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Standing for Citizens: An Idea Whose Time Has Come

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"(T)o none will we deny, to none will we delay right or justice."
Magna Carta, 1215 A.D.

The doctrine of locus standi ("standing" or "status to sue") has long prevented members of the public from going to court to protect the environment and other public rights. But it has become clear not only that the purposes which limitations on standing are meant to serve are provided for by other legal tools, but, more important, that the standing barrier blocks potentially beneficial legal actions, without which the public interest can suffer severely.

The standing doctrine is that no person may use the courts either to challenge a statute or an action of a government or a public body, or to seek damages or other relief against a public nuisance, unless he or she has some special interest—usually pecuniary or proprietary—or has sustained damage beyond that suffered by the general public. In the case of a public nuisance, it appears that the plaintiff may have to show that he has suffered damage different in kind from, as well as greater in degree than, the public at large.

Thus, the only possible plaintiff, in cases where no private interest is at stake, is the Attorney General; but there is no reason in principle why members of the public should not be allowed to protect the public interest in the courts, and many reasons in practice why they should.

Reasons for changing the rule of standing have to do not only with environmental protection, but with the broader question of the rule of law. A democratic government must be a legal government: it must obey its own

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laws. That means that when there is any question as to whether a governmental action is within the law, or a statute within the constitution, there must be a way for that question to be decided by the courts. To leave it to the discretion of the Attorney General—who is himself an arm of government—to raise the question is clearly insufficient.

Even with the best will in the world, no government has the resources to protect the environment fully, in light of the new threats to it which are proliferating at an alarming rate, and in the face of what is often immense pressure to permit profitable, but environmentally hazardous, activities. Unless citizens have access to the courts to protect the environment, all too often it must go unprotected.

The arguments against a liberalized rule of standing boil down to three. First, it is said that the courts will be unable to cope with the resulting flood of litigation, much of which will be of dubious merit; secondly, that only the Attorney General can properly represent the public interest; and thirdly, that defendants may be subjected to a number of court actions over the same incident.

The "floodgate theory" does not hold water. The expected crowd of litigants simply has not materialized in jurisdictions where access to the courts has been allowed. This should really come as no surprise, for other obstacles to embarking on public-interest litigation, such as lack of money and expertise, are formidable enough to discourage most potential plaintiffs even where there are no restrictions on standing.

In Michigan, where an Environmental Protection Act passed in 1971 established a right to a clean environment and granted standing to any member of the public to enforce the right, studies show the courts have not been overburdened.[1] Similar legislation in five other states has not led to an inordinate amount of litigation according to their Attorneys General.[2]

In Ontario, the *Environmental Protection Act* passed in 1971 permits anyone to prosecute alleged polluters, yet there has been no flood of private prosecutions under that Act. Those which have occurred are usually brought by public officials such as local officers of health and municipal by-law enforcement officers. J. A. Kennedy, Q.C., former chairman of the Ontario Municipal Board, where liberal rules of standing apply, has said that the Board has been able to accommodate all members of the public who wanted to question an application or present an argument without resulting in any paralysis of the Board or unfairness to the applicants.

As for improper or unmeritorious actions, the courts have many other

[1] "Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act", (1974) 4 Ecology Law Quarterly, Sax, J.L. and DiMento, J.F.

[2] "Do Citizen Suits Overburden Our Courts", Consumer Interest Foundation, Washington, D.C., 1973. The states are Connecticutt, Florida, Indiana, Massachusetts, and Minnesota.

ways to control them, without resorting to a ban on *all* public-interest litigation out of a fear that *some* of it will be without merit. In addition to the ability of the courts to award costs against those who bring unmeritorious actions, or to award only nominal damages, or to withhold remedies which are discretionary, the courts' own rules of procedure permit any judge to dismiss an action he considers frivolous or vexatious, or which discloses no reasonable cause of action on a preliminary motion. Indeed, if someone were to persist in trying to bring frivolous actions, the *Vexatious Proceedings Act* could be used to stop him.

The second objection rests on two assumptions: that the Attorney General is always the best person to represent the public interest; and that a private person, with no financial interest in the outcome of the case, cannot possibly litigate with sufficient vigour to ensure that the issues are given a full hearing.

For reasons mentioned before, while the Attorney General may be an appropriate plaintiff in public-interest actions, he is not the *only* appropriate plaintiff. Moreover, there are occasions, as in the *Thorson* case[3] where the issue was the validity of the government's own legislation, when the Attorney General is a very inappropriate plaintiff; indeed, he has a conflict of interest. And there are cases, such as the Dow Chemical pollution suit in Ontario, which after almost six years seems to be at a standstill, which would appear to indicate that the Attorney General cannot always be relied upon to conduct prosecutions with the requisite vigour.

The second assumption rests on the traditional, but erroneous, belief that private interests are far more important than public ones, and that the courts exist primarily to protect these private interests. This assumption is belied by the simple fact that people do find public-interest actions important enough to put time, money, and energy into them, even though they have nothing to gain as private persons but only as members of the public.

The third objection, multiplicity of suits, rests on the mistaken assumption that the public would have something to gain by taking a defendant to court more than once. If individual members of the public have a personal injury to their property or their health for which they want to recover damages, they already have the kind of interest that gives them standing. Whether they bring these actions separately or together depends not on the availability of standing, but on the scope of class action rules, and on whether the courts wish to consolidate actions under existing rules for their own convenience or for the convenience of any of the parties.

Granting standing to enforce existing rights is different from establishing a new right to compensation for injuries that are not already compensible under the common law. If someone has an injury that is not recognized as compensible by law, then his case should be dismissed on the grounds that he has no cause of action, not that he has no standing.

[3] [1975] 1 SCR 138, (1974) 43 DLR (3d) 1.

If, on the other hand, more than one person has an injury recognized as compensible by damages, then each person should be allowed to sue for his damages. In such cases, the first action does not normally lead to more actions, but to settlements, which is surely in the public interest. In most cases where the plaintiff seeks to vindicate a "public" right or uphold a "public" interest, the first action will have been not for damages but for equitable relief such as a declaration or injunction. Once such a remedy is granted there will be no need for further actions.

The question of the defendant being penalized more than once for the same offending behaviour can only arise if legislation provides new causes of action or new heads of damages. It will not arise if only a right of standing to use the courts for any remedy that would otherwise have been available at common law is put into a statute. In the kinds of cases where the courts have held that the plaintiffs have no right or interest greater than the general public, damages have generally been sought only in those public nuisance cases in which the plaintiff suffers an economic loss by being deprived of his means of earning a living—for example, where fisheries are destroyed by water pollution.[4] In these cases, the law should be changed to give the injured parties standing to sue even though, for example, they may have no greater right to fish in public waters than the rest of the public. In other cases, the question of damages and any problems a claim for damages might cause would not arise.

The decisions in the *Thorson* and *McNeil*[5] cases have begun to erode the standing barrier. But legislation to broaden standing is still needed so that citizens do not have a long wait for this change to come, slowly and in piecemeal fashion, through the courts. For one thing, the *Thorson* and *McNeil* decisions touch only on the actions of public authorities, and do not extend to public nuisance. Some courts may interpret them as precedents for granting standing only in cases where it is alleged that public authorities are acting unconstitutionally, and not where they may be exceeding their authority or acting unlawfully in other ways.

For another, to leave the question of standing to the discretion of the courts would institutionalize uncertainty thereby placing a burden on both the courts and potential litigants which neither should be forced to bear. The courts are entitled to have as clear a law as possible to apply; and citi-

[4] Notably, *Fillion v. New Brunswick International Paper Co.*, [1934] 3 DLR 22; *Hickey v. Electric Reduction Company of Canada Ltd.* (1972), 21 DLR (3d) 368.
[5] 5 N.R. 43.

zens are entitled to know whether they have the right to sue without having to spend a great deal of their resources just to get a decision on standing.

Permitting the public to have access to the courts will in no way impede or restrict government-initiated actions against polluters or other lawbreakers. More liberal standing will simply add a new and effective dimension to judicial redress for existing and threatened injuries to the environment and to civil liberties. It will restore the access to justice guaranteed in the Magna Carta, which has been eroded since the turn of this century by what might fairly be called decisions of policy or convenience by some judges which, under our system of judicial precedents, have been elevated into inflexible rules of law.

The rule of standing should be changed by legislation providing that any person has the right to take legal action against any public nuisance, or to ensure the lawful behaviour of any public body, for any remedy that would otherwise be available, and for damages in cases of public nuisance causing loss of livelihood. This should, ideally, be combined with a substantive right where appropriate; for example, legislation establishing the right to a clean environment.

Now is the right time to abolish the standing barrier. Not only has such abolition been preceded by a long history of judicial precedent and commentary, not only does it reflect contemporary social reality, but it is one of the few improvements in the administration of justice and in protection of people's rights which will require almost no government expenditures. It would go a long way toward fulfilling the promise, which the present Attorney General made upon assuming that office, to improve the administration of justice in the Province of Ontario.

ANTOINETTE v FITZNILLY, carrying on as a bachelor

Marcel Striberger*

ALTAR J. This is an action by Clementine Antoinette against William T. Fitznilly for damages for breach of promise to marry. Perhaps I should mention at this point that both parties are themselves solicitors practicing law in the City of Metro.

On February 14th, 1976, Mrs. Martha Pleasant, a marriage broker, introduced Ms. Antoinette to Mr. Fitznilly. It seems that it was love at first sight and accordingly they immediately became engaged to be married. It was agreed that the wedding would take place on June 30th, 1976; time was to be of the essence.

The defendant then gave to the broker a diamond ring as a deposit to be held by her until the completion of the wedding.

The parties subsequently commenced preparation for the wedding. On February 16th, 1976 the defendant sent a letter (exhibit 1) to the plaintiff which read:

> We are the bridegroom and we understand that you are the bride. We have completed our searches and investigations and hereby make the following requisitions without prejudice to our right to make further requisitions before the closing of this agreement on the wedding date:
>
> 1. Instrument number 45-17684H is a marriage certificate indicating that Clementine Antoinette was married to Farley Quincy Jones on March 22nd, 1972.
>
> REQUIRED: On or before closing production and registration of a certified copy of a decree absolute with respect to the aforementioned couple. Alternatively, satisfactory evidence that you are a widow.

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