* v. *Nova Scotia Board of Censors*, (1975) 55 D.L.R. (3d) 632 (S.C.C.), and text *infra*.

All developed legal systems have had to face the problem of adjusting conflicts between two aspects of the public interest - the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him.

The law on standing has not been comprehensively or consistently expounded by the courts even though there is voluminous case law on the subject.[8] It would appear, however, that, depending on the remedy sought and the subjectmatter of the action, there are certain basic principles that govern an individual's standing to sue in respect of a violation of a public right. As we have already pointed out, these basic principles were developed in public nuisance cases, and are now, generally speaking, applied to all other forms of interference with public rights. In Canada, however, there are, in addition to certain statutory modifications to the law on standing, two situations where the subjectmatter of the dispute has led to the courts applying different rules on standing, namely, where ratepayers seek to challenge the illegal expenditure of municipal funds,[9] and where a private citizen seeks to challenge the constitutional validity of federal[10] or provincial[11] legislation. In both situations the rules on standing are more relaxed than in other areas. The development of the law on standing to challenge the constitutionality of legislation is of recent origin and, although it is too early to tell, may lead to a relaxation in some other areas.

In the result, both the subjectmatter of the action and the remedy sought can be crucial in determining whether a particular plaintiff has the requisite standing to commence an action.

We should also to point out that it is very common for a right to appeal a decision of an administrative tribunal to be conferred by statute. Such an appeal may be to a court, an administrative tribunal, a minister of the Crown, their deputies, or some other person. The standing required to bring an appeal is usually governed by the relevant statute which, in providing a statutory remedy, usually stipulates to whom the remedy is available. Various formulae are used to describe the persons who have standing to pursue the prescribed statutory remedy. The more common formulae used are, "person aggrieved," "person dissatisfied," "person affected," or "person interested." None of these is capable of a single definition; the interpretation accorded to each is purely a matter of statutory construction which tends to vary according to the context in which it is found. The manner in which these formulae have been interpreted will also be examined in this chapter.

We will, however, deal first with the general principles governing the law on standing in public interest suits.

A. General Principles

It is well established that a private plaintiff has standing to sue for declaratory or injunctive relief in respect of a matter of public interest without the AttorneyGeneral being a party if he satisfies either of the two conditions laid down by Buckley J. in *Boyce* v. *Paddington Borough Council,* where he said:[13]

A plaintiff can sue without joining the AttorneyGeneral in two cases: first, where the interference with the public right is such 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.

14. Cited with approval by Davies J. in *Macllreith* v. *Hart, supra* n. 9. Buckley J. was concerned with a suit for an injunction but the principle laid down in this case was held applicable to the declaration in *London Passenger Board* v. *Moscrop*, [1942] A.C. 332 and this was recently reaffirmed by the House of Lords in *Gouriet* v. *U.P.W.*, [1978] A.C. 435 (H.L.). *See also Cowan* v. *C.B.C., supra* n. 1, where the Ontario Court of Appeal specifically applied this statement of the law in relation to injunctions and to actions for declarations.

15. *See* De Smith, *supra* n. 1 at 402.

16. *Harvey* v. *B.C. Boat & Engine Co*., (1908) 14 B.C.R. 121 (B.C.S.C.); *see also Lyon* v. *Fishmongers Co*., (1876) 1 A.C. 662 (H.L.) *per* Lord Cairns at 671672; *Hagel* v. *Yellowknife* (1962 35 D.L.R. (2d) 110 (N.W.T. C.A.).

17. *Rorison* v. *Kolosoff*, (1910) 15 B.C.R. 26 (B.C.S.C.), *rev'd* on other grounds (1910) 15 B.C.R. 419 (B.C.C.A.).

18. [1911] 1 K.B. 410.

1. Private Right

The term "private right" used by Buckley J. in the *Boyce* case denotes a right the invasion of which gives rise to an actionable wrong within the categories of private law, such as a breach of contract or trust or the commission of a tort. The example most often given is an obstruction on a highway (an interference with the public right to pass and repass along the highway) that is placed so as to interfere with the private access to and from private premises abutting the highway.[15] This right of access to a highway by an occupier of land abutting upon it is a private right which differs from the public right to pass along the highway, and any disturbance of this private right may be enjoined in an action by the occupier alone.[16] Likewise, if there is an obstruction to the foreshore of tidal waters, which also interferes with a riparian land owner's access to the water, such a land owner is entitled to maintain an action to restrain such an obstruction.[17]

In the famous case of *Dyson* v. *AttorneyGeneral*[18] the plaintiff was the recipient of one of eight million similar notices sent out by the Commissioners of Inland Revenue requiring the making of certain tax returns. Failure

to make the return would subject the recipient to penalties. Dyson, whilst occupying a position similar to that of millions of others, nevertheless could show that he would suffer injury to specific private rights of his own, in the sense that if the form had been issued, and a penalty levied, the levy would have been wrongful and he would have had the right to recover it. He was therefore allowed to seek a declaration that the notice was *ultra vires* of the Commissioner.

This exception applies not only to a common law right but also to statutory rights. That is to say, a private plaintiff may also sue in his own name to ascertain or enforce statutory provisions enacted for his benefit,[19] and he need not prove or allege any special or particular damage:[20]

Where an Act of Parliament contains a provision for the special protection or benefit of an individual, he may enforce his rights thereunder by an action, without either joining the AttorneyGeneral as a party or showing that he has sustained any particular damage.

Whether a provision in a statute has been enacted for the benefit of the plaintiff so as to entitle him to maintain such an action is purely a question of statutory interpretation. It is not necessary, however, that the statutory provision expressly confer standing,[22] for if there is an express statement in the statute that a provision is for the benefit of a particular individual or a specific body, it is clear as a matter of construction that the individual or body does have standing.

21. *Ibid* (headnote).

22. S.M. Thio, *supra* n. 3 at 205208.

23. *Sirnmonds* v. *Newport Abercarn Black Vein Steam Coal Co*., £1921] 1 K.B. 616; *Joseph Crosfield & Sons* v. *Manchester Ship Canal Co*., [1905] A.C. 421. *Cf A.G. v. Pontypridd Waterworks Co*., [1908] 1 Ch. 388 but this case has been criticized by several writers as being wrongly decided. *See, e.g*., Thio, *supra* n. 3 at 206, n. 69. I. Zamir, *The Declaratory Judgment* at 270, n. 30 (1962).

24. *A.G*. v. *North Eastern Ry. Co*., [1915] 1 Ch. 905; *see also A.G*. v. *St. Ives R.D.C*., [1960) 1 Q.B. 312, 323324, aff'd [1961) 1 Q.B. 366.

25. *Oak Bay* v. *Gardner, supra*, n. 20 391; *Grant* v. *St. Lawrence Seaway Authority*, (1960) 23 D.L.R. (2d)252 (Ont. C.A.); *St. Lawtence Rendering Co*. v. *Cornwall*, [1951] O.R. 669 (Ont. H.C.).

26. *Ibid*. *See also Watson* v. *City of Toronto Gas Light & Water Co*., (1847) 5 U.C.Q.B. 158; *Chiswell* v. *Rural Municipality of Charleswood and Alcrest Golf Club Ltd*., [1935) 3 W.W.R. 217 (Man. K.B.); for a recent restatement of this principle by a British Columbia court *see National Harbours Board* v. *Hildon Hotel (1963) Ltd. et al*, (1967) 61 W.W.R. 75 (B.C.S.C.), *per* Ruttan J. at 80. Such an express provision, however, does not necessarily mean that only that individual or body may sue, for it may also be of public interest so as to entitle the Attorney-General to sue.[24]

2. Special Damage

The special damage rule has its origins in public nuisance which is one of the earliest examples of a private litigant suing in respect of a public right. While, as a general rule, only the AttorneyGeneral has standing to bring an action in respect of a public nuisance,[25] it has long been established that if a private person has suffered some special or particular damage as a result of a public nuisance, over and above the ordinary inconvenience suffered by the public at large, he may sue in his name without joining the AttorneyGeneral.[26]

Despite a vast volume of case law there remains much uncertainty as to the precise sort of damage that can be characterized as "special" or "particular" damage. According to one view, the plaintiff's injury must have been different not merely in degree but in kind from that suffered by the general public.[27] The more liberal and widely

accepted approach is that special or particular damage should not be limited to damage different in kind, but should also include damage which is substantially or appreciably greater in degree than that suffered by the general public.[28] This latter approach would appear to include, for example, inconvenience and delay that may be suffered by an individual .

28. *See, e.g.*, J.G. Fleming, *The Law of Torts*, 341 (4th ed. 71).

29. *Ibid*. *See also* n. 41 *infra*.

One writer has pointed out that while Canadian authority does not give a conclusive answer on this issue, it does suggest sympathy for the latter "more inclusive approach." It is clear that special or particular damage can include injury to a plaintiff's person

32. *See, e.g., The "Eurana"* v. *Burrard Inlet Tunnel & Bridges Co*., (1931) A.C. 300, where the owners of a bridge over navigable waters did not comply with statutory requirements and which constituted a substantial interference with navigation were held liable to a ship damaged in a collision with the bridge; *see also Suzuki et al* v. *"Ionian Leader"* [1950] 3 D.L.R. 790 (Ex. Ct.), where a fisherman's nets were fouled by oil pumped from a ship aground in the Fraser River.

33. *Rose* v. *Miles* (1815) 4 M.&S. 101, 105 E.R. 773.

34. *Crandell* v. *Mooney*, (1878) 23 U.C.C.P. 212; *Rain River Navigation Co*. v. *Ontario & Minnesota Power Co*., 1914 17 D.L.R. 850 (Ont. S.C. App. Div.); *Rainy River Navigation Co*. v. *Watrous Island Boom Co*., (1914) 26 0.W.R. 456; *see also Newell* v. *Smith* (1971) 20 D.L.R. (3d) 598 (N.S.S.C.), where because a public road was obstructed, one plaintiff was unable to arrive at his own property and the other lost prospective purchasers of her property and it was held that both had suffered a particular damage distinct from the general inconvenience caused to the public.

35. [1934] 3 D.L.R. 22 (N.B.S.C. App. Div.).

36. (1972) 21 D.L.R. (3d) 368 (N.S.S.C.).

37. *0'Neil* v. *Harper*, (1913) 13 D.L.R. 649 (Ont. S.C. App. Div.). or his property,[32] and may also include such pecuniary losses as expenses incurred[33] or a loss of business.[34] Such losses, however, can all be characterized as losses different in kind from those suffered by the general public. Where the loss has been characterized as being merely different in degree, Canadian courts have, in some instances, held that such a loss does not fall within the designation special" damage. For example, in a New Brunswick case, *Fillion* v. *New Brunswick Paper Co*.,[35] waste from the defendant's pulp mill allegedly caused interference with a commercial fisherman's fishing. It was held that since the plaintiff was only exercising a common public right to fish he could have no greater rights than any other member of the public in fishing, and any damage flowing from this interference was therefore, by definition, merely different in degree from that incurred by the public as a whole. This same reasoning was recently used in a Newfoundland case a *Hickey* v. *Electric Reduction Co. of Canada Ltd*.,[36] in which the court dismissed an action by a group of commercial fishermen who claimed to have suffered loss of revenue as a result of fish allegedly killed by the discharge of chemicals from the defendant's plant.

There are other cases, however, which tend to support the proposition that an aggravated degree of harm is sufficient to constitute special damage. This is implied in three early Ontario decisions, one involving obstruction of a highway,[37] and the others navigable waterways.[38] It was also suggested in a recent Ontario case[39] that persons who use a highway more frequently than others have a special interest sufficient to support an action in public nuisance in respect of an obstruction of the highway.

Outside Canada, the most controversial cases, as Fleming points out, are those involving expense and delay caused by road obstruction,[40] but he argues that:[41]

> ... there is an undoubted modern tendency to reject the elusive distinction between difference in kind and degree, and to allow recovery if the obstruction caused more than mere infringement of a theoretical right which the plaintiff shares with everyone else.

39. *Muirhead et al* v. *Timbers Bros. Sand and Gravel Ltd. et al,* (1977) 3 C.C.L.T. 1 (Ont. H.C.) *per* Rutherford J. at 9.

40. *Supra* n. 28 at 341342.

41. *Ibid*.

42. Thus, while it has been held that an ordinary traveller cannot complain of mere delay or being forced to make a detour, *Winterbottom* v. *Derby*, (1867) L.R. Ex. 316, it has been held that a farmer deprived of his ordinary route to market or to an adjacent holding, suffers sufficient damage to qualify, even if it is impossible to infer actual pecuniary loss. *See, e.g., Smith* v. *Wilson,* [1903] 2 I.R. 45, *see also Walsh* v. *Ervin*, [1952] V.L.R. 361 which contains an excellent review of the older authorities.

43. *Supra* n. 36 at 370.

44. *See generally Salmond, The Law of Torts*, 8687 (16th ed. 1973) and Fleming, *supra* n. 4 at 342; and *see Gravesham B.C.* v. *British Railways Board*, [1978] 3 All E.R. 853.

45. *Supra* n. 34.

46. *Newell* v. *Smith, supra* n. 34.

47. *See, e.g., Cowan* v. *C.B.C. supra* n. 1; for a more recent example *see Re Doctors Hospital and Minister of Health et al*, (1976) 68 D.L.R. (3d) 220 (Ont. H.C. Div. Ct.).

48. S.M. Thio, *supra* n. 3 at 204.

49. *Ibid*.

Another issue raised in the *Hickey* case was whether the kind of damage suffered by the plaintiff, i.e. business losses, was actionable at all. Furlong J. took the view that it was not, as it was "not direct but merely consequential damage resulting from the nuisance." [43] As we have pointed out, however, in other jurisdictions such a loss, occasioned by a public nuisance, has been held to be actionable.[44] In Ontario, three appellate decisions make it clear that financial loss incurred by shipping concerns because of obstructions to navigation can amount to special damage which is actionable.[45] Indeed, in a recent Nova Scotia case, the loss of prospective purchasers of a piece of land due to a road obstruction was held to constitute sufficient damage so as to enable the plaintiff to maintain an action.[46]

The requirement of "special damage" is often characterized as a requirement that the plaintiff must have been "peculiarly affected" or have a "special" or "sufficient" interest in the matter.[47] This is particularly true where an administrative act is sought to be impugned. It would

appear that the terms special or sufficient interest are susceptible of denoting both a private right and special damage.[48] Since the term special damage has a particular connotation in private law, being used in contradistinction to general damages, such expressions as "peculiarly affected" or "special interest" may be preferable if confusion is to be avoided.[49]

A recent example of a court granting standing to sue on the basis of the plaintiffs' "special interest" in the subject matter is the British Columbia case of *Chastain* v. *B.C. Hydro & Power Authority,* where the plaintiffs sued on their own behalf and on behalf of approximately 20,000 others who occupied residential premises and were required by the defendant to pay, or had paid, security deposits for the supply of gas and electricity. They claimed that these security deposits were unlawful. The court agreed with the plaintiffs' contention that they had a "special interest" sufficient to enable them to maintain the action, for, as McIntyre J. pointed out:[51]

... This is not a situation faced by the public at large. This is a problem faced by some members of the public only and those who are compelled to pay these deposits or suffer the consequence of nonpayment have

> suffered a special injury and damage beyond that suffered by the community at large and they have thus acquired a status to sue.

He went on to say that in his view the case fell within the same category as the case of *Dyson* v. *Attorney-General,*

52. *Supra* n. 18.

53. *Sevenoaks Urban District Council* v. *Twynam*, [1919] 2 K.B. 440 at 443.

54. *See, e.g., Re Consumers' Gas Co. et al and Public Utilities Board et al*, (1971) 18 D.L.R. (2d) 749 (Alta. S.C. App. Div.).

55. *See e.g., Fish Inspection Act*, R.S.B.C. 1979, c. 136, s. 7; *Hearing Aid Regulation Act*, R.S.B.C. 1979, c. 164, s. 9; *Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237, s. 32(2); *Milk Industry Act*, R.S.B.C. 1979, c. 258, s. 56; *Municipal Act*, R.S.B.C. 1979, c. 290, s. 727(1)(a); *Natural Products Marketing (B.C.) Act*, R.S.B.C. 1979, c. 296, s. 11(1); *Real Estate Act*, R.S.B.C. 1979, c. 356, s. 22(1); *School Act*, R.S.B.C. 1979, c. 375, s. 20(b). discussed earlier, and that the plaintiffs had the necessary standing to seek a declaration by the court as to the legality of the demands made upon them.

B. Statutory Appeals

As we pointed out earlier various formulae are used to describe the persons who have standing to appeal a decision of an administrative tribunal. The more common formulae used are, "person aggrieved," "person dissatisfied," "person affected," or "person interested," and the interpretation accorded to each is purely a matter of statutory construction which tends to vary according to the context in which it is found. As Lord Hewart C.J. once said of the term "person aggrieved":[53]

> ... there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have been enacted alio intuitu. The problem ... is not, what is the meaning of the expression "aggrieved" in any one of a dozen other statutes, but what is its meaning in this part of the statute?

While this can mean that the same standing formula has been interpreted differently, the courts have very often looked at the interpretation accorded to a particular term in other cases involving other statutes.[54] We will therefore examine the more common standing formulae and the manner in which they have been interpreted.

1. Person Aggrieved

One of the more common formulae used to describe those persons who have standing to such an appeal is the term "any person aggrieved." [55]

The meaning of "person aggrieved" may vary according to the statutory context but, generally speaking, a person has not been held to be "aggrieved" by a decision if that decision is not materially adverse to him. It is not enough for a person to show he is dissatisfied with the order made or that his interests are likely to be prejudiced by the outcome, for, as James L.J. pointed out in *Ex parte Sidebotham:*

> The 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.

58. [1930] S.C.R. 307.

59. R.S.C. 1927, c. 291, s. 45.

60. *See also Jones* v. *Horton*, (1925) 65 D.L.R. 33 (Ex. Ct.); *Mayer* v. *Holland*, [1933] Ex C.R. 217.

61. [1964] 2 W.L.R. 715.

62. *Ibid* at 725.

Despite such judicial pronouncements, it is unsafe to generalize, as the courts have been prepared, in relation to some statutes, to adopt a more liberal interpretation of the term "person aggrieved." In *Robert Crean & Co*. v. *Dodds & Co*.,[58] for example, the Supreme Court of Canada considered a section of the *Trade Mark and Design Act*[59] that empowered the Exchequer Court to expunge a trade mark from the register "at the suit of any person aggrieved by the entry." It was held that any person who was in any way hampered in his trade by the presence of the marks or one who had any real interest in having them removed, or who may possibly be injured by their continuance, was a "person aggrieved."[60]

The courts in England, in recent years, have tended to depart from the strict interpretation given to the term in the *Sidebotham* case. In *Maurice* v. *London County Council*,[61] Lord Denning M.R. made a short survey of the interpretation accorded to the term "person aggrieved" and said:[62]

> I know that one time the words 'person aggrieved' ... were given in these courts a very narrow and restricted interpretation. It was said that the words 'person aggrieved' in a statute only meant a person who had suffered a legal grievance. Indeed, in *Buxton* v. *Minister of Housing and Local Government* ... Salmon J. declined to go into the question of loss of amenities. But that narrow view should now be rejected. In the more recent case of *AttorneyGeneral of the Gambia* v. *N'Jie* the Privy Council had to consider these words 'person aggrieved' once again. On behalf of the Board, I ventured to say there: 'the words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.'

In a more recent case Lord Denning M.R. has reiterated his comments in this regard[63] and the definition he propounds has also been relied upon in at least one Canadian case.[64]

In some statutes the expression any person who thinks himself aggrieved" is used.[65] It has been suggested in a recent English case that a similar expression, namely a person who "feels aggrieved," may afford standing to persons not coming within the definition "person aggrieved."

63. *Re Liverpool Taxi Owners' Assn*., [1972] 2 Q.B. 299.

64. *Re City of Kingston and Mining and Lands Commissioner et al*, (1977) 18 0.R. (2d) 166 (Ont. H.C. Div. Ct.), and *see also John Graham & Co*. v. *C.R.T.C*. [1976] 2 F.C. 82, 90; *Re Doctors Hospital and Minister of Health et al, supra,* n. 47. The case was referred to but distinguished in *Re Bruhn-Mon and College of Dental Surgeons, B.C*., (1976) 59 D.L.R. (3d) 152 (B.C.S.C.).

65. *See, e.g., Electrical Energy Inspection Act*, R.S.B.C. 1979, c. 104, s. 14(1); *Private Investigators Act*, R.S.B.C., 1979, c. 337, s. 15(1); *Employment Standards Act*, R.S.B.C. 1979, c. 107, s. 71.

66. *R*. v. *Ipswich Justices, ex parte Robson*, [1971] 2 Q.B. 740.

67. *Rex* v. *Olney*, [1926] 4 D.L.R. 869 (B.C.C.A.).

68. *Ibid* at .

69. *See, e.g., Fire Services Act*, R.S.B.C. 1979, c. 133, s. 43(3); *Municipal Act*, R.S.B.C. 1979, c. 290, s. 313.

70. *Supra* n. 54.

71. *See, e.g.,C .P.R.* v. *Toronto Transportation Commission*, [1930] A.C.686; *Hall Development Co. of Venezuela, C.A.* v. *B.&W. Inc.*, [1952] Ex. C.R. 347, *Re Hord*, [1945] 0.W.N. 891 (Ont. H.C.).

72. *Supra* n. 54 at 761. It should be noted, however, that in an early British Columbia case[67] it was held that the expression " any person who thinks himself aggrieved," did not mean that the' person "says or fancies he is aggrieved" but that he has "legal grounds for saying he is aggrieved." [68]

2. Person Interested

In several statutes it is provided that a "person interested" or a "person who has an interest" may appeal a particular order or decision.[69] While the meaning accorded to this term will often depend upon the context in which it is found, the courts have in general interpreted it broadly rather than restrictively.

Various judicial decisions and pronouncements bearing upon the interpretation of this term were considered recently by Allen J.A. in *Re Consumers' Gas Co. et al and Public Utilities Board et al.*[70] From these decisions and pronouncements it would appear that the tendency of the courts is to regard the term as not having any technical or special legal sense, but rather to interpret it in its ordinary popular sense.[71]

In the *Consumers' Gas Co.* case it was held that persons who had contracts to purchase gas from a customer of a particular gas supplier were themselves "interested" parties for the purpose of participating in a hearing before a tribunal charged with determining the reasonableness of a rate increase fixed by the supplier. The court said that 'a refusal by the tribunal to allow such persons to participate except in association with a party having a direct contractural link with the supplier was therefore wrong. It is interesting to note that the court also

said that:[72]

> A point was raised as to the possible difference between the words "interested person" and "interested party"; the latter, it being contended, indicated a more restricted classification than the former, but it is noted, and was admitted on the hearing, that the words "person" and "party" seemed to be used interchangeably in some of the authorities cited and not too much argument was directed to that contention, with which I am not impressed.

In British Columbia the term is used in the *Municipal Act*

75. *See, e.g., Re Bourque et al, and Township of Richmond*, (1977) 77 D.L.R. (3d) 207 (B.C.S.C.); *Ross et al* v. *District of Oak Bay*, (1965) 50 D.L.R. (2d) 468 (B.C.S.C.), *rev' d* 57 D.L.R. (2d) 770 n. (B.C.C.A.)

76. [1977] 6 W.W.R. 749 (B.C.S.C.).

77. *See Municipal Act*, R.S.B.C. 1979, c. 290, s. 940; *Land Wife Protection Act*, R.S.B.C. 1979, c. 223, s. 15; *Vancouver Charter*, S.B.C. 1955, c. 55, s. 291(B).

78. (1959) 28 W.W.R. 364 (Alta. S.C.) 373374.

79. *Ibid* 373, 374. in relation to those who may apply to the court for an order setting aside a bylaw. Section 313 of that Act provides:

> 313. The Supreme Court, on application of an elector of a municipality or of *a person interested* in a bylaw of its Council, may set aside the by-law in whole or in part for illegality and award costs for or against the municipality according to the result of the application.

The few reported cases in which the status of an applicant to make such an application has been challenged on the basis that he is not a person interested in the bylaw, give no firm guidance as to the degree of interest required to accord him standing under the section. In some cases the courts have been content merely to state that the "material filed" with the application either showed, or did not show, that the applicant was a person interested, giving no indication as to what the content of his "material" or what interest is sufficient to bring a person within the section.[75]

The type of applicant that is likely to be accorded standing under this section is probably best illustrated by the recent case *Re Sunshine Hills Property Owners' Association* v. *Delta*.[76] In that case an incorporated society consisting of residents of a single subdivision was held to be a person "interested" in a bylaw on the basis that the society's objects dealt with the community's wellbeing and its membership was made up of community residents.

3. Person Dissatisfied[77]

It would appear that the courts have also interpreted the term "dissatisfied" more liberally than the term "aggrieved." Although the courts have said that the term "dissatisfied" does not necessarily connote some legal grievance, they have, on occasion, restricted in scope to a particular class or classes of individuals. In *Re Herron' s Application,*[78] *for* example, Egbert J. said with regard to a right of appeal given to persons who are "not satisfied" with a zoning decision":[79]

> This right of appeal is stated in very broad terms and if construed literally would give to a resident of New Zealand or Hungary who is in no way interested in the land or the area involved in the application ... I am of the opinion that the person" ... must be confined to the person who has made application to the planning board and is dissatisfied with its decision, or to another owner or resident of the zone who has objected to the application and who is dissatisfied with the decision. Either the clause must be given a literal interpretation so as to give to any person in the world at any time a right of appeal which I consider so unreasonable that it could not have been intended by the legislature, or it must be given a restricted interpretation; and if a restricted interpretation is to be given to it, then in my view the only reasonable interpretation is the one I suggest.

On the other hand, it has been held that the term, as used in other statutes, could encompass persons who were not parties to the proceedings appealed from.[80]

In the result, and at the risk of sounding trite, all that can be said is that the term is incapable of exact definition and its interpretation will invariably depend upon the context in which it is used and the circumstances of a particular case.

4. *Person Affected*[81]

The courts have, in general, tended to interpret the term "person affected" in a literal manner, and have not confined its scope to those with a legal grievance. In one case, Wills J. said:[82]

> Affected is ... not a word of the art, but a word of ordinary English. It is capable of a very large meaning, and was, I think, purposely used for that reason.

This statement of Wills J. was cited in the Nova Scotia case, *Re Clarendon Development Ltd*.,[83] where it was held that a section of the *Town Planning Act*,[84] which provided that at meetings to discuss the amendment of repeal of a zoning bylaw "all persons whose property would be affected" by such amendment or repeal may appear, entitled all property owners in the neighbourhood to appear on which the zoning change would have an effect and not only those properties which themselves would be rezoned.

In the *Federal Court Act*, it is provided that "any party directly affected" by a decision or order may appeal to the Federal Court.[85] This standing provision appears to have been litigated only twice,[86] and in these cases the court did not confine the term to those persons who have suffered a legal grievance as such or who have had their legal rights' infringed. In *John Graham & Co*. v. C.R.T.C.,

81. *See, e.g., Mineral Act*, R.S.B.C. 1979, c. 259, s. 50(7); *Mineral Processing Act*, R.S.B.C. 1979, c. 261, s. 14; *Mortgage Brokers Act*, R.S.B.C. 1979, c. 283, s. 9(1); *Credit Reporting Act*, R.S.B.C. 1979, c. 78, s. 8(1).

82. *Re Buckinghamshire Council and Hertfordshire C.C*., (1899) 68 L.J. Q.B. 417, at 419420.

83. (1965) 50 D.L.R. (2d) 521 (N.S.S.C.).

84. R.S.N.S. 1954, c. 292, s. 16.

85. *Federal Court Act*, R.S.C. 1970, c. 10, s. 28(2).

86. *Commonwealth of Puerto Rico* v. *Hernandez*, [1975] 1 S.C.R. 228; *John Graham & Co*. v. *C.R.T.C*., [1978] 2 F.C. 82.

87. *Ibid*. for example, a number of minority shareholders were granted standing to contest a C.R.T.C. ruling that required the company of which they were shareholders to divest itself of its cablevision interests. Although no legal rights as such were affected, Urie J. held that the shareholders' economic interests were affected inasmuch as the value of their shares could well be diminished and that consequently they were "directly affected by the decision."

C. Exceptions to General Principles

1. Ratepayers

In Canada municipal ratepayers have been allowed standing to sue where a municipality has made or is about to make an expenditure which is alleged by the ratepayer to be ultra vires.[88] It has been said that in these circumstances the ratepayer is presumed to have suffered special damage, in the form of increased taxes, over and above the other residents of the municipality and the public at large.[89] The ratepayer may therefore sue on behalf of himself and all other ratepayers in a class action.[90]

Such a right of action was approved by the Supreme Court of Canada in *Macilreith* v. *Hart*.

89. *Macllreith* v. *Hart, ibid per* Davies J. at 663.

90. It has been suggested that an action of this kind must of necessity be constituted as a class action, *Elworthy* v. *Victoria*, (1896) 5 B.C.R. 123 (B.C.S.C.). The theory of the class action is that where there is a common interest and a common grievance, all persons showing that interest or grievance can be represented in such a suit if the relief sought would be appropriate for those represented; *see Bedford (Duke)* v. *Ellis*, [1901] A.C. 1 (H.L.); *R.C. Separate Schools Trustees for Tiny* v. *The King*, (1926) 59 O.L.R. 96 at 152 (Ont. H.C.).

91. *Supra* n. 1.

92. (1974) 43 D.L.R. (3d) 1 (S.C.C.).

93. *Ibid* at 15.

94. In a recent case, it was held that where it was obvious that a school board had made up its mind to make an alleged illegal payment, the plaintiff need not, as a precondition of status, first ask the board not to pay the money. *Re Vladicka and Board of School Trustees of Calgary School District #19*, (1974) 45 D.L.R. (3d) 442 (Alta.S.C.T.D.).

95. *Supra* n. 89. In that case a municipal council had paid $231 to the mayor to reimburse him for his expenses in attending a municipal convention. A ratepayer brought a class action against the mayor (the municipal council having refused to do so) for a declaration that the payment was illegal and that the sum in question should be returned. On the question whether a ratepayer's action lay, the Supreme Court held that it did. In *Thorson* v. *AttorneyGeneral for Canada,*[92] Laskin J. discussed this case with apparent approval, and noted that Duff J. had[93]

> ... concurred in the reasons of Davies J., who founded himself on the principle of *Paterson* v. *Bowes* and who found reconciliation with English authority by concluding that ratepayers, who sue to vindicate a public right to have municipal money lawfully appropriated, suffer damage peculiar to themselves *qua* ratepayers in the increased rates they would have to pay by reason of illegal expenditures, even though the damage is small. Idington J., proceeded squarely on *Paterson* v. *Bowes*. So did Maclennan J. (with whom Fitzpatrick C.J.C., concurred) although he viewed that case as reflecting a trusteebeneficiary relationship between the municipality and its ratepayers. It is quite clear that obeisance to the special damage requirement was purely formal, and that at least equally important was the fact that *ultra vires* expenditures were involved which the municipal council was unwilling to reclaim.

In *Macllreith* v. *Hart*, Davies J. regarded the relationship between the ratepayer and the municipality as one of trust so that the ratepayers:[95]

> ... have a right to sue in their own name, in equity, to have the wrong rectified or proposed wrong enjoined, where their trustee (the municipality) refuses to allow the corporate name to be used for the purpose ...

MacLennan J. said:[96]

> ... the corporation is a trustee for the inhabitants ... the ratepayers are also *cestuis que*___ *trustent* of the city corporation ...

This trust analogy had formed the basis of the decision in the earlier leading case of *Paterson* v. *Bowes*.[97] As Laskin J. pointed out in Thorson:[98]

> *Paterson* v. *Bowes* spoke in terms of the interest of inhabitants (it was an inhabitants' class action rather than a ratepayers') to prevent a misapplication of funds which came from municipal rates, and it distinguished the case of the public nuisance. Analogy there to equity jurisdiction to hold a faithless agent to be trustee for his principal was based on the fact that the defendant mayor had obtained £lO,0OO as a discount on the purchase for the city of debentures in the sum of £50,OOO, and had retained the sum for his own use. The municipal council refused at first to act and it was only after the question of standing had been resolved in favour of the inhabitants who brought the action that the council agreed to be substituted as plaintiff.

In *Robertson* v. *City of Montreal,*

98. *Supra* n. 92 at 14.

99. (1915) 52 S.C.R. 30.

100. *Ibid* at 37.

101. *Ibid* at 62, 63.

102. *Ibid* at 65.

103. [1924] 3 D.L.R. 189.

104. *Ibid* at 193. however, Sir Charles Fitzpatrick C.J. doubted that such an analogy was applicable.[100] In the same case Duff J. was more direct in doubting the analogy. He said:[101]

> ... it is only in a broad sense that a municipal council exercising such powers can be said to act as "trustee" for the inhabitants or for the ratepayers as individuals. Between them as individuals, and the council, there is no fiduciary relation in the legal sense ...

He also stated, in referring to *Macllreith* v. *Hart*, that he had concurred in the judgment of Davies J., but:[102]

> ... I must admit I have always had my doubts about this decision.

He reiterated this doubt in *Smith* v. *AttorneyGeneral* for Ontario,[103] when he said that the case was an exception which "does not rest upon any clearly defined principle, and we think it ought not to be extended." [104]

The doubt thrown on *Macllreith* v. *Hart* by *Robertson* v. *Montreal* resulted in the courts being very cautious when granting standing on this ground. Thus, if there is no threatened financial loss as a result of an *ultra vires* act, the ratepayer has no standing to challenge the validity of the municipal government's decision.[105] Furthermore, if the financial aspect affects not only the municipality but the province generally, the ratepayer does not have standing.[106]

In *Hooper* v. *City of North Vancouver* the British Columbia Court of Appeal held that a ratepayer could not bring an action in his own name to obtain an injunction restraining the municipality from issuing, pursuant to a by-law, free transportation passes on its municipal ferries. The court made it clear that a ratepayer must have some interest peculiar to himself to enable him to bring an action against the municipality, and that there was no general interest accruing to ratepayers as such which would qualify each and every one of them to launch actions. While this bylaw was concerned with fiscal matters, this did not of itself give a ratepayer automatic standing to question its validity. Perhaps most importantly, on the question of whether taxation would be increased as a result of this scheme, McPhillips J. found that:

107. (1922) 31 B.C.R. 51.

108. *Ibid*.

109. For example, in *Affleck and McCandlish* v. *City of Nelson*, (1957) 10 D.L.R. (2d) 442 (B.C.S.C.), Wilson J. could only bring himself to hold "dubitante, following *Macllreith* v. *Hart*" that an action by a ratepayer attacking the illegal expenditure of municipal funds would lie without the intervention of the AttorneyGeneral; *see also* Eric C.E. Todd, *The Quashing and Attacking of Municipal ByLaws*, (1960) 38 Can. B. Rev. 197, in particular at pp. 206215; *but see Bongard* v. *Town of Parry Sound*, (1968) 2 0.L.R. 137 (Ont. H.C.); and *Barber* v. *Calbert*, (1970) 71 W.W.R. 124 (Man. Q.B.) where, in both cases, the courts held that ratepayers had standing to sue following *Macllreith* v. *Hart*.

110. *See Re Vladicka and Board of School Trustees of Calgary School District #19, supra* n. 94; *Re Brodie* v. *City of Halifax*, (1974) 46 D.L.R. (3d) 528 (N.S.S.C.); *Wilin Construction Ltd*. v. *Dartmouth Hospital Commission*, (1977) 75 D.L.R. (3d) 145 (N.S.S.C.).

111. *Supra* n. 92 at 19.

112. [1924] S.C.R. 331.

> ... there is no threatened taxation consequent upon the course being pursued.

The doubts raised by such cases meant that the courts were cautious in allowing standing on the principle established by *Macllreith* v. *Hart*.[109] As we have pointed out, however, Laskin J. in delivering the majority judgment of the Supreme Court in *Thorson* v. *Attorney General for Canada* expressed approval of *Macllreith* v. *Hart* and the principle it established, and this approval has been noted and relied upon in subsequent cases.[110] It is interesting to note Laskin J. was not only clearly of the view that ratepayers should be able to maintain such actions, but also asserted that such a right should not rest on the basis of the token special damage caused by the expenditure, a basis he described as "unreal." [111]

2. Constitutional Cases

Until recently the most commonly cited authority on the law concerning standing to question the constitutional validity of legislation was the decision of the Supreme Court of Canada in *Smith* v. *AttorneyGeneral of Canada*.[112] In that case the Supreme Court refused to accord standing to Smith, a private citizen, to challenge the validity of a resolution of the Ontario Legislature which had the effect of prohibiting the importation of liquor into Ontario. After a Montreal dealer had refused to fill an order because of the legislation, Smith argued that neither he nor the dealer should have to risk prosecution in order to raise questions as to the validity of the resolution, and that therefore he should be able to approach the courts for a declaration. This argument was rejected by the court who refused to. accord Smith standing as he had no interest beyond that of "hundreds of other citizens" and was "not in jeopardy by reason of any act of his or of any threat of a penalty unless he submits to an unreasonable demand." Duff J. in the course of this judgment concluded that the grave inconvenience to governments involved in allowing private citizens to challenge the validity of legislation "directly affecting" them outweighed the "risk of prosecution" argument.[114] In the result this decision established that a private citizen could not challenge the constitutional validity of legislation unless he was specially affected by the operation of that legislation.[115]

Recent decisions of the Supreme Court of Canada have, however, marked a retreat from this position. In *Thorson* v. *AttorneyGeneral of Canada* a federal taxpayer was granted standing to apply for a declaration that the Official Languages Act and its accompanying *Appropriations Acts* were unconstitutional. In delivering the majority judgment, Laskin J. said:[117]

> In my opinion, the standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised ... Relevant as well is the nature of the legislation whose validity is challenged, according to whether it' involves prohibitions or restrictions on any class or classes of persons who would thus be particuarly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide ... that a member of the public ... is too remotely affected to be accorded standing. On the other hand, where all members of the public are affected alike ... the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the AttorneyGeneral refuses to act, it may choose to hear the case on the merits.

Laskin J. stated that the nature of the legislation is a relevant factor to be taken into account by the court in exercising its "discretion" in this regard. Earlier in his judgment he had drawn a distinction between the legislation in issue in *Smith* and that in issue in the case before him. The legislation at issue in *Smith* he described as regulatory, namely:

116. *Supra* n. 92.

117. *Ibid* at 1718.

118. *Ibid* at 8.

> ... legislation which puts certain persons, or certain activities theretofore free of restraint, under a compulsory scheme to which such persons must adhere on pain of a penalty or a prohibitory order as nullification of a transaction in breach of the scheme ...

The legislation at issue in *Thorson* he described as both declaratory and directory which "creates no offences and imposes no penalties; these are not duties laid upon members of the public."[119] Professor Mullan has pointed out:

120. D. Mullan, *Standing After McNeil*, (1976) 8 Ottawa L.R. 32, 3435.

> At the first blush, the drawing of this distinction might be interpreted as another example of an appellate judge restrictively distinguishing an earlier authority rather than overruling that authority, notwithstanding its obvious deficiencies. Indeed, later in the judgment, *Smith* is given some support at least as a decision on its facts: "If it is legislation of [a regulatory] kind, the Court may decide, as it did in the *Smith* case, that a member of the public, and perhaps even one like Smith, is too remotely affected to be accorded standing." On closer reading, however, it seems that there may be a more satisfactory explanation for the drawing of the distinction. Laskin may be saying that, with Smith type regulatory legislation, those regulated or directly affected have standing to raise constitutional questions but not mere taxpayers. With *Thorson* type declaratory and directory legislation, all citizens have standing subject to the discretion of the court. Because no one is regulated, the denial of standing to a mere citizen or taxpayer would lead possibly to a situation where no citizen would have standing to challenge the validity of the legislation, and, as Laskin stated earlier in his judgment, "it would be strange and, indeed alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."

Professor Mullan goes on to say that this kind of distinction has a superficial appeal, but that it is not without difficulties as was demonstrated in *Re McNeil et al* v. *Nova Scotia Board of Censors et al*.

122. *Supra* n. 117.

123. (1974) 53 D.L.R. (3d) 259 (N.S.S.C. App. Div.), 271272.

124. *Ibid* at 272. In *McNeil*, a taxpayer sought to impugn the constitutionality of provincial legislation regulating film censorship by way of an action for a declaration. Such legislation would clearly be regulatory in the Laskin sense, in that penalties and sanctions were imposed and those directly regulated were the film exchanges and theatre owners. Although the public was affected by the action of the Board of Censors, the question arose as to whether, as claimed by the Crown, the plaintiff was "too remotely affected" to be accorded standing to impugn the regulatory statute.[122]

In the Appeal Division of the Nova Scotia Supreme Court, MacDonald J. A. noted that, in *Thorson*, Laskin J. had drawn a distinction between regulatory statutes and declaratory or directory statutes,[123] but stated that "as he (Laskin J.) wends his way through the various authorities the distinction between the two types of legislation for status purposes seems to become less clear."

126. *Supra* n. 121 at 635. While he noted that Laskin J. had' stated that the nature of the legislation is a relevant factor in the court's discretion to grant standing, he concluded that as a result of *Thorson* any citizen may be able to challenge the constitutional validity of any kind of legislation provided there is a substance in the challenge.[125]

In delivering the Supreme Court judgment in *McNeil*, Laskin C.J. rejected the contention that the distinction between regulatory and declaratory statutes was a controlling distinction as far as according standing to mere taxpayers is concerned. He said:[126]

> The distinction, broadly taken, was sufficient to enable this Court to explain why in the *Thorson* case it was a proper exercise of discretion to accord standing to the appellant as a mere taxpayer seeking to challenge the validity of a federal statute. It was not a distinction that could be controlling, especially in the light of the reserve of discretion in the court, and more especially because the word or the term "regulatory" is not a term of art, not one susceptible of an invariable meaning which would in all cases serve to distinguish those in which standing to a taxpayer or citizen would be granted and those in which it would not.

He then discussed the effect of the legislation on the plaintiff and found that:[127]

> There's an arguable case under the terms of the challenged legislation that members of the Nova Scotia public are directly affected ... in what they may view in a Nova Scotia theatre, albeit there is a more direct effect on the business enterprises which are regulated by the legislation. The challenged legislation does not appear to me to be legislation directed only to the regulation of operators and film distributors. It strikes at the members of the public in one of its central aspects.

With regard to this Professor Mullan has said:[128]

> ... while this finding is obviously a very strong factor in the case, nowhere is it stated that persons have to be 'directly affected,' even in this broad sense, before they will be given standing. Ultimately, the most that can be said is that where the legislation involved has regulatory features, the courts should pay some attention to the way in which the legislation affects private citizens exercising their discretion in relation to the grant of standing to such a private citizen.

In a recent British Columbia case, *Dybikowski and B.C. Civil Liberties Association* v. *The Queen*[129] both *Thorson* and *McNeil* have been interpreted as giving the court a discretion on the issue of standing to question, but that in exercising this discretion the court should take into account whether the plaintiff is "directly affected" by the legislation. In that case an individual and the Civil Liberties Association of British Columbia sought to question the constitutionality of the *Heroin Treatment Act*.

128. D. Mullan, *supra* n. 120 at 37.

129. [1979] 2 W.W.R. 631 (B.C.S.C.).

130. R.S.B.C. 1979, c. 166.

131. *Supra*, n. 129 at 638.

132. *See also Re University of Manitoba Students' Union and AttorneyGeneral of Manitoba*, (1980) 101 D.L.R. (3d) 390 (Man. Q.B.). Fawcus J. held that while the plaintiffs need not show that they have a particular interest in the legislation or that they will suffer any injury peculiar to them:[131]

> ... on the authority of the *McNeil* case, in my view the plaintiffs must at least show that they are directly affected by the impugned legislation. This they have failed to do. With respect to Mr. McAlpine, I am of the further view that they do not have 'an arguable case for according standing. Nor do I think it preferable or necessary for this Court to explore the merits of the action prior to a determination of the standing of the plaintiffs. I say this because it is clear from a perusal of the Act, that the plaintiffs are under no risk as a result of nor can they in any way be directly affected by the provisions of the Act.

From the decision in both *Thorson* and *McNeil* it appears that there are other factors relevant to the exercise of judicial discretion to accord standing. One of the significant features of *Thorson* was the fact that if *Thorson* was not accorded standing, it was unlikely that the validity of the legislation would ever be challenged in the courts.[134] Again in *McNeil*, Laskin C.J. pointed out that the facts in that case revealed that those most directly affected by the legislation, i.e. the film exchanges and theatre owners, were unwilling to challenge the legislation, a factor he undoubtedly took into account.

Another factor is, as Laskin J. said in *Thorson*, the "justiciability of the issue sought to be raised." Earlier in his judgment he had said that the constitutionality of legislation "has in this country always been a justiciable question." [137] This would seem to imply that where a constitutional challenge is involved that is enough. Professor Mullan has pointed out,[138] however, that Laskin J. suggested that the question of justiciability was a point involved in the Australian case *Anderson* v. *Commonwealth,*[139] where standing was denied to a member of then public to challenge the validity of an agreement between the Commonwealth and one of the States. This suggests to Professor Mullan that there are certain constitutional issues that Laskin J. does not regard as justiciable. The problem was not clarified by *McNeil*, and it must be left to the Supreme Court to clarify the question.

As we pointed out in Chapter III,

138. D. Mullan, *supra* n. 120.

139. (1932) 47 C.L.R. 501.

140. At p. 17.

141. *Supra* n. 92 at 78, 10.

142. *Supra* n. 92 at 7.

143. [1973] Q.B. 629.

144. *Supra* n. 92 at 7. Laskin J. recognized in *Thorson* that the AttorneysGeneral in Canada were not necessarily satisfactory guardians of the public interest who could always be relied upon to challenge the constitutionality of legislation either personally or in relator proceedings.[141] It is still unclear, however, whether it is necessary for a private individual to approach the AttorneyGeneral before he can sue in his own right. In both *Thorson* and *McNeil* the plaintiff had requested the AttorneyGeneral to take action. In *Thorson*, Laskin J. noted that this seemed to have been laid down as a condition precedent to a private citizen's action[142] by the English Court of Appeal in *Attorney General* v. *Independent Broadcasting Authority, ex parte McWhirter,*[143] but was in doubt as to whether this should be necessary in a federal jurisdiction "where the AttorneyGeneral is the legal officer of a Government obliged to enforce legislation enacted by Parliament." [144] In *McNeil*, Laskin C.J. stated that he was of the opinion that the plaintiff had taken "all the steps that he could reasonably be required to take in order to make the questions of his stand-

ing ripe for consideration." [145] This seems to suggest that the exhaustion of other avenues, including approaching the AttorneyGeneral, may affect the exercise of discretion to grant standing.

While *Thorson* and *McNeil* involved constitutional challenges, the judgments may lead to a general relaxation of the rules governing standing in other areas, for example where someone seeks to challenge unlawful administrative action. The extent to which these decisions might be used to accord standing to private individuals in non-constitutional cases is impossible to gauge. As we point out later in the section on remedies the lower courts in different provinces have interpreted them both broadly and narrowly, and this has resulted in a great deal of uncertainty as to the exact ambit of the traditional restrictions on standing.

3. Statutory Exceptions

In some statutes standing has been widened so as to allow a particular body, class of persons, or individuals the right to maintain particular actions without the need to show a personal interest in the subjectmatter of the litigation.

In various statutes governing certain professions, for example, the governing body of the profession is given the right to seek an injunction to restrain a breach of a particular statute.

147. In the absence of such statutory provisions a professional body cannot seek an injunction to restrain persons from acting in breach of the statute unless the AttorneyGeneral is joined as a plaintiff, *Public Accountants Council for Ontario* v. *Premier Trust Co*., (1964) 42 D.L.R. (2d) 411 (Ont. H.C.).

148. R.S.B.C. 1979, c. 19, s.65.

149. R.S.B.C. 1979, c. 141, s. 23.

150. R.S.B.C. 1979, c. 92, s. 82(2).

151. R.S.B.C. 1979, c. 26, s. 82.

152. R.S.B.C. 1979, c. 109, s. 20.

153. *B.C. Tree Fruit Marketing Board* v. *Pacific Produce Co. and Tom Yee Co*., [1978] 4 W.W.R. 477 (B.C.S.C.); the reasons for judgment were amplified in (1979) 10 B.C.L.R. 117 (B.C.S.C.). Such a provision is contained in the *Architects Act,*[148] the *Foresters Act,*[149] the *Dentists Act,*[150] the *Barristers and Solicitors Act,*[151] and the *Engineers Act*.[152] In a recent British Columbia case it was held that a marketing board could seek an injunction to enforce its regulations as it was vested with "all powers necessary or useful" to the exercise of its regulatory power.

Under the *Municipal Act*[154] and the *Vancouver Charter,*[155] municipalities and the City of Vancouver are given the right to seek an injunction to restrain a contravention of their bylaws. Indeed, under the *Vancouver Charter* this right is extended to any "ownerelector."

156. *Ibid* s. 334.

157. *Supra*, n. 151, s. 238.

It is also provided in both the *Municipal Act*

159. R.S.B.C. 1979, c. 406, s. 18.

160. S.A. de Smith, *supra* n. 1 at 452.

161. I. Zamir, *The Declaratory Judgment*, 270280 (1962).

162. [1892] 3 Ch. 242. and *Vancouver Charter*[158] that any elector or a "person interested in a bylaw" may apply to the Supreme Court for an order quashing a bylaw. Thus merely being on the electoral roll will clothe an individual with the requisite standing to question the validity of a bylaw.

Finally, under the *Trade Practices Act*,

164. *Ibid* at 480. "any person may maintain an action for a declaration or an injunction in respect of a deceptive or unconscionable act or practice, whether or not that person "has a special, or any, interest under the Act, or is affected by a consumer transaction.

D. Remedies

It would appear that while the subjectmatter of a particular action may determine a person's standing to sue, the type of remedy sought might also be a factor taken into account by the court.

1. Injunctions and Declarations

The most common remedies sought in "public interest" actions are injunctions and declarations, and the preceding discussion relates primarily to such remedies.

While the same general rules on standing apply equally in actions for an injunction or declaration, it is the view of some writers that there are particular interests that the court will protect by the award of a declaration but not by an injunction. Professor de Smith has said that "it is not to be assumed that the restrictive rules governing *locus standi* in relation to injunctions will necessarily apply (to declarations)." [160] Indeed, Professor Zamir has concluded that special damage is unnecessary in declaratory proceedings,[161] relying primarily on the case of *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*,[162] to support his conclusion. In that case the Peninsular and Oriental Steam Navigation Co., one of the plaintiffs, not asserting any public right, and so not using the AttorneyGeneral's name, was bound to prove special damage and was unable to do so. It failed to establish its alleged rights and so its appeal was dismissed; nevertheless the court made a declaration of right in favour of the P. & 0.

In *Gouriet* v. *U.P.W.*,[163] however, Lord Wilberforce said:[164]

> ... the decision (in *London Association of Shipowners and Brokers* v. *London and India DocksJoint Committee*) and the observation of the Lords Justices, gave clear support to the distinction between private and public rights and to the necessity for the latter to be enforced by, or through, the AttorneyGeneral. Whether the Court, having dismissed the appeal, ought to have granted declaratory relief, whether, indeed, it would have done so if it had not had all the parties before it and if concessions and admissions had not been made at the Bar (see *per* Bowen L.J. at p. 266), may be debatable, but the case throws no light on the nature of relator actions.

In his concluding remarks he noted that:[165]

> The majority of the Court of Appeal sought, in effect, to outflank the refusal of the AttorneyGeneral to relator proceedings by allowing declaratory relief to be claimed and by permitting this to be used as a basis for granting

> an interim injunction. This produced the remarkable result that the plaintiff was more successful at the interim stage than he could possibly be at the final stage - for it was accepted that no final injunction could be claimed.

Viscount Dilhorne also discussed the *P. & O.* case and noted that the "court somewhat surprisingly granted a declaration, it would seem, by consent."

166. *Ibid* at 493.

167. *See* case note, *The AttorneyGeneral and the Trade Union*, (1978) 94 L.Q.R. 4.

168. *Supra*, n. 92.

169. *Supra*, n. 121.

170. (1976) 61 D.L.R. (3d) 566 (F.C.T.D.).

171. *Ibid* at 569; *see also Re Rothmans Pall Mall Ltd.* v. *M.N.R.* (1976) 67 D.L.R. (3d) 505 (F.C.C.A.), *per* Le Dain J. at 513.

172. (1976) 69 D.L.R. (3d) 384. In the *Gouriet* case the House of Lords refused to make a declaration in respect of a "public right" in the absence of "special damage" suffered by the plaintiff, from which it can be assumed that the courts in England will apply the same restrictive rules that govern standing to seek an injunction in actions for a declaration.[167]

In Canada, however, the law governing the standing necessary to bring an action for a declaration is in a state of flux. The decisions in Thorson[168] and McNeil,[169] discussed previously, have broadened the law of standing where it is sought to challenge the constitutionality of legislation. The precise effect of these decisions and their applicability to nonconstitutional cases is to some extent uncertain, as lower courts in different provinces have interpreted them both broadly and narrowly.

In some cases the courts have taken the view that they have only widened the law of standing where a declaration is sought as to the constitutionality of legislation. For example, in *Blackie* v. *Postmaster General,*[170] the Federal Court denied standing to postmasters who had sought, in a class action, a declaration that the Postmaster General had acted *ultra vires* in appointing a corporation as postmaster. Such standing was denied as the act of the Postmaster General did not infringe the private rights of the postmasters. The court said that *Thorson* was an exception to the general rule, merely enabling a private individual to question the constitutionality of a statute, and was therefore inapplicable where an administrative act was sought to be impugned.[171]

Similarly, in *Rosenberg* v. *Grand River Conservation Authority,*[172] the Ontario Court of Appeal denied standing to two members of the Authority, acting in a representative capacity, to restrain the Authority from acting *ultra vires*. The court held that none of the members of the public body had such a pecuniary or proprietary interest as to entitle them to standing, and Arnup J. A.concluded:[173]

> I conclude that the "discretion to permit" principle of the *Thorson* case does not extend to a case like the present. In my view the case does not decide that in all cases of alleged *ultra vires* action by a statutory corporation, the Court has a discretion to permit the continuation of an action by someone who is in the same position as the rest of the public.

On the other hand, in *Stein* v. *City of Winnipeg*,[175] a taxpayer sought an interim injunction to restrain the City of Winnipeg from conducting a programme of spraying alleged to be in contravention of the terms of *The City of Winnipeg Act*. The Manitoba Court of Appeal was unanimous in its view that the *Thorson* case, and the nature of the right to be enforced under *The_City of Winnipeg Act*, permitted a taxpayer to have standing to apply for the injunctions. Matas J. A., delivering the judgment of the Court of Appeal, accepted Laskin J.'s judgment that it was "unreal" to allow ratepayers' actions on the basis of the effect of unlawful expenditures on their tax burden. He then went on to place the plaintiff's rights to challenge the City's spraying programme on the broader basis of citizens generally being allowed to commence actions in the public interest. In support of this conclusion he stated that one of the important aspects of the legislation is an express intention to involve citizen participation in municipal government ... "This case is an example of clear judicial support for citizens' actions generally.[177]

Again, in *Carota* v. *Jamieson*,[178] Collier J. in the Trial Division of the Federal Court allowed standing to a private individual to seek an injunction restraining the defendants from expending federal funds on a comprehensive development plan for Prince Edward Island. The plaintiff claimed that an agreement to carry out this plan had been entered into without providing for participation by persons, groups, etc., in accordance with the *Government Organization Act*. The defendants claimed that the plaintiff had no standing to bring the action, and that the Attorney General of Canada was the proper and only person to maintain such an action. Collier J. discussed this contention, and said:

175. [1974] 5 W.W.R. 484 (Man. C.A.).

176. *Ibid* at 497.

177. *See also 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.).

178. [1977] 1 F.C. 19.

179. *Ibid* at 2425.

> 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 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 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*.

Collier J.'s decision in this regard was subsequently upheld by the Federal Court of Appeal.[180]

From certain observations made by Laskin J. in *Thorson* it would appear that there is one area involving public rights where widened rules on standing would be inapplicable. In *Thorson*, after quoting Duff J.'s statement in *Smith* v. *Attorney General of Ontario*,[181] that in order to maintain an action to restrain a wrongful violation of a public right the plaintiff must be "exceptionally prejudiced" by the wrongful act, he said:

181. *Supra* n. 113.

182. *Supra* n. 92 at 10.

183. *R.* v. *Ontario Labour Relations Board, ex parte Dunn*, [1963] 2 O.R. 301 (Ont. H.C.); *R.* v. *Sask. Labour Relations Board ex parte Construction, etc. Union*, (1966) 57 D.L.R. (2d) 163 (Sask. Q.B.).

184. *A Procedure for Judicial Review of the Actions of Statutory Agencies* (1974) L.R.C. 18, 12.

185. (1870) L.R. 5 Q.B. 466.

> I am of the opinion that the foregoing statement of Duff J. cannot be torn from the context of case law and principle out of which it obviously arises, and that the submissions of the plaintiff become somewhat tortuous in seeking to parse the words "exceptional prejudice" as if they were disembodied terms of a statute. Although Duff J. cited no authority for his assertion, it is a derivation from English cases, relating to private attempts to enjoin a public nuisance. In this class of case, which involves no question of the constitutionality of legislation, there is a clear way in which the public interest can be guarded through the intervention of the AttorneyGeneral who would be sensitive to public complaint about an interference with public rights ... It is on this basis that the Courts have said that a private person who seeks relief from what is a nuisance to the public must show that he has a particular interest or will suffer an injury peculiar to himself if he would sue to enjoin it.

This suggests to us that Laskin J. did not intend that the relaxed requirements as to standing as laid 'down in *Thorson* should be taken as extending to cases of public nuisance.

These decisions illustrate the present confusion that surrounds the law of standing, with regard to both actions for an injunction and a declaration; in the result it is uncertain where the courts will draw the line in the future.

2. Applications for Judicial Review

It appears that differing rules on standing apply' where proceedings are brought by petition for judicial review for relief in the nature of *certiorari, prohibition or mandamus*.

With regard to the right to apply for *certiorari* and *prohibition* there is some support for the proposition that Canadian courts will be almost as strict as they have been on standing to apply for declarations or injunctions.[183] As we pointed out in an earlier Report,[184] however, there is much authority in the English cases for the view that it is unusual for the courts in practice to be very exacting about the requirement of *locus standi* to for such relief. In *R.* v. *Surrey Justices,*[185] Blackburn J. said:

187. *See, e.g., R.* v. *Paddington Valuation Officer*, (1966) 1 Q.B. 380 (C.A.); *R.* v. *Manchester Legal Aid Committee, ex parte R.A. Brand & Co.*, [1952] 2 Q.B. 413,. *Durayappah* v. *Fernando*, [1967] 2 A.C. 337; *Re Liverpool Taxi Owners' Assn,*, [1972] 2 Q.B. 299.

188. *Supra* n. 92 at 18.

189. (1966) 60 D.L.R. (2d) 331 (B.C.C.A.).

190. *Ibid per* Davey J.A. at 332, and Norris J.A. at 339 *et seq. See also Re Thomas*, (1969) 72 W.W.R. 54 B.C.S.C.), and *Re Prince Edward Island Land Use Commission*, (198UY 101 D.L.R. (3d) 404 (P.E.I. S.C.).

191. *Supra* n. 184 at 16.

> In other cases where the application is by the party grieved ... we think it ought to be treated ... as an *ex debito justitiae*; but where the applicant is not a party grieved (who substantially brings error to redress his private wrong), but comes forward as one of the general public *having no particular interest in the matter, the court has a discretion*, and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person. (emphasis added)

As we pointed out earlier there are a number of recent English cases which support a liberal interpretation of the term party or person "aggrieved".[187] Laskin J., in delivering the majority judgment in *Thorson* referred, in *obiter dictum*, to "the cases on *certiorari* and prohibition which, even in a nonconstitutional context, have admitted standing in a mere stranger to challenge jurisdictional excesses, although the granting of relief remains purely discretionary ..." The fact that the granting of standing to apply for *certiorari* and prohibition to a stranger is a matter within the discretion of the court appears to have been established in British Columbia by the decision of the Court of Appeal in *R*. v. *Vancouver Zoning Board of Appeal, ex p*. *North West Point Grey Home Owners Association*.[189] Although standing was not granted to "nonaggrieved members of the public" in that case, two judges acknowledged that they had a discretion in the matter.[190]

As with *certiorari* and prohibition it is unsafe to generalize on the question of standing to apply for mandamus. As we pointed out in an earlier Report,[191] in *Hughes* v. *Henderson and Portage La Prairie*,[192] Ferguson J. applied the statement found in Halsbury that "the court will ... 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."

The unsettled state of the law was exemplified in an English decision, *R*. v. *Hereford Corporation, ex p*. Harrower.[194] In that case Lord Parker C.J. said:

195. *Ibid* at 1428. "It is said that a far more stringent test applies in the case of (standing to apply for) *mandamus* and that an applicant must have, as it is put, a specific legal right." In this context *mandamus* was refused to applicants *qua* electrical contractors from whom, in breach of their statutory duties, the local authority had omitted to invite tenders for the installation of electrical equipment. *Mandamus* was, however, granted to them *qua* ratepayers. It should also be noted that some courts in Canada are adopting a more liberal approach on the question of standing to seek *mandamus* particularly where they are of the view that the merits of a case are of sufficient importance.

E. Miscellaneous

1. Private Prosecutions

In *Gouriet* v. *U.P.W.*,[198] several of their Lordships referred to the right of an individual to maintain a private prosecution where an offence has been committed and the authorities have declined to take any action against the offender. The existence of this right was one of the grounds upon which the House of Lords justified its refusal to allow a private individual to bring a civil action for an injunction to restrain the commission of an offence. In view of this a brief examination of the law relating to the right to maintain private prosecutions is called for. We have drawn heavily in this connection upon a recent comprehensive article on this subject written by Professor Burns.

At common law it was open to any member of the public to institute criminal proceedings, there being no need for such person to have any interest whatsoever in the subjectmatter of the charge.

200. *See generally* R.M. Jackson, *The Machinery of Justice in England*, 155157 (6th ed. 1972).

201. *Ibid*.

202. *See generally*, J.LL.J. Edwards, *The Law Officers of the Crown*, 237246 (1964). This is still the position in England where, in the absence of intervention by the Crown, a private individual can carry a prosecution for any criminal offence through all its stages.[201] It should be noted, however, that with regard to certain offences the consent of the AttorneyGeneral may be required before proceedings may be instituted.[202]

The position is not so straightforward in British Columbia, as the right to maintain a private prosecution appears to depend on the type of offence and the mode of trial adopted.

With regard to those offences governed by the *Offence Act,*[203] it appears quite clear that any person can lay an information before a Justice of the Peace.[204] The justice must "hear and consider" the allegations of the informant and the evidence of witnesses where he considers it desirable or necessary to do so and, where he considers that a case for so doing is made out, issue a summons or warrant to compel the defendant to attend before him. Furthermore, by virtue of subsection 45(1) a "prosecutor" is entitled personally to conduct his case, which would appear to give a private individual the right to carry a prosecution under the Act through all its stages.

The right of an individual to bring a private prosecution under the *Criminal Code*[206] depends on whether any provisions of the *Code* have had the effect of altering the criminal law of England relating to private prosecutions.

Under the *Criminal Code* any person may lay an information in respect of both indictable and summary conviction offences.[208] A justice is obliged to take the information if all the formal requirements are met, and if he refuses on the ground that he has no jurisdiction, his decision is reviewable, the matter being a question of law.[209]

A justice is empowered to issue a summons or warrant pursuant to section 455(3) of the *Code* "where he considers a case for so doing has been made out." This power is described by Riley J. in *Evans* v. *Pesce and the Attorney General of Alberta* as:[210]

> ... a matter that is wholly within (the justice's) discretion. Even if the (justice] were to make an erroneous determination on the law in exercising that discretion, mandamus cannot lie ...

A prosecutor cannot therefore require a justice to issue either process to compel the accused's attendance in court.

206. R.S.C. 1970, C34 (as amended).

207. *Ibid* s. 455.

208. *Ibid* s. 723.

209. *The King* v. *Meehan (No. 2),* (1902) 30 L.R. 567.

210. (1969) 8 C.R.N.S. 201, at 214.

211. *See, e.g., R.* v. *Jones ex p. Cohen*, [1970] 2 C.C.C. 376 (B.C.S.C.).

212. *Supra* n. 206, s. 720(1).

At the next stage of the proceedings, namely the trial or preliminary hearing of the allegations against the accused, the 'right of a private prosecutor to conduct the case depends on whether the charge concerns a summary conviction or an indictable offence.

With regard to summary conviction of fences a "prosecutor" is entitled, by virtue of section 737, "personally to conduct his case'[5] and may examine and crossexamine witnesses himself or by counsel or agent. A "prosecutor" may be the "informant" [212] and thus a private person where the AttorneyGeneral or his agent does not intervene, and it therefore follows that such private person can personally prosecute the case summarily.

With regard to indictable offences the right of a private prosecutor to prosecute personally depends on the mode of trial adopted. In *R.* v. *Schwerdt*,[213] Wilson J. concluded that the rights of a private prosecutor with regard to the different modes of trial of an indictable offence were as follows:

1. On a summary trial before a magistrate under Part 16 of the *Code* the private prosecutor is heard as of right.[214] Wilson J. pointed out:[215]

> There is nothing in Part 16 which bars the basic right, derived from English law, of a private citizen to conduct a private prosecution.

2. A preliminary hearing may be conducted by a private prosecutor.

215. *Ibid* at 380.

216. *See also Re McMicken*, (1912) 3 W.W.R. 492 (Man. C.A.).

217. *Supra* n. 213, 379.

218. *Ibid* at 385.

219. *Ibid* at 405.

3. On a "speedy trial before a judge he (the private prosecutor) cannot be heard unless the Attorney-General or the clerk of the peace prefers a charge, or the AttorneyGeneral allows him to prefer a charge." [218] This is because under section 496 of the *Code*, where the accused elects a speedy trial, an indictment shall be preferred by the AttorneyGeneral or his agent, or by any person who has the written consent of the AttorneyGeneral, and in the Province of British Columbia may be preferred by the clerk of the peace." The language is mandatory and only in the event of the AttorneyGeneral's permission can a private prosecutor personally pursue the case.

4. On trial by judge and jury a private prosecutor may be heard by leave of the court or the AttorneyGeneral.[219] Wilson J. reached this conclusion on the basis that section 507(2) provides that an indictment may be preferred "by the AttorneyGeneral or his agent, or any person with the written consent of a judge of the court or the AttorneyGeneral or, ... by order of the Court." Wilson J. took the view that one must start with "the premise that a private prosecution is lawful unless forbidden" and that no clause in Part 17 forbids such a prosecution either expressly or by necessary implication.

In *R.* v. *Schwerdt*, Wilson J. was asked to decide whether, in a prohibition application, a private prosecutor can conduct a summary trial or preliminary inquiry relative to an indictable offence. He found that such a private prosecutor could so proceed. The major part of his analysis, as set out above, is therefore *obiter dicta* (which he acknowledged) but it is the only judicial attempt to rationalize the private prosecutor's role under the *Code*.

Finally, in summary conviction cases, a private prosecutor has the right to appeal against dismissal of the action or the sentence imposed.[220] With regard to indictable offences, however, only the person convicted

221. *Ibid* s. 603.

222. *Ibid* s. 605.

223. *Ibid* 618621.

224. The Law Reform Commission of Canada Working Paper 15, *Criminal Procedure: Control of the Process*.

225. *Ibid* at 4951.

226. *See generally* A.D. Levy, The Amicus Curiae, (1971) L.S.U.C. Gazette, 110.

227. (1939) 20 C.B.R. 415.

228. *Ibid* at 421422.

229. [1945] 4 D.L.R. 674 (Ont. H.C.).

or the AttorneyGeneral or counsel instructed by him[222] have standing to appeal to the Court of Appeal or the Supreme Court of Canada.[223]

The Law Reform Commission of Canada, in a Working Paper on Criminal Procedure,[224] has considered private prosecutions and recommended certain restrictions on the right to maintain them.

2. Intervention as Amicus Curiae

Reference has already been made to intervention by the AttorneyGeneral as *amicus curiae* and in this section we propose to examine the circumstances in which a private individual will be permitted by the court so to intervene.[226]

The words *amicus curiae* mean "friend of the court," and the term is applied to one who is not a party to the proceedings, and who suggests something for the information of the court. The traditional role of an *amicus curiae* was discussed by Urquhart J. in *Re Pehlke*,[227] where he said:[228]

> A point of law in favour of a defendant may be suggested to the court or argued by counsel who is not interested in the case, or by anyone else acting as *amicus curiae*. The term is generally applied to a solicitor of the court who, being present, makes some suggestion to the court in regard to the matter before it, and it is more rarely applied to counsel arguing the case. The term is also used of persons who have no right to appear in a suit but are allowed to protect their own interest, and finally, to a stranger who, being in court, calls the court's attention to some error in the proceedings. In a case where there is a plentiful supply of counsel, many of whom could take the point sought to be raised by a stranger, there is no room for an *amicus curiae*. The practice ought to be confined to the cases above mentioned and in the case where counsel simply comes and presents a point more or less roughly, the practice should be discouraged.

In *Re Drummond Wren*,[229] for example, the Canadian Jewish Congress was allowed to intervene as *amicus curiae* in an action brought to set aside a restrictive covenant which provided that land was "not to be sold to Jews, or to persons of objectionable nationality."

Another example of intervention as *amicus curiae* being permitted is *R. ex rel. Rose* v. *Marshall*

231. *Ibid* at 6667.

232. (1978) 81 D.L.R. (3d) 33 (Ont. H.C.).

233. R.S.C. 1970, c. A19.

234. *Supra* n. 232 at 38. which dealt with the issue of whether certain publications were obscene. The distributors did not contest the seizure of the publications and did not make submissions at the show cause hearing. One of the publications, however, was "Playboy" and counsel for the publisher sought to intervene as *amicus curiae* in order to argue that "Playboy" was not obscene. In allowing such an intervention, Kent D.C.J. said:[231]

> At this time I did not see that Mr. Barry, appearing simply for and on behalf of Playboy and under the name on the record, had a right to be heard. However, in the particular circumstances of this case and the fact that I felt the bearing of all persons who might in any capacity properly be permitted to be heard before the Court, would be of assistance to the Court, particularly where there was no voice before the Court on behalf of the publications seized, I therefore told Mr. Barry that I would not permit him to be heard as representing a party to the summons, but as a matter of indulgence I would hear him simply as *amicus curiae*.

As the distributor did not make any submissions on the issue of obscenity, the trial judge considered that counsel for "Playboy" could assist the court in determining that legal issue.

In recent years groups and individuals who have lacked the requisite standing to be included as a party to an action have attempted to circumvent this barrier by requesting that they be allowed to intervene as *amicus curiae*.

Such requests are usually unsuccessful unless the court considers that it is clearly in need of assistance. In *Re Clark et al and the Attorney General of Canada*,[232] for example, the Civil Liberties Association was refused leave to intervene as *amicus curiae* in an action concerning the validity of certain Regulations promulgated pursuant to the *Atomic Energy Control Act*.[233] Leave was refused and Evans C.J.H.C., after reviewing the authorities, said:[234]

> Subject to statutory or Courtmade rules, it is my view that *interventions amici curiae* should be restricted to those cases in which the Court is clearly in need of assistance because there is a failure to present the issues (as for example, where one side of the argument has not been presented to the Court). Where the intervention would only serve to widen the lis between the parties or introduce a new cause of action, the intervention should not be allowed.

While it may have been preferable to have dealt with the application for intervention following the argument of counsel for the applicants, I concluded, in the present case, that the experience and competence of counsel for the applicants guaranteed a complete canvass of the legal issues involved and that intervention was therefore not appropriate.

In the result all that can be said about the right to intervene as *amicus curiae* is that a court will only permit such intervention if it considers that it is in need of assistance and that the potential *amicus curiae* is, in the court's view, the person most appropriate to render such assistance.

CHAPTER VI THE NEED FOR REFORM

Recent judicial decisions both in Canada and England have focused attention on relator actions generally, and raised certain questions relating to the AttorneyGeneral's role in public interest actions. The AttorneyGeneral's traditional role as guardian of the public interest has been scrutinized, as have previously unquestioned rules on standing. In the result it has been suggested the AttorneyGeneral is not necessarily always the appropriate person to vindicate public rights, and that private individuals are, in certain circumstances, just as competent to sue in respect of such rights even though their individual interests have not been adversely affected. In particular, as we have pointed out earlier, this has led the Supreme Court of Canada to allow a private individual standing to challenge the constitutionality of legislation. As we have also pointed out, however, this liberal approach has been interpreted restrictively by some courts where it has been sought to extend such relaxed rules on standing to other situations.

Such developments have raised the question as to whether the AttorneyGeneral's suit is, in view of its exclusivity, the most appropriate vehicle for vindicating public rights. Added to this is the question whether the law of standing should be widened so as to allow private individuals to maintain actions in the public interest. These questions will be examined in this chapter.

A. The Role of the AttorneyGeneral

It is clear that the AttorneyGeneral suing either alone or on the relation of a private individual, can act as an effective guardian of the public interest. The reported case law on the subject is a testament to this fact. The question arises, however, as to whether civil litigation in defence of the public interest should remain within his exclusive domain. The AttorneyGeneral has an absolute discretion in deciding whether to lend his name to a relator action. As this discretion cannot and will not be enquired into by the courts, it is possible that, should the AttorneyGeneral refuse his consent, situations may arise where an infringement of a public right might go unchallenged if members of the public are denied standing because their communal as opposed to their individual interests are adversely affected. In such a situation the AttorneyGeneral rather than the court is, in effect, the final arbiter of the validity of the action complained of and which is sought to be impugned.

The AttorneyGeneral may refuse his consent for a variety of reasons. For example, he may regard the matter as trifling or unarguable or the relator's motives may be questionable. It might therefore be argued that in such circumstances it is desirable that the court's time should not be wasted on such matters, and that the AttorneyGeneral can act as a useful screen in this regard. By its very nature, however, the AttorneyGeneral's discretion is more far-reaching and can give rise to questions of some delicacy involving his role as a member of the government of the day. It was suggested in *Gouriet* v. *U.P.W.*

2. *Ibid* at 758.

3. S.M. Thio, *Locus Standi and Judicial Review*, 8 (1971).

that the AttorneyGeneral's discretionary power does present the danger that he, being a politician, may be accused of refusing to give his his consent for political or partisan reasons.[2] His dual position both as a member of the government and as the guardian of the rights of the public is extremely delicate. As one writer has pointed out:[3]

In matters of charitable trusts and public nuisance which are the progenitors of the present Attorney-General's suit for judicial review, a conflict of interests is unlikely, but this is less obvious where the validity of the acts of the administration is in issue.

Even in the realm of public nuisance, however, it has been suggested that the AttorneyGeneral of British Columbia may be placed in an invidious position if his consent is sought to bring a relator action against a polluter. It has been said:[4]

Since the government is resource owner, and through its licencees and lessees resource developer as well as guardian of the physical environment, the AttorneyGeneral (of British Columbia) may be placed in an obviously difficult position. The Federal AttorneyGeneral is of course encumbered by considerations of maintenance of harmonious FederalProvincial relations.

While we do not suggest that an AttorneyGeneral would abuse his powers in this regard, this apparent conflict of interest could give rise to a suspicion amongst certain members of the public that an AttorneyGeneral is not adequately protecting the public interest. Such suspicion may well be unfounded and unjustifiable but it may nevertheless still exist. That an AttorneyGeneral can be placed in extraordinary difficulty was noted by one judge in a recent Australian case,[5] where he said:[6]

> The complex structure of public authorities in modern society and the involvement of the Government, often through conflicting agencies, in so many types of activity makes it impossible for the AttorneyGeneral to function as the sole protector of what are called public rights. For a political officer to protect public rights of action may on occasion be politically impossible in that, as he has an absolute discretion in determining to lend his fiat in relator actions, it is difficult to strip his decisions of political content.

We take the view that it is undesirable that an AttorneyGeneral, who as senior law officer of the Crown is required by section 3(b) of the *Attorney General Act*

5. *Mutton* v. *KuRingGai M.C.*, [1973] N.S.W.L.R. 233.

6. *Ibid* at 254.

7. R.S.B.C. 1979, c. 23.

8. [1978] A.C. 435 (H.L.). to see that "the administration of public affairs is in accordance with the law," might be placed in the embarrassing position of being the object of suspicion in the minds of some members of the public.

In *Gouriet* v. *U.P.W.*

10. [1946] 4 D.L.R. 278 (Ont. H.C.). several Law Lords went out of their way to point out that the Attorney General may have had sound legal reasons for refusing to lend his name to a relator action, even though it might appear that he had been swayed by partisan considerations. We have set out their comments in this regard in Chapter III, and have nothing to add except that such legal reasons did not appear to affect the public suspicion that surrounded his actions.[9]

Another factor that has caused us some concern is that in some circumstances the need to join the AttorneyGeneral in a relator action can be of inconvenience to him. Indeed, in *Williams* v. *City of Toronto,* counsel for the AttorneyGeneral specifically argued that it was inconvenient for the AttorneyGeneral to be brought in as a party.

Once the AttorneyGeneral's consent has been granted it is not unusual for him to have nothing more to do with the action. To this extent the relator action has been termed as being no more than a "quasilegal fiction."[12] In *Gouriet* v. *U.P.W.*

14. *Ibid*.

15. *Supra* n. 8 at 478. Ormrod L.J., in the English Court of Appeal, spoke of this fictional element in relator actions and concluded:[14]

> I have said some harsh things about the relator procedure generally because it appears to me to be obsolete. It has the practical advantage of preventing a large number of frivolous, futile or merely mischievous cases coming to the courts, but there are other ways of dealing with that problem. It has the grave disadvantage of putting the AttorneyGeneral into the invidious position of appearing to be the prime mover in litigation conducted by some other person, with motives which may be quite different from his, or of forcing him to decide whether to sanction such proceedings as in the present case, and thus to appear to be standing between a private citizen and the court. Quasilegal functions may be intelligible to lawyers; in the public mind they produce nothing but confusion, and sometimes frustration.

In the House of Lords, however, Lord Wilberforce replying to the argument that it was time to discard this "fiction," said:[15]

> My Lords, apart from the fact that to accept this line of argument would mean a departure from a long, uniform and respected series of authorities, so straining to the utmost the power of judicial innovation, in my opinion it rests on a basic misconception of the AttorneyGeneral's role with regard to the assertion of public rights.

It can be granted that in this, as in most of our law, procedural considerations have played a part. It was advantageous to make use of the name of the King so as to gain a more favourable position in the King's Courts and to avoid restrictions by which the King was not bound: *see Robertson, Civil Proceedings by and against the Crown* (1908), p. 464. Moreover it may well be true that in many types of action, and under some AttorneysGeneral, the use of his name was readily granted - even to the point of becoming a formality. This was particularly the case in charity cases up to the time of Sir John Campbell A.G.: *see Shore* v. *Wilson* (1842) 9 Cl. & F. 355, 407.

But the AttorneyGeneral's role has never been fictional. His position in relator actions is the same as it is in actions brought without a relator (with the sole exception that the relator is liable for costs ...). He is entitled to see and approve the statement of claim and any amendment in the pleadings, he is entitled to be consulted on discovery, the suit cannot be compromised without his approval; if the relator dies, the suit does not abate. For the proposition that his only concern is to "filter out" vexatious and frivolous proceedings, there is no authority indeed, there is no need for the AttorneyGeneral to do what is well within the power of the court. On the contrary he has the right, and the duty, to consider the public interest generally and widely.

Lord Edmund Davies concurred in this view:

> His [the AttorneyGeneral's] role is ... far from purely fictional, and it is not easy to see why Ormrod L.J., described the relator procedure as "obsolete". On the contrary, it remains a well nurtured, vigorous and useful plant.

It would appear to us that Ormrod L.J. was not suggesting that the AttorneyGeneral is not an appropriate plaintiff in public interest suits, but was only criticizing his absolute discretion in granting or withholding his consent to a relator action. That the AttorneyGeneral should have such an absolute discretion when, generally speaking, he plays a limited role in the conduct of a relator action, was a notion that to him was obsolete. Indeed, we find Ormrod L.J.'s observations particularly appropriate to the situation that appears to exist in British Columbia, where the AttorneyGeneral has played a very limited role in recent relator actions.[17]

In the light of the issues discussed above, we have come to the conclusion that the right to maintain a civil action to vindicate public rights should not necessarily remain within the AttorneyGeneral's exclusive jurisdiction. We do not mean to suggest that the AttorneyGeneral is never the appropriate plaintiff in such situations, merely that we consider that he may not always be the *only* appropriate plaintiff. In our view, the law on standing might be widened so as to allow a private individual to maintain an action in the public interest in situations where he is unable to do so at present.

B. Widening Individual Standing

As we have already pointed out, three factors have led to the restrictions on an individual's standing to sue in respect of the public interest, namely the desire to avoid multiple proceedings, the needs of the adversary system and the elimination of "busybodies." The question arises as to whether such factors are relevant today and are sufficient justification for the present restrictions on standing.

In our opinion the fear of multiple litigation is exaggerated. Furthermore we do not believe that if any member of the public were competent to sue in respect of public rights, the floodgates of litigation would be opened, clogging both the judicial and administrative processes. Public apathy, and the expense and inconvenience of litigation are inhibiting factors.[18] As Professor Zamir has pointed out:[19]

> People are not keen to rush to the courts. It is in their interest to avoid the inconvenience and expense of litigation rather than to commence proceedings on trivial matters.

It is interesting to note that neither Laskin J. in Canada, nor Lord Denning M.R. in England, was impressed by the "multiple litigation" or "floodgates" argument. In *Thorson* v. *A.G. of Canada,*

18. S.M. Thio, *supra* n. 3 at 7.

19. I. Zamir, *The Declaratory Judgment*, 272 (1962).

20. (1973) 43 D.L.R. (3d) 1 (S.C.C.). Laskin J. referred to the trial judge's statement, which echoed Duff J.'s views in *Smith* v. *Attorney General of Ontario*,[21] that if every taxpayer could bring an action to test the validity of a statute, it would "lead to grave inconvenience and public disorder"[22] and said:[23]

> 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, and by imposing costs; and as a matter of experience, *Macllreith* v. *Hart,* to which I will return, does not seem to have spawned any inordinate number of ratepayer's actions to challenge the legality of municipal expenditures.

22. (1972) 22 D.L.R. (3d) 274 (Ont. H.C.), *per* Houlden J. at 278.

23. *Supra* n. 20 at 6.

24. *See also* dissenting judgment by McIntyre J.A. in *Ex Parte John Doe*, (1974) 46 D.L.R. (3d) 547 (B.C.C.A.) at 562563, with which Branca J.A. concurred; and *see* P. Martin, *The Declaratory Judgment*, (1931) 9 Can. B.R. 540, 552, where it was said with regard to the "great inconvenience argument": "It is submitted that the court should have been more concerned over the convenience that the public would enjoy, rather than to stress any inconvenience which the courts and law offices (sic) might experience."

25. [1973] Q.B. 629.

26. *Ibid* at 646.

27. *Supra* n. 8 at 510.

28. *See*, *e.g., Kylmchuk* v. *Cowan*, (1964) 47 W.W.R. 467 (Man. Q.B.) *per* Smith J. at 473474; *see also Power Commission of St. John* v. *Now System Laundry Ltd*., [1928] 2 D.L.R. 661 (N.B.S.C. App. Div.).

In *A.G. ex rel McWhirter* v. *Independent Broadcasting Authority*[25] Lord Denning M.R. pointed out[26] that the desire to avoid a multiplicity of actions developed in the field of public nuisance, where the real concern was multiple damage suits. He then questioned the relevance of such a consideration where a member of the public merely seeks a declaration or an injunction. He made the point that such remedies are discretionary to which no one has a right, but which the court can grant if it thinks fit.

Even in *Gouriet* v. *U.P.W.*, Lord Edmund Davies, while refusing to accord the plaintiff standing, commented:[27]

I have to say that none of the grounds advanced on behalf of the AttorneyGeneral and trade unions have satisfied me that in the circumstances predicated it must necessarily be in the public interest to deny such a claim by a private citizen. For example, it was urged that any change in the present law would open what were called the "floodgates" to a multiplicity of claims by busybodies. But it is difficult to see why such people should be more numerous or active than private prosecutors are at the present day, and they are few and far between, though this fact may be attributable in part to the power of the AttorneyGeneral to enter a "*nolle prosequi*" in any criminal case or to order the Director of Public Prosecutors to take it over and then to offer no evidence.

It must also be noted that as the decision of one court has a *stare decisis* effect little would be served by seeking further judicial pronouncement on the same subjectmatter. Indeed it is interesting to note that on occasion declarations have been granted to avoid multiplicity of suits.[28] Even if the courts were to be faced with multiple proceedings they can always penalize such litigation with costs, or strike the matter out as being vexatious.

Even if the proceedings cannot be characterized as vexatious, the court has a discretion as to the granting of an injunction or declaration. With regard to declarations the court has an extremely wide discretion, as Professor Strayer has noted:

> ... they [the courts] have a discretion to refuse the declaration even where the action is properly instituted. Even if the plaintiff has standing, considerations of utility may deter the court from granting the declaration. The importance of the issue to the parties, the usefulness of a declaration in the dispute, the existence of sufficient facts on which to base a decision, the question of whether matters of public importance may also be conveniently settled at the same time, the balance of convenience to the parties, and similar criteria will influence the court in the exercise of its discretion.

It is clear then that discretion plays a major part in a court's decision, first, to entertain a declaratory action, and, secondly, to grant or refuse a declaration.

31. [1974] 5 W.W.R. 484 (Man. C.A.).

32. *Ibid* at 500.

33. L.J. Jaffe, *The Citizen as Litigant in Public Actions: The NonHohfeldian or Ideological Plaintiff*, (1968) 116 U. of Penn. L.R. 1033, 10371038.

The courts can be quite imaginative in the use of their discretion to grant or withhold an injunction or declaration. In *Stein* v. *City of* Winnipeg,[31] for example, the court granted standing to a private individual on the authority of *Thorson* v. *Attorney General of Canada*, but refused to grant the injunction that was sought. In *Stein*, the plaintiff sought an injunction to restrain the City of Winnipeg from spraying trees in contravention of *The City of Winnipeg Act*. The court was unanimous in its view that the plaintiff had standing, but Matas J.A., speaking for the majority, held that an injunction should not be granted "on the balance of convenience." This case is one of the few examples of a court evaluating supposedly competing "public interests," as opposed to balancing competing public and private interests. As Matas J.A. pointed out in his concluding remarks:[32]

> We have thus a conflict between two adverse environmental effects - a comparison of the adverse effects on Stein and perhaps others if there is a spraying, as against the effect on the aesthetic and general environment if there were no spraying and a consequent loss of trees. This is not a case of a clearcut comparison of a hazard to health of humans as opposed to a hazard to inanimate objects. Absence of trees would have an effect on the human as well as on the physical environment.
>
> I have concluded that the plaintiff has not discharged the onus of proof under the test of balance of convenience. In my view, the greater inconvenience would be with the city if an interlocutory injunction were granted. I would dismiss the application with costs here and in the Court of Queen's Bench.

With regard to the argument that restrictions on standing are needed if the adversary system is to function, we are not convinced that this is necessarily true. We do not endorse the assumption that the law of standing assures that counsel, or for that matter a lay litigant, will make an able presentation to the courts. There is no evidence to suggest that parties to whom the court denies standing would not make as able a presentation than parties whose standing the courts upheld. As Professor Jaffe has said:

> ... It is argued that unless the plaintiff is a person whose legal position will be affected by the court's judgment, he cannot be relied on to present a serious, thorough and complete argument. I do not know whether there is any way of finding out whether nonHohfeldian plaintiffs are less zealous than Hohfeldian ones. My own recourse is to my understanding of human nature, which tells me that there is no predictable difference between the two. If it were thought that selfaggrandizement is a more dependable motive than ideological interest, I would point out that it usually requires a financial outlay to undertake a lawsuit, so that once launched the ideological plaintiff has, at least, committed a sum of money and so, in some sense, has a financial investment to protect. But the very fact of investing money in a lawsuit from which one is to acquire no further monetary profit argues, to my mind, a quite exceptional kind of interest, and one peculiarly indicative of a desire to say all that can be said in support of one's contention. From this I would conclude that, insofar as the argument for a traditional plaintiff runs in terms of the need for effective advocacy, the argument is not persuasive.

The third factor that has led to restrictions on standing, namely the desire to eliminate "busybodies" and meddlesome interlopers, does have a certain attraction. At the same time, however, one man's "busybody" may be another's saviour. To be sure, the Union of Post Office Workers probably regarded Mr. Gouriet as a "busybody," while members of Mr. Gouriet's organization and a portion of the public took the opposite view. As a result of the present rules on standing the courts are, in effect, leaving the question as to who is a "busybody" to be decided by the AttorneyGeneral. This can lead to the AttorneyGeneral being the subject of criticism whatever he decides and as he does not, by tradition, give reasons for his decisions, the reasons behind such decisions can give rise to a certain amount of unfounded speculation. We do not believe that the AttorneyGeneral, as a matter of principle, should be

open to such criticism nor should his decisions be the subject of speculation. As we have already suggested it does not seem unreasonable to expect a court to exercise its discretionary powers to thwart attempts by "busybodies" to abuse the judicial system, and while this might attract some criticism at least the courts are less likely to be accused of bowing to political pressure.

It is sometimes suggested that judges often view any relaxation of standing requirements as being directly related to the expansion of judicial power tending toward government by judges.[34] We are unpersuaded by such arguments: the way to protect against too much government by judges is to limit what judges decide, not to limit who can raise questions for a court to decide. In this regard we agree with Professor Davis' statement that:

> Protecting against an excessive judicial role by using the law of standing is likely to mean for some cases not only providing that protection but also preventing judicial review that is needed in the interests of justice.

The discussion above suggests that there would appear to be no valid reason for any restriction on an individual's standing to sue in the public interest. This is a view expressed by several writers who would allow anyone to raise any question in any court that has jurisdiction. One writer, for example, would allow standing to anyone who "proves his special interest" by being the one to bring the suit and bear its costs.[37]

A possible approach to reform would be to retain the requirements of standing, but to devise a more relaxed uniform formula for determining whether an individual has a sufficient interest in the subjectmatter so as to give him standing. We considered this very question in an earlier Report[38] concerning judicial review of administrative action. In that Report we pointed out that the English Law Commission in a Working Paper on the same subject had suggested a statutory formula for *locus standi* to bring an application for judicial review of administrative action. We said:

39. The Law Commission, *Remedies in Administrative Law*, (Working Paper No. 40, 1971).

40. *Supra* n. 38 at 36.

41. The Law Commission, *Report on Remedies in Administrative Law* (1976).

42. *Ibid* at 2122.

> The writers of the English Working Paper favour tentatively a general formula such as that set out in the *Federal Communications Act* in the United States. This provides that:
>
> An appeal may be taken ...
>
> (1) By an applicant ... whose application is refused ...
>
> (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing such application.
>
> In aid of this general formula the writers of the English Working Paper suggest that a number of guidelines be set out, such as:
>
> (1) the nature of the powers or duties in respect of which illegality is alleged;
> (2) the relative seriousness of the illegality; and

(3) having regard to those matters, whether it is reasonable for the applicant to seek review.

> While we agree that the law relating to *locus standi* and judicial review is uncertain, we have reservations about replacing one set of uncertainties with another. It seems to us that a general formula of the kind suggested has a superficial attraction, but in the ultimate event we are not sure that a litigant faced with the interpretation of such a formula will be any more competent to judge his position than he is now, bearing in mind that the formula and the guidelines are sufficiently wide to support any number of interpretations.

It is interesting to note that in their subsequent Report, the English Law Commission acknowledged that the predominant view expressed in consultation on their Working Paper was that any attempt to define in precise terms the nature of standing required would run the risk of imposing an undesirable rigidity in this respect, and said:

We appreciate this danger, and think that what is needed is a formula which allows for further development of the requirement of standing by the courts having regard to the relief which is sought. Our recommendation is therefore that the standing necessary to make an application for judicial review should be such interest as the Court considers sufficient in the matter to which the application relates.

The Law Commission's recommendations have now been enacted and are contained in the Rules of the Supreme Court. Order 53, Rule 3(5) provides that "the court shall not grant leave [to apply for judicial review] unless it considers that the applicant has a sufficient interest in the matter to which the application relates." To some commentators this formula merely reproduces the existing law,

48. *Ibid* at 2930.

49. *Ibid* at 35.

50. *Ibid*. although the English Court of Appeal, in a recent decision,[46] appears to have interpreted this rule liberally.

A similar approach to the question of standing to seek judicial review of administrative action has also been recommended in New Zealand. The majority of the Public and Administrative Law Reform Committee have recommended the enactment of a bill that although similar in concept to the English provision is worded differently.[47] As is stated in the Report:[48]

Whereas the English proposal requires that the court "shall not grant relief ... unless it considers that the applicant has a sufficient interest," our proposal empowers the court, in exercising its discretion to grant or refuse relief, to refuse it if in the court's opinion he does not have a sufficient interest. The purpose of this approach is to make it clear that in general the question of standing is not one to be dealt with as a purely preliminary matter, but is to be considered along with other issues in the context of the court's general discretion. We have formulated the provision in permissive terms("may refuse ...") and not in the mandatory ("may refuse ...") and not in the mandatory terms proposed by the Law Commission ("... shall not grant ...") because we consider that the liberalising thrust of the proposal might be endangered by a mandatory, negative formula. The formulation emphasizes the discretion conferred on the court.

Two Committee members, however, disagreed with this recommendation. It was their opinion that a significant number of applications for judicial review would be brought to secure advantages of delay rather than genu-

inely to test the legality of a particular decision.[49] They therefore believed that this would be magnified if the right to challenge administrative action was granted to all people claiming to have a "sufficient interest."[50]

It was also the view of the minority that as the recommendation of the majority offered no guidelines as to what "interest" would be "sufficient," the future development of the laws of standing would become unpredictable.[51]

Although they disagreed with the recommendation of the majority, the minority did agree that there was a need for reform. They suggested that the Attorney General should still play a role in the screening process. If the Attorney General should refuse his consent to the proposed action, they suggested that the court be given the power to make a "standing order," which would allow the plaintiff to proceed notwithstanding the Attorney General's refusal of his consent.[52] They recommended that the court should make such an order if it is satisfied that the applicant genuinely represents the public, that the public has a cause of complaint, and that in all the circumstances, having regard to the nature of the statutory power in question and the number of persons affected thereby, it is appropriate that the applicant should be permitted to commence an application for review.

In a recent Working Paper the Law Reform Commission of Australia has also suggested that the law of standing be reformed.[54] Like the English Law Commission and the majority of the New Zealand Public and Administrative Law Reform Committee, they have suggested a new general formula to determine a plaintiff's standing. This general formula is based on a proposal by Dr. G. Taylor that a person should have standing if the issues are "matters of real concern to the plaintiff." As Dr. Taylor has explained:

> '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.

The Law Reform Commission of Australia has therefore tentatively suggested that the Taylor "concern" formula be adopted but that it be turned around so as merely to empower the court to dismiss proceedings if satisfied that the plaintiff has no real concern with the issues. It was their view that a negative formulation will necessarily require the court to examine fully the case before being able to dismiss it for lack of standing. They believe that it would likely render standing a nonissue in the overwhelming proportion of public interest cases.

55. G.D.S. Taylor, *Defence of the Public Interest in Civil Litigation*, a Report to the Australian AttorneyGeneral, 1974, para. 117.

56. *Supra* n. 52 at 98.

57. *Ibid*. 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."

Despite these suggestions for a general formula we do not believe that this is the proper approach for reform. The approach that commends itself to us, and which we explore in greater detail in the following chapter, is a scheme that would render the status of a litigant irrelevant in public interest suits, a scheme that would in effect abolish the traditional standing requirements altogether. We therefore recommend later that the law of standing should be relaxed so as to permit any person to bring an action in respect of a violation of a public right where the AttorneyGeneral does not wish to bring the action himself or has refused his consent to the use of his name in a relator action. Our recommendation in this regard is a departure from some of the conclusions reached in a Working Paper on this subject that we circulated in 1979. The Working Paper was circulated for comment to practising lawyers, legal scholars knowledgeable in their field, public interest groups, municipalities and other organizations. A partial list of those to whom the Working Paper was circulated is contained in Appendix B. All were asked for

comments on and criticisms of the proposals that we advanced. We received a number of submissions, and these have been of great value to us in assessing our original proposals and formulating our final recommendations. A summary of the proposals made in the Working Paper is set out in Appendix A.

C. Related Matters

In our Working Paper, we made reference to certain matters which do not form part of our final recommendations in this Report.

1. Injunctions Sought by Professional Organizations

It was proposed in the Working Paper that the right given to certain professional bodies to seek an injunction to enjoin a breach of their governing statutes should be reconsidered by the Legislature with a view to its repeal.

Several professional organizations criticized this proposal. They were opposed to the proposal and put forward convincing arguments as to why they should have the right to seek such an injunction. They stressed that the AttorneyGeneral was not close enough to the daytoday operation of the professions to be an adequate arbiter of when to take action, and of what action to take. They felt that each needed this right if they were to carry out their duty to protect the public.

We have, therefore, been persuaded that there should be no change in the law in this regard.

2. Statutory Appeals

In the Working Paper we said:

> In the abstract, a uniform standing requirement for all statutory appeals would appear to be desirable. We agree but we are not willing to recommend some general formula without examining each statute in turn to determine whether the general formula is appropriate in all the circumstances. There are several hundred provisions dealing with statutory appeals and a detailed examination of each of these is beyond our resources. Moreover, we do not believe that we are best equipped to make the detailed enquiries on a broad front which are necessary if the public policy served by each particular statute is to be determined.

The position taken by the Commission attracted little comment, and we remain of the view that, although reform of the law in this area is desirable, we are not the best equipped, in terms of time and expertise, to examine the many difficult and complex issues that we believe have to be considered before any suggestions for reform can be made. As was stated in the Working Paper, we believe that the most appropriate body to examine these issues would be an inquiry body that the Commission, in its Report on *Procedure Before Statutory Agencies,* had recommended be established to identify and examine agencies within the Province which exercise adjudicative rulemaking and investigative powers under statute. We might add that the creation of a single appeal board to hear all statutory appeals would appear to us to be a useful starting point for reform.

3. Procedural Aspects of Relator Actions

It was proposed in the Working Paper that a more formal procedure to govern relator actions should be adopted. We were concerned that while the present informal procedures in British Columbia allows for flexibility, it can lead to some uncertainty. It was, therefore, proposed that the *AttorneyGeneral Act* be amended to empower the Lieutenant Governor in Council to promulgate regulations to govern relator actions. The full text of the proposal is set out in Appendix A.

Only a few of those who responded to the Working Paper commented on this proposal. One respondent suggested that the present informal practice is satisfactory and is of some advantage to the relator. He also suggested that the proposal might lead to "procedural road blocks by way of Regulations" being placed in the path of relators.

Other respondents expressed some concern about the proposed regulation (iii), which would require the solicitor to certify the competence of a relator to answer for the costs of the relator action. It was suggested that such a regulation would be undesirable and that, in any event, few solicitors would be willing to give such a certificate.

We have reconsidered the proposal and have concluded that we should not make any recommendations in respect of the procedures that govern relator actions. The present informal practice appears to have worked well in the past, and we see no reason why it should not continue to work well in the future.

CHAPTER VII RECOMMENDATIONS FOR REFORM

A. General

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 AttorneyGeneral to take action. If the AttorneyGeneral 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. The scheme that we would recommend is discussed in greater detail later.

Before reaching this conclusion, we considered various arguments that have been advanced in support of restrictive standing requirements in respect of violations of particular public rights. In the face of such arguments, it could be suggested that the question of standing to sue in the public interest should be considered in the context of the particular public right that is sought to be protected, and that they preclude any attempt at a uniform approach to reform. The various types of public interest suits that are traditionally brought by the AttorneyGeneral are therefore considered below.

1. *Infractions of Statutes Enacted for the Benefit of the Public*

Certain arguments have been raised against allowing private individuals to seek injunctions to enjoin infractions of statutes which are concerned not so much with the character of the plaintiff, but rather with the use of the civil courts as a means of enforcing the criminal law.

It has been suggested, for example, that where injunctions are granted in such cases, a person is, in effect, being convicted in a civil proceeding without the protection of the criminal laws of burden of proof and evidence. It was suggested that such a person would also be in "double jeopardy" for, although he has been found guilty by the civil court, he will also be liable to be punished again for the same crime by a court of criminal jurisdiction.

2. Such a provision is contained, for example, in the *Foresters Act*, R.S.B.C. 1979, c. 141, section 23. Furthermore, if a person ignored an injunction, he would be liable to be imprisoned for contempt of court whereas the penalty provided in the statute which he had been enjoined from breaking might only be a fine.

The view has been expressed that if there is a concern about the persistent offender who, despite several convictions, continues to flout the law because of the inadequacy of the fines he has to pay, then the appropriate method of dealing with such offenders is to provide for increasing fines in respect of repeated offences.[2]

These same concerns are present when the AttorneyGeneral seeks an injunction in such cases, and it is apparent that the courts are alive to these issues when exercising their discretion in either granting or withholding an injunction. It is for this reason that the courts have only granted such injunctions in exceptional cases. Indeed, in *Gouriet* v. *U.P.W.*,[3] Lord Wilberforce did not suggest that injunctions ought never to be given to enjoin a breach of a statute, merely that it should be reserved for exceptional cases "where an offence is frequently repeated in disregard of a, usually, inadequate penalty," or to cases of emergency. As one writer has said in respect of the purposes of such injunctions:[5]

> The purposes are ... to bolster respect for the law so that people should not bring it into contempt by openly flouting it and appearing to get away with it, and preventing an immediate threat to life, limb or (perhaps) property. The former object requires a power to impose substantial penalties (an injunction is only needed because the penalty is "inadequate," and that only means insufficient to deter the offender). In the latter case the object is purely preventive: the emergency must be diverted, and the threat of unlimited sanctions is useful to persuade the person creating the emergency to desist.

In view of the limited circumstances in which a court is likely to exercise its discretion to grant an injunction in such cases, we do not believe that the retention of the existing standing requirements is warranted. We should also like to emphasize that it is not the grant of the injunction, but rather a breach of its terms that would result in the imprisonment of an individual. The choice rests with the individual who has been enjoined by injunction.

We would, therefore, recommend that the law of standing be widened so as to allow an individual to bring such an action. We later make specific recommendations in respect of the standing of private individuals to commence actions in the public interest, and the right to seek an injunction to enjoin the infraction of a statute would be included within the scheme suggested.

2. Public Bodies Acting in Excess of their Statutory Power

We recognize that if an act or decision made by a public body could be challenged by any person, at any time, the likelihood of that act or decison being challenged would increase and that one could not rely with as much certainty on a decision never being impugned. We agree that, to some extent, this is a possibility, but it is not a mat-

ter of overriding concern. Declarations and injunctions, in addition to being discretionary remedies, are subject to equitable defences such as delay, or laches or acquiescence, and any attempt to impugn an *ultra vires* act after there has been delay, etc., will not be looked upon with favour by the courts.

5. D. Feldman, *Injunctions and the Criminal Law*, (1979) 42 M.L.R., 369, 371372.

6. *See, e.g., Francis School District Board of Trustees* v. *Regina East School Board*, (1974) 46 D.L.R. (3d) 588.

We also recognize that if any member of the public has the right to challenge an *ultra vires* act or decision, notwithstanding that he is not directly affected by that act or decision, the possibility of interference with established private rights might increase. If, for example, a particular act or decision is declared to be ultra vires, this might result in loss being suffered by a person who has expended money in reliance on the particular act or decision.

Generally speaking, it would appear that an individual is only able to recover damages in respect of such loss if the decision made was administrative in character rather than legislative or judicial. The landmark decision in this area is the case of *Welbridge Holdings* v. *Metropolitan_Corp. of Greater Winnipeg*. In that case the plaintiff had leased certain lands in Winnipeg intending to construct a multistorey apartment building and, relying on the validity of an amending zoning law, which was eventually declared invalid by the Supreme Court of Canada in *Wiswell* v. *Metropolitan Corp. of Greater Winnipeg*.[8] In *Welbridge*, the plaintiff had obtained a building permit and begun construction, but the permit was revoked and work on the apartment stopped when the trial judge in the *Wiswell* case found the bylaw invalid on the ground that the corporation had failed to observe certain procedural formalities. The plaintiff in *Welbridge* asserted negligence on the part of the corporation in failing to ensure that these procedural formalities were followed.

The Supreme Court of Canada held that a distinction must be drawn between legislative and judicial functions on the one hand, and administrative functions on the other, and that an actionable claim for damages will only lie in respect of negligence in the performance of administrative functions. The claim for damages was therefore denied.

We do not believe that if standing is widened that someone would necessarily suffer a loss every time that an act or decision of a public body is successfully challenged. In any event, even if it is thought that this would happen, we do not believe that this by itself justifies a restrictive approach to the question of standing. If a particular act or decision is *ultra vires*, those persons who are likely to suffer loss as a result of a court order to that effect ought not to be protected by denying someone else the right to seek such a court order. If it is thought that people who act in reliance on an *ultra vires* decision should be protected from loss, then perhaps this should be done by conferring on them a right to compensation, and not by immunizing the act or decision itself from challenge merely because the plaintiff does not have the requisite standing. As to this, at present an individual can only seek damages if the decisionmaker is performing an administrative function and not if the function is legislative or judicial or quasijudicial in character. We are reluctant to suggest, however, that a general liability be imposed upon decisionmakers, whatever function they are performing, to compensate individuals for any loss they may have suffered as a result of relying on an act or decision being declared *ultra vires*.

Another argument which could be raised against widening standing in this area is that if any member of the public was able to challenge an act or decision at any time, this could lead to the alteration of specific relationships with which the parties directly concerned are satisfied. In such cases, however, the court may very well take such factors into account in exercising its discretion to grant an order. The Supreme Court of Canada in *P.P.G. Indust. Can. Ltd.* v. *A.G. Can.*,

11. [1976] 2 S.C.R. 739, 749750. refused to set aside a decision of the AntiDumping Tribunal at the instance of the Attorney General for the reason, *inter alia*, that none of the parties affected by the decision took exception to it or lent their support to the challenge of the decision by the Attorney General. The court did not suggest that the Attorney General could never intervene in protection of the public interest where the parties directly affected had not complained, but merely that there was not sufficient taint to the decision to warrant intervention in the public interest.

In response to our proposal in the Working Paper that standing to challenge *ultra vires* decisions be relaxed, it was suggested, on behalf of municipalities that this could lead to an increase in litigation which would result in the imposition of more onerous tax burdens upon local residents. It was further suggested that it would not be in the public interest to allow a person who is not a resident of a municipality to attack a bylaw of the municipality. We sympathize with the view that our recommendations might increase the economic burden on municipalities and may, we put it no higher, result in higher municipal taxes. We cannot persuade ourselves, however, that this overrides the interest that all citizens have in public bodies performing their duties in accordance with their mandate.

We should like to add that the Legislature has, to a limited extent, already widened the law of standing in this area by giving any "elector" the right to challenge a municipal bylaw for illegality. In addition, the courts have for many years permitted ratepayers to challenge the illegal expenditure of municipal funds.[12]

In the light of the foregoing, we therefore take the view that there are no persuasive reasons for not permitting any member of the public to challenge public bodies exceeding their powers, and that the right to make such a challenge should be included in a general right to maintain an action to vindicate a public right.

3. Public Nuisance

It is our view that there are no factors peculiar to public nuisance that would warrant the retention of the existing standing requirements, and that any member of the public should be able to maintain an action in respect of a public nuisance.

We note that under Scottish law, it is well established that any member of the public can seek an interdict to restrain a public nuisance, without proving special damage or interference with a private right.[13] We are not aware of this right leading to any difficulty or undue concern in Scotland, and this fortifies our conclusion in this regard. Indeed, widened individual standing with respect to the right to maintain an action in respect of activity that amounts to a public nuisance is not without precedent in British Columbia, albeit on a limited scale. For example, in the *City of North Vancouver Grand Boulevard Restriction Act*, it was provided in section that:

> Any violation or attempted violation of the provisions of this Act shall be deemed a nuisance, and any resident or residents within the area mentioned in section 3 hereof may, in his or their own name or names, and without making the AttorneyGeneral a party, take such action, by injunction or otherwise, as they may be advised, to restrain any such violation or attempted violation.

14. S.B.C. 1927, c. 57.

15. For an example of the use of this section *see Fielding* v. *Sibald*, [1953] 1 D.L.R. 232 (B.C.C.A.).

In addition to recommending a change in the law that would enable a private individual to maintain an action in respect of a public nuisance even though he has suffered no damage, we also believe that the law should be

clarified with respect to the type of damage that is sufficient to give rise to an actionable claim for damages in a private action. As we pointed out earlier, where an individual suffers "special" or "particular" damage as a result of a public nuisance, over and above the ordinary inconvenience suffered by the public at large, he may sue in his own name without joining the AttorneyGeneral. There is some uncertainty, however, as to the type of damage that can be characterized as "special" or "particular" damage. In some cases, it has been held that the damage suffered by the plaintiff must be different not merely in degree but in kind from that suffered by the general public. We therefore recommend that a person who suffers damage as a result of a public nuisance should not be precluded from seeking relief merely because that damage differs in degree rather than kind from that suffered by the public at large.

It is well established that in an action brought in respect of a private nuisance, the court has jurisdiction to award damages in addition to or in substitution for an injunction. The court has the jurisdiction to make such an award in equity under the provisions of *The Chancery Amendment Act 1858*, commonly known as *Lord Cairns' Act*, an English statute that has been held to be in force in British Columbia by virtue of the *English Law Act*,[17] the forerunner to section 2 of the present *Law and Equity Act*. Section 2 of *Lord Cairns' Act* provides:

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct.

From the wording of the section, it would appear that the court's jurisdiction to award such damages is unlimited, and this has been confirmed by various authorities. For example, Norris J.A. in *Rombough et al* v. *Crestbrook Timber Ltd*.,[19] a private nuisance case, quoted the following words from the judgment of Lindlay L.J. on *Shelfer* v. *London (City) Elec. Lighting Co.*:

> The jurisdiction to give damages instead of an injunction is in words given in all cases ... there appears to be no limit to the jurisdiction.

20. [1895] 1 Ch. 287, 315.

From this it could be argued that the court could therefore award such damages where, as a result of our recommendation, a private individual who has suffered no damage brings an action in respect of a public nuisance.

As a matter of principle, we believe it desirable that in cases of public nuisance, the court should have a discretion to award damages in addition to or in substitution for an injunction. We appreciate that the court may have jurisdiction to make such an award at present but would prefer, for a number of reasons, to make this clear by enactment of a restatement of the principle of section 2 of *Lord Cairns' Act* with specific reference in public nuisance actions. Firstly, we are not aware of any instance of *Lord Cairns' Act* being invoked where the AttorneyGeneral has sued in respect of a public nuisance. Secondly, the phrasing of the Act leaves the question open as to how an award of damages is to be assessed and applied in cases of public nuisance. The Act merely provides that damages are to be awarded to "the party injured" and may be "assessed in such manner as the court shall direct." In cases of private nuisance, various criteria have been laid down by the courts as a guide to awarding damages under the Act.

In the second place, the power of awarding darnages which is conferred by a *Lord Cairns' Act* provision is not limited to cases where damages might properly be awarded at law. It is in truth a much more general provision, which should in no way be limited by implication, which enables damages to be awarded whenever the court thinks fit.

In Damages in Equity A Study of *Lord Cairns' Act* (1975) 34 Camb. L.J. 224, Jolowicz at 242 makes the point more elaborately:

If there is a case made out which is sufficient to call upon the judge to exercise his general equitable discretion, then, even though in the exercise of that discretion he concludes that no injunction or decree of specific performance should actually issue, he still has jurisdiction to consider and should consider whether an award of damages under the Act ought to be made.

22. *See, e.g., Shelfer* v. *London (City) Elect. Lighting Co., supra* n. 22. These criteria, however, may not prove too helpful as they are, in the main, concerned with the seriousness of the personal loss occasioned by the nuisance. In our suggested restatement of the principle of *Lord Cairns' Act*, we would therefore give some guidance to the court by limiting the damages that can be awarded in those public nuisance actions maintained as a result of our recommendation to widen standing, to an amount that represents the cost of remedying or repairing the effects of the nuisance. The broad scope of *Lord Cairns' Act*, in our view, necessitates such a limitation on the extent that damages can be awarded.

We recommend that the court should have a complete discretion whether or not to make such an award, and if it should decide to make such an award, it should have the power to direct how the award is to be applied and disbursed. Any such award should be payable to the AttorneyGeneral who would then have a duty to spend the amount awarded to remedy the damage caused by the nuisance.

In exercising its discretion in awarding damages for public nuisance, the court will be guided by equitable considerations. This gives the court a desirable degree of flexibility, and will allow it to take a wide variety of circumstances into account, including the behaviour of the plaintiff and defendant. There is, of course, the unlikely possibility that, as a result of our recommendation to widen standing, a defendant might be faced with a number of actions in respect of the same nuisance, in which a claim for damages is made in addition to or in substitution for an injunction. This possibility is not an overriding concern, however, as we are confident that in most cases an application to consolidate the various actions would be successful. Furthermore, if a situation arose where an action for damages was maintained in respect of a public nuisance that had already been the subject of a successful damage claim, the court would doubtless in the exercise of its discretion refuse to make another damage award.

We should like to emphasize that our recommendation in this respect can be treated independently of our principal recommendation to widen standing, and that enactment of our principal recommendation would not of necessity require the enactment of this recommendation relating to damages for public nuisance.

4. Constitutional Cases

We have concluded that there are no persuasive reasons that call for restrictions on the right of any member of the public to seek a declaration as the constitutionality of legislation. Our conclusion in this regard is fortified by the recent decisions of the Supreme Court of Canada in the *Thorson* and *McNeil* cases.

It could be argued that in the light of these decisions, the courts should be left to develop the law in this regard, particularly as they would appear to give a court a discretion whether or not to accord an individual standing. We cannot predict the manner in which these cases will be applied in the future but it is conceivable that the courts might exercise this new discretion to accord standing

in only exceptional circumstances, such as when the plaintiff can demonstrate that he is "directly affected" as in *Dybikowski* v. *The Queen*,[23] or when all other avenues for questioning the constitutionality of legislation have been closed.[24] We agree that if the constitutionality of legislation can be decided in another manner, it is probably inappropriate for the court to entertain an action by any member of the public, but we do not believe that the action should be struck down by reason of the plaintiff's standing. As a declaration is a discretionary remedy, the court should merely refuse to grant the declaration requested.

It is our view that proceedings to question the validity of a statute should not be encompassed within our principal recommendation. To our mind, they are separate and distinct from other types of public interest suits. Furthermore, as Laskin J. pointed out in the *Thorson* case, the validity of a statute is always a "justiciable" issue and, consequently, that part of our general recommendation that hinges on justiciability is inapplicable to constitutional cases. We therefore recommend 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.[25]

We consider it appropriate that this right be included within the *Constitutional Question Act*.

24. *See, e.g., Forest* v. *A.G. of Manitoba* [1979] 4 W.W.R. 729 (Man. C.A.).

25. As to the jurisdiction of the Supreme Court of British Columbia in declaratory actions to determine the constitutional validity of a federal statute in declaratory actions, *see Law Society of British Columbia* v. *Attorney General of Canada*, [1978] 6 W.W.R. 289 (B.C.S.C.).

26. R.S.B.C. 1979, c. 63. That Act already provides that both the Attorney General of Canada and the AttorneyGeneral of British Columbia be notified whenever a question concerning the validity of any statute is raised in a proceeding and that they are given the right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the action or the proceeding. We believe that this provision is sufficient to ensure that either Attorney General has the opportunity to present his views to the court.

B. Suggested Scheme for Reform

We have concluded that it is preferable to present our recommendations in the form of a draft legislation that is designed to give effect to the recommendations we make in this Report. The draft bill that we have prepared is designed to amend existing legislation by the addition of sections to both the *Law and Equity Act* and the *Constitutional Question Act*, and we should like to thank Legislative Counsel for the Province who provided us with invaluable assistance in the drafting of these recommended amendments.

1. Principal Recommendation

We support the general proposition that any member of the public should have the status to bring proceedings in respect of an actual or apprehended violation of a public right, whether it be an infraction of a statute, a public body exceeding its power or a public nuisance. We do not believe that the right to bring such proceedings should remain within the AttorneyGeneral's exclusive jurisdiction. We do not mean to suggest, however, that the AttorneyGeneral is never the appropriate plaintiff in such cases. We believe it desirable that the AttorneyGeneral should continue to have an opportunity to participate and exercise some degree of control over public interest suits. He may

wish to participate for a number of reasons. For example, he may have doubts as to the competence of the person to conduct the proceeding, or that the case is one which would benefit from having the full resources of his ministry behind it. At the same time he may not wish, for a variety of reasons, to be involved in the proceeding at all. As a result of our recommendation, his decision not to participate will not give rise to any suggestion that this decision has prevented an otherwise meritorious case being brought before the courts.

We suggest that where a person wishes to maintain an action in respect of an alleged interference with a public right, and such an action is one which at present can only be brought in the name of the AttorneyGeneral, either *ex officio* or in a relator action, that person should serve an application on the AttorneyGeneral, together with a copy of the proposed originating process. On receipt of this application, the AttorneyGeneral should have the opt ion either to commence and conduct the action himself or consent to the use of his name in a relator action. Thus, up to this stage, we would not be recommending any change to the present practice and procedure.

We take the view, however, that if the AttorneyGeneral should refuse or neglect to take any action within a specified time, the person who served the application upon him should have the right to seek the consent of the court to commence the action in his own name.

We would suggest that to avoid any undue delay, the AttorneyGeneral should be allowed ten days from service to make a decision as to whether or not he wants to be associated with the action. This would, to our mind, give the AttorneyGeneral and his staff adequate time to reach a decision. At present, for example, only six days notice is required to be given to the AttorneyGeneral where the constitutional validity of a statute is going to be argued in a proceeding.

We recommend that if the AttorneyGeneral does not notify the person who applied of his decision within a period of ten days, that person should be permitted, after obtaining the consent of the court, to commence and conduct the proceeding in his own name.

Furthermore, we believe that such consent should be given automatically unless the court considers there is not a justiciable issue to be tried. To us, a requirement that the consent of the court be obtained is desirable for a number of reasons. For example, notice of any application for such leave should be required to be served upon the AttorneyGeneral and the proposed defendant. They would then have an opportunity to speak against the application and to show that there is not a justiciable issue to be tried. While in any action it is always open to a defendant to make such an attack, our recommendation would ensure that this issue was decided before proceedings commenced, saving both time and expense.

An issue is justiciable if it raises a question that may properly come before a court and which is appropriate for decision. For example, the courts have declined to entertain actions based on hypothetical questions or to give advisory opinions. A recent example of the court questioning the justiciability of an issue is the decision of the House of Lords in *Imperial Tobacco Ltd*. v. *Attorney General*,[29] which concerned a claim for a declaration as to the legality of an advertising scheme that offered the purchaser a chance to win prizes. Criminal proceedings had already been instituted against the claimant charging that the scheme was an unlawful lottery. It was held that because criminal proceedings had been instituted, the claim for the declaration was not justiciable in that it would not

be a proper exercise of the court's discretion to grant to the defendant in the criminal proceedings a declaration that the facts to be alleged by the prosecution did not in law prove the offence charged.

Another case in which the nonjusticiability of an issue precluded the granting of relief is *Re Pim and the Minister of the Environment*.

30. (1979) 23 0.R. (2d) 45 (Ont. H.Ct.). In that case the applicant sought a declaratory order that the Minister failed to recommend certain Regulations as required by statute and an order directing that Regulations be filed. It was held that the question whether the Lieutenant Governor in Council can be required to file such Regulations was not a justiciable one since on the wording of the statute, the power was a prerogative power.

We also recommend that the court should be empowered to give its consent on such conditions it considers appropriate. For example, the court might order that no settlement can be made without the approval of the court.

Finally, we recommend that where consent is given, it should always be open to the AttorneyGeneral to intervene in the proceeding or to be joined as a party of record. He may, for example, want to intervene or be joined as a party so that he can present issues to the court that might not otherwise be drawn to its attention, or present arguments as to why a particular form of relief should or should not be granted.

2. Related Recommendations

There are various statutory provisions that require the AttorneyGeneral's consent before proceedings can be brought against particular public bodies or public officers. In the light of our principal recommendation, we would suggest that such provisions cannot be justified and should be repealed. The provisions that we would recommend be repealed are set out in Clauses 3 and 4 of the Draft Bill.

Finally, the new sections 52 and 53 of the *Law and Equity Act* in Clause 1 of the Draft Bill are designed to give effect to our recommendations in respect of private and public damage actions for public nuisance, and Clause 2 of the Draft Bill to give effect to our recommendation in respect of standing to question the constitutionality of statutes.

3. Draft Legislation

The Commission recommends the enactment of the legislation comparable to the following:

1. The Law and Equity Act, *R.S.B.C. 1979, c. 224, is amended by adding the following sections after section 49:*

50. In sections 51, 52 and 53, "public interest proceeding" means a civil proceeding which can by law but for section 51, be brought by the AttorneyGeneral, either on his own initiative or at the request of a relator, in the Supreme Court, in respect of a present or apprehended violation of a public right, including a proceeding

(a) in respect of a public nuisance, or

(b) to restrain

(i) a person from violating an enactment, or

(ii) a public body from exceeding its powers.

51. (1) A person who wants to commence a public interest proceeding shall serve on the AttorneyGeneral,

an application requesting the AttorneyGeneral to commence the proceeding, and

(b) a copy of the proposed originating process.

(2) Upon being served under subsection (1), the AttorneyGeneral may notify the applicant that,

(a) the proceeding will be undertaken by the AttorneyGeneral, or

(b) the applicant may undertake the proceeding in the name of the AttorneyGeneral.

(3) Where an applicant does not receive a notice under subsection (2) within ten days after service under subsection (1), he may apply by petition to the Supreme Court for consent to undertake the proceeding in his own name.

(4) The applicant shall serve the AttorneyGeneral and any proposed defendants or respondents with a copy of the petition.

(5) The Supreme Court, on conditions it considers appropriate, shall give its consent unless it considers there is not a justiciable issue to be tried.

(6) In a proceeding undertaken with the consent of the Supreme Court under subsection (4), the AttorneyGeneral may intervene or shall on his application be joined as a party of record.

52. (1) In a public interest proceeding undertaken in respect of a public nuisance, the Supreme Court may in substitution for or in addition to an injunction, award damages payable to the AttorneyGeneral in an amount representing the cost of remedying the effects of the nuisance on the same basis as it would for a private nuisance.

(2) Money received by the AttorneyGeneral under this section shall be spent by the AttorneyGeneral without an appropriation other than this section in whatever manner he considers appropriate to remedy the effect of the nuisance.

53. In a proceeding in respect of a public nuisance, other than a public interest proceeding, the plaintiff is not barred from seeking relief by reason only that damage he has suffered only differs in degree from that suffered by the public at large.

2. The Constitutional Question Act, *R.S.B.C. 1979, c. 63, is amended by adding the following section:*

10. Any person may commence a proceeding in the Supreme Court for a declaration that an enactment of the Province or of Canada is invalid whether or not consequential relief is or could be claimed and whether or not the person has an interest in or is affected by the enactment.

3. The following Acts are amended by repealing the sections shown opposite them:

Livestock Brand Act	*61*
Insurance Act	*355*
Fire Services Act	*55*
Trust Company Act	*77*

4. Section 47 of the Water Act, *R.S.B.C. 1979, c. 429 is amended by striking out "with the consent of the AttorneyGeneral."*

C. Acknowledgments

While this Report reflects the conclusions of the Commission as currently constituted, it would be incomplete without some reference to the contributions of former members of the Commission: Mr. Justice J. D. Lambert, Leon Getz and Paul D. K. Fraser. In the earlier phases of this study, they reviewed materials upon which parts of this Report are based and made many helpful suggestions and proposals.

We also wish to express our gratitude to all others who contributed their time and energy to this study including all those who responded to our Working Paper. In particular, we should like to thank Mr. Norman Tarnow, Solicitor with the Ministry of the AttorneyGeneral for providing us with information relating to the Ministry's present practice in dealing with relator actions, and Mr. Alan Roger, Legislative Counsel, who assisted us in the preparation of the draft legislation that we recommend be enacted. During the course of the preparation of this Report, the Commission was visited by Mr. Bruce Debell, a member of the Law Reform Commission of Australia. He advised us of the current status of their studies and recent developments in the Australian courts on the law of standing. Our discussions with Mr. Debell proved most useful and helped us in sharpening our views on the issues.

Finally, our thanks go to Anthony J. Spence, Counsel to the Commission, who was responsible for the drafting and preparation of this Report and the Working Paper on which it was based.

PETER FRASER
ARTHUR L. CLOSE
KENNETH C. MACKENZIE
BRYAN WILLIAMS
ANTHONY F. SHEPPARD

June 16, 1980.

APPENDICES

Appendix A

***Summary of proposals made in the Working Paper*:**

1. The right given to certain professional bodies to seek an injunction to enjoin a breach of their governing statutes should be reconsidered by the Legislature with a view to its repeal.

2. In this proposal "public body" means a body set out in 3 below.

   (a) Where it is alleged that a public body has acted or is proposing to act *ultra vires*, any person may seek an order as to the validity of the act in question whether or not that person has an interest in or is affected by that act.

   (b) Proposal 2(a) should not apply to *ultra vires* acts which amount only to a disregard of procedural or formal requirements of an enabling statute.

   (c) Where an action is maintained pursuant to Proposal 2(a) by a person who does not have an interest in or who is not affected by the act in question, notice of the action must be served on the AttorneyGeneral who should be entitled to be heard in person or by counsel, and who may request that the action be stayed, and the court upon receiving such a request should stay the action.

3. For the purposes of proposal 2, public body means any of the following entities:

   (a) Ministries of the Government;

(b) A person, corporation, commission, board, bureau, or authority who is or the majority of the members of which are, or the majority of the members of the board of management or board of directors of which are,

(i) appointed by an Act, minister, the LieutenantGovernor in Council, or

(ii) in the discharge of their duties, public officers or servants of the Government, or

(iii) responsible to the Government;

(c) A corporation the ownership of which or a majority of the shares of which is vested in the Government;

(d) Municipality;

(e) Regional districts;

(f) The Islands Trust established under the *Islands Trust Act*;

(g) Public schools, colleges and Boards of School Trustees as defined in the *Public Schools Act*, and College Councils estab1ished under that Act;

(h) Universities and the Universities Council as defined in the *Universities Act*;

(i) Corporations as defined in the *Colleges and Provincial Institutes Act*;

(j) Hospitals and Boards of Management of hospitals as defined in the *Hospitals Act*;

(k) Governing bodies of professional and occupational associations that are established or continued by an Act.

4. The following sections be repealed:

(a) Section 12, *British Columbia Centennial '71 Celebration Act*, S.B.C. 1969, c. 2;

(b) Section 16, *Canadian Confederation Centennial Celebration Act*, S.B.C. 1962, c. 9;

(c) Section 62, *Stock Brands Act*, R.S.B.C. 1960, c. 371;

(d) Section 323, *Insurance Act*, R.S.B.C. 1960, c. 197;

(e) Section 48, *Fire Marshal Act*, R.S.B.C. 1960, c. 148;

(f) Section 77, *Trust Companies Act*, R.S.B.C. 1960, c. 389;

(g) Section 140, *Securities Act*, S.B.C. 1967, c. 45.

5. The words "with the consent of the AttorneyGeneral" in section 49 of the *Water Act*, R.S.B.C. 1960, c. 405 be repealed.

6. Where an action is brought in respect of a public nuisance a plaintiff should not be banned from seeking relief merely because any damage he has suffered only differs in degree from that suffered by the public at large.

7. Any person should be able to bring an action in respect of a public nuisance in his own name, and without making the AttorneyGeneral a party where there has not been an infringement of some private right of his or where he has not suffered damage that is different in kind or degree from the public at large, and in such an action the court may grant or make one or more of the following:

(a) an injunction on such terms or conditions as the court considers reasonable and just;

(b) an award as to damages in the amount of the loss or damage suffered by the public at large, including punitive or exemplary damages.

8. Notice of any award of "public damages" pursuant to proposal 7 should be required to be served on the AttorneyGeneral, who should be entitled to be heard in person or by counsel, as to the proper disposition of the award.

9. The *Constitutional Questions Determination Act* be amended by the addition of a provision comparable to the following:

The Supreme Court has jurisdiction to entertain an action at the instance of any person for a declaration as to the validity of any enactment or any Act of the Parliament of Canada, whether or not further relief should be prayed or sought and whether or not that person has an interest in, or is affected by, the enactment or Act.

10. (a) The *AttorneyGeneral Act* be amended by adding a section comparable to the following:

The LieutenantGovernor may from time to time make such regulations as he may deem necessary or advisable that shall govern the procedure to be followed where an application is made to the AttorneyGeneral for his authority to commence an action in his name at the instance of a relator.

(b) Pursuant to proposal 10(a) regulations comparable to the following should be promulgated:

In the case of any application to the AttorneyGeneral for his authority to commence an action in his name at the instance of a relator, the following formalities shall be observed:

(i) A copy of the proposed originating process shall be left with the AttorneyGeneral for his signature together with the proposed statement of claim, which the Attorney-General, if he shall allow the action, will also sign and return to the relator's solicitor to be delivered or filed as required.

(ii) There shall also be left with the AttorneyGeneral a second copy of the originating process with a copy of the statement of claim appended thereto, on which there shall be written a certificate of the relator's solicitor to the following effect: - "I certify that this action is proper for the allowance of the AttorneyGeneral. Dated, etc." This copy shall be retained by the AttorneyGeneral.

(iii) The papers shall be accompanied by a certificate of the solicitor presenting the same for allowance that the proposed relator is a proper person to be relator, and that he is competent to answer the costs of the proposed action.

(iv) If any amendment to the pleadings shall at any time become necessary, the proposed amendment need not be approved by the AttorneyGeneral unless the court so orders on the ground that the claim would differ substantially from the original claim.

Appendix B

Circulation of the Working Paper

We maintain a mailing list of those to whom we send a copy every working paper we publish. This list includes other law reform agencies, Judges of the County Court, Supreme Court and Court of Appeal of British Columbia, Court Registrars, Registrars of Land Titles and Court libraries. In addition to the foregoing, copies of our Working Paper on Civil Litigation in the Public Interest were sent to the following:

British Columbia Branch of the Canadian Bar Association Sections (Multiple copies):

Civil Litigation
Municipal Law
Civil Liberties
Environmental Law
Administrative Law
Constitutional and International Law

Various academics at the Universities of British Columbia and Victoria and other universities in Canada.

Legal officers within the Ministry of the AttorneyGeneral.

Deputy Minister of each British Columbia Government Ministry.

British Columbia Hydro and Power Authority.

British Columbia Railway.

British Columbia Ferry Corporation.

British Columbia Telephone Company.

College of Dental Surgeons of British Columbia.

Association of Professional Engineers.

Association of Professional Foresters.

Law Society of British Columbia.

Architectural Institute of British Columbia.

Heritage Canada.

The Public Interest Advocacy Centre. Canadian Environmental Law Association. Union of British Columbia Municipalities. West Coast Environmental Law Association. The Greenpeace Foundation.

Sierra Club.
Consumers' Association of Canada.

British Columbia Wildlife Federation.

Society for Pollution and Environmental Control.

Various practising lawyers.