REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 218 of 2014

BETWEEN

JOHN REGINALD PHELPS DUMAS

Appellant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL: **P. Jamadar, J.A.**
N. Bereaux, J.A.
G. Smith, J.A.

APPEARANCES:

Mr. R. Maharaj, S.C., Ms. E. Greene and Mrs. M. Clarke for the Appellant.

Mr. A. Sinanan, S.C., Mrs. D. Prowell, Mr. R. Jagai and Mr. S. Julien for the Respondent.

DATE DELIVERED: 22nd December, 2014.

DELIVERED BY JAMADAR, J. A.

WHO GUARDS THE GUARDIANS?

> ***"Allowing, even encouraging, people to take an active part in the enforcement of the law, so as to encourage a 'judge over the shoulder' attitude on the part of government, must be a good thing. On the other hand, allowing any old busybody to bring proceedings which will delay or even prevent perfectly lawful governmental actions and decisions must be a bad thing, as must allowing them to interfere in other people's proceedings. Distinguishing between busybodies and champions is almost as difficult as distinguishing between terrorists and freedom fighters. But too close a concentration on the particular interest which the claimant may be pursuing risks losing sight of what this is all about – fundamentally, as Mark Elliott has said, the issue is not about individual rights but about public wrongs. There are better ways of nipping unmeritorious claims in the bud than too restrictive an approach to standing."***[1]

Introduction

1. This appeal raised the important core issue of public interest standing in the context of constitutional review, particularly in relation to generalized grievances (as opposed to specific grievances).[2] In this case the alleged wrongdoing constitutes a generalized grievance, because its effects impact the entire society and are not limited to any single individual, group or segment of the citizenry.

2. The specific issues were whether a public-spirited applicant[3] who seeks to vindicate a general grievance in relation to the rule of law, can have *locus standi* (standing) to bring a judicial challenge to Presidential nominations and appointments to the Police Service Commission, on the basis that they were *ultra vires* the Constitution. If so, in what circumstances?

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[1] [1] Baroness Hale, 'Who Guards The Guardians?'; 14th October, 2013; Closing Address London Conference 2013 – 'Judicial Review Trends and Forecasts'.

[2] A general grievance is one where the alleged public wrong impacts on all members of the society; whereas a specific grievance is one where the impact is only on a segment of the society or on a specific group or individual in the society.

[3] One who is not directly or personally aggrieved or affected by the impugned constitutional action.

3. This court determined that the appellant, as such a public-spirited applicant, had *prima facie*, the necessary standing to receive the permission of the 'first gatekeeper'[4] and 'gain entry into the law' – access to justice and to commence these proceedings. As will become apparent, this *prima facie* assumption can be rebutted if during the course of these proceedings, there is evidence to show that the appellant ought not to be permitted to continue these proceedings – which may be issues for other gatekeepers.

The Appellant's Status and Interest

4. The appellant commenced these proceedings as a public-spirited citizen of Trinidad and Tobago. He has not alleged any infringement of his fundamental rights and freedoms and does not purport to bring these proceedings pursuant to section 14 of the Constitution.[5] Furthermore, he is clear that his interest in these proceedings is not personal and that he will not likely be "directly affected in his individual capacity" by the impugned decision of the President.

5. The Appellant articulated his position as follows:[6]

> 1. I am the Claimant herein and I make this affidavit on my behalf in support of my claim for the interpretation of section 122(3) of the Constitution of the Republic of Trinidad and Tobago ("the Constitution") and certain declarations concerning the nomination and appointment of Mrs Roamar Achat-Saney and Dr. James Kenneth Armstrong to the Police Service Commission …
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> 2. Section 122 of the Constitution establishes a Police Service Commission for Trinidad and Tobago. Its five members are to be appointed by the President in accordance with the provisions of that section …

[4] "**Before the law sits a gatekeeper**. **To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. "It is possible," says the gatekeeper, "but not now."** … "But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other. I can't endure even one glimpse of the third." **The man from the country has not expected such difficulties: the law should always be accessible for everyone, he thinks**. …". "Before the Law" (Vor dem Gesetz") by Franz Kafka (1915); translated by Ian Johnston.

[5] That is, as a 'person' who alleges that the provisions of Chapter 1 of the Constitution have been or are likely to be contravened 'in relation to him.'

[6] Appellant's affidavit filed on the 10th April, 2014; at paragraphs 1, 2, 3, 4, 7, 8 and 9.

3. On the 4th September 2013 His Excellency the President of the Republic of Trinidad and Tobago … issued four Notifications for the appointment of persons to the Police Service Commission.

4. The Notification in respect of Mrs. Roamar Achat-Saney described her as a person who is qualified and experienced in the disciplines of law and sociology. The Notification concerning Dr. James Kenneth Armstrong described him as a person who is qualified and experienced in the disciplines of management and finance …

7. Having seen the reports in the press concerning Mrs. Achat-Saney and Dr. Armstrong and their *curricula vitae*, I became concerned that these two persons did not fulfill the requirement of section 122(3) of the Constitution of being "qualified and experienced" in the disciplines for which His Excellency had nominated them to become members of the Police Service Commission. **My concern was not personal**. I do not know Mrs. Achat-Saney and am only slightly acquainted with Dr. Armstrong. **Nor did I judge that I would be directly affected in my individual capacity by any possible consequences of the Notifications**, if approved by the House of Representatives. **Rather, I was and am concerned as a citizen who has for many years written and spoken publicly about the need for good governance in this society, particularly including respect for our institutions such as our Constitution, which is the highest law of the land. I am therefore acting in what I consider to be the public interest of Trinidad and Tobago** …

8. **I am equally concerned as a citizen of Trinidad and Tobago that in the exercise of its powers an institution such as the Police Service Commission should be properly constituted under section 122 of the Constitution of the Republic of Trinidad and Tobago …**

9. **I verily believe that it is in the public interest that the Police Service Commission be properly constituted under the Constitution**. This is all the more so given the current situation in Trinidad and Tobago where there is yet to be a substantive appointment to the post of Commissioner of Police since the former Commissioner of Police Dwayne Gibbs resigned in August 2012 …

6. Indeed, the appellant is a well known and in many quarters well respected citizen of the Republic, who has consistently written about public interest and governance issues in Trinidad and Tobago. He is a former head of the Public Service of Trinidad and Tobago and a former

Ambassador and High Commissioner of Trinidad and Tobago. He is known to be outspoken, forthright and rational in expressing his opinions.

7. Moreover, in furtherance of his reservations about these two appointments, the appellant's concerns were communicated to and published in the Trinidad and Tobago Guardian newspaper of the 20th September, 2013, under the caption '**New PSC picks worry Dumas**.'

8. Extracts from that article are as follows:

> "Former head of the Public Service Reginald Dumas has raised concerns over the nomination of former Independent Senator Dr. James Armstrong and attorney Roamar Achat-Saney to the Police Service Commission. Dumas says they do not appear to meet the constitutional requirement for appointment. The two were nominated by President Anthony Carmona after consultations with the Prime Minister and Leader of the Opposition, and are expected to be confirmed after a debate in Parliament shortly …
>
> Dumas' first ground of objection is that the Constitution stipulates that commissioners must be "qualified and experienced in the disciplines of law, finance, sociology or management." He said yesterday that the chairman of the PSC, Prof Ramesh Deosaran, is a sociologist and the commission has already two lawyers—Addison Khan and Martin George. "I believe it was a constitutional requirement for people qualified in finance and management to be appointed to the PSC," he insisted. "The commission thus lacks an expert in finance and management", he noted.
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> Dumas said the PSC was the only commission which requires specific expertise, and as far as he was aware, neither Achat-Saney nor Armstrong was qualified or experienced in finance. From the auditing and evaluation work done by the PSC, he said, it was critical that people qualified in human resource management should be included in the PSC, since it would be critical to its efficient and effective functioning. Dumas said his concerns also extend beyond the appointment of the new commissioners, since while on paper there is a chairman, the commission is not now in existence. He noted that the PSC had very important responsibilities to carry out, including the appointment of a commissioner of police and deputy commissioners."

9. So concerned was the appellant, that on the 26th September, 2013, he caused a formal and lengthy letter expressing his concerns to be written by Karl Hudson-Phillip Q.C. and sent to the

Attorney General and to the President. In that letter the appellant's concerns were stated as follows:

> "It is against the above background that I am instructed by my client to convey his serious concerns and reservations as a citizen that the nominations by His Excellency of Dr. James Kenneth Armstrong and Mrs. Roamar Achat-Saney do not comply with the letter and spirit of the requirements of section 122(3) of the Constitution. A proper reading of the relevant provisions indicates that nominees must be in a position to show that they are both qualified and experienced in one of the prescribed discrete disciplines of law, finance, sociology or management. Qualification alone in a particular discipline will not be sufficient unless it is reinforced by experience. In addition, experience in one of the disciplines without being qualified in it will not satisfy the requirement."
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> "I am instructed that the curricula vitae of both Dr. James Kenneth Armstrong and Mrs. Roamar Achat-Saney demonstrate that they do not satisfy the requirement of section 122(3) of the Constitution and are therefore not eligible for appointment as members of the Police Service Commission. Their failure to meet these requirements must not be construed as an indication that they do not possess qualifications which may be eminently suited for service elsewhere."

10. Despite having expressed these concerns publicly and also directly to the Attorney General and to the President, on the 13th March, 2013 the Presidential nominations of both Mrs. Achat-Saney and Dr. Armstrong were approved by the House of Representatives pursuant to section 122(4) of the Constitution.

11. It is clear from the affidavit of the appellant in support of his application, that he has carefully researched the issues about which he is concerned and supported his assertions with copious and *prima facie* credible documentary evidence and advice. In short, the appellant is concerned that neither Mrs. Achat-Saney, nor Dr. Armstrong, is 'qualified and experienced' in the disciplines for which they were nominated and appointed to the Police Service Commission pursuant to section 122(3) and (5) of the Constitution, thereby rendering the Commission unlawful and unconstitutional.

12. It is in this context that the appellant asserted in his affidavit in support of this action:

(i) "I do not believe that His Excellency has the power or the authority to nominate or appoint to the Police Service Commission persons who are not qualified and experienced in the

disciplines of law, sociology, management or finance. I believe this to be so even where, as here, the House of Representatives had approved His Excellency's nominations."[7]

(ii) "I verily believe, deferentially, that His Excellency acted without regard to the clear requirements of section 122(3) when he nominated Mrs. Roamar Achat-Saney as being qualified and experienced in law and sociology and Dr. James Armstrong as being qualified and experienced in management and finance. These nominations, as is known, were approved by the House of Representatives on the 13th of November, 2013."[8]

13. Section 122 (2), (3), (4), and (5) of the Constitution states:

(2) The members of the Police Service Commission shall be appointed by the President in accordance with this section.

(3) The President shall, after consultation with the Prime Minister and leader of the Opposition nominate persons who are qualified and experienced in the disciplines of law, finance, sociology or management, to be appointed as members of the Police Service Commission.

(4) The President shall issue a Notification in respect of each person nominated or appoined under subsection (3) and the Notification shall be subjected to affirmative resolution of the House of Representatives.

(5) The President shall make an appointment under this section only after the House of Representatives has approved the Notification in respect of the relevant person.

14. It is to be noted that section 122 of the 1976 Constitution was amended by the Constitution (Amendment) Act, 2006,[9] whereby the original subsections (2), (3) and (4) of section 122 were replaced with the new subsections (2), (3), (4), (5), (6) and (7). Further, that the new subsections for the first time (in subsection (3)) provided qualification criteria for the appointment of members of the Police Service Commission.[10]

[7] See the appellant's affidavit filed on the 10th April, 2014, at paragraph 13.
[8] See the appellant's affidavit filed on the 10th April, 2014, at paragraph 26.
[9] This Act was proclaimed on the 1st January, 2007.
[10] The explanatory note to the Constitution (Amendment) Bill, 2006, explains that these amendments to section 122 were "to provide the method of and criteria for the appointment of the members of the Police Service Commission" - (see clause 4 of the Bill). In moving the Bill in the Senate, the Minister of National Security explained these amendments to section 122 as follows:

15. Indeed, these amendments to sections 122, 123 and other related sections of the 1976 Constitution were part of a composite package of legislative changes agreed upon by the Government and Opposition,[11] in order to address deficiencies in policing in the context of low morale, escalating criminality, low detection of crime and the unacceptable levels of successful prosecutions.

16. It would therefore appear that there is *prima facie* an arguable case on the evidence as presented by the appellant at this stage, that the nominations by the President of both Mrs. Achat-Saney and Dr. Armstrong on the 4th September, 2013 may have been *ultra vires* section 122 of the Constitution, though we make no finding as to this. However, given the context in and the purpose for which section 122 was amended, there can be little doubt that the proper composition of the Police Service Commission is a matter of national concern.

17. Against this evidential backdrop, the appellant sought, *inter alia*, the following relief by way of fixed date claim form (filed on the 10th April, 2014):

(i) the determination of issues of interpretation regarding section 122(3) of the Constitution;

(ii) declarations in relation to the specific appointments of both Mrs. Achat-Saney and Dr. Armstrong;

(iii) a declaration in relation to the authority of the President to appoint to the Police Service Commission persons who are not qualified and experienced in the requisite disciplines; and

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> "Section 122 of the Constitution provides for the establishment of an independent Police Service Commission which consists of a chairman and four other members … One of the major points of agreement between the Government and the Opposition was the reform of the Commission. The amendment seeks to create a detailed process to allow for the appointment of members of the Commission … The membership of the Commission, under section 122 (1) of the Constitution, would continue to be the chairman and four other members. First, members would be nominated for appointment to the Commission by the President after consultation with the Prime Minister and the Leader of the Opposition. However, **in order to be nominated a person must be qualified and experienced in the disciplines of law, finance, sociology or management …** Madam President, the Government and the Opposition are in agreement that **the process of appointment of members of the Police Service Commission is of paramount importance because the Members of the Commission must be persons of impeccable character, and who are qualified and experienced so as to ensure that the police service is effectively and efficiently managed."** (pages 709 – 710 of the Hansard dated 28th March, 2006).

[11] The Constitution (Amendment) Bill; The Police Service Bill and The Police Complaints Authority Bill.

(iv) a declaration in relation to the constitutionality of the Public Service Commission as constituted on the 29th November, 2013 (the date of appointment of Mrs Achat-Saney and Dr. Armstrong).

18. From this narrative and the evidence available at this stage in the proceedings, several things are immediately relevant to the issues in this matter:

(i) The appellant has demonstrated a genuine, serious and bona fide interest in the constitutional proprietary of these two appointments to the Police Service Commission.

(ii) The appellant is not a mere busybody, whose motive in challenging this presidential action is not to right a wrong but to achieve a collateral and ulterior end; he is not 'interfering' in a matter about which he has no legitimate concern at all.

(iii) The appellant is a person who appears to have the capacity and willingness to litigate this issue as a public-spirited citizen in the public interest and in service of upholding the Constitution and the rule of law.

(iv) The appellant is not seeking from the courts an advisory opinion on a hypothetical matter. This challenge is grounded in real and recent events that have unfolded in Trinidad and Tobago, and the challenge has been brought within six months of the impugned appointments.

(v) No other person or entity has come forward to raise and pursue the issues raised by the appellant in these proceedings, or attempted to join in these proceedings, who may be more competent or able to do so.

(vi) There is *prima facie* an arguable case on the evidence as presented by the appellant thus far, that the nomination of both Mrs. Achat-Saney and Dr. Armstrong may have been *ultra vires* section 122 of the Constitution.

(vii) The appellant has attempted to have this matter rectified by writing to both the Attorney General and the President prior to the approval of the nominations in the House of Representations, but to no avail.

(viii) The issue of the proper composition of the Police Service Commission is a genuine matter of national importance.

History of the Proceedings

19. On the 20th October, 2014, this court heard and determined this procedural appeal and as mandated by Part 64.9 (6) of the Civil Proceedings Rules (CPR, 1998) gave its unanimous decision and reasons orally. This written judgment follows because of the relative importance of the issues determined, as it is not generally expected that written judgments are to be given in procedural appeals under the CPR, 1998.

20. The trial judge had held that the action should be struck out because it could not be commenced by fixed date claim form pursuant to Part 62, CPR, 1998, since Part 62 did not permit (and specifically prohibited) approaching the courts for an interpretation of the Constitution and/or a review of executive action exercised by Presidential power pursuant to the Constitution (the procedural point).

21. The trial judge also concluded that apart from section 14 of the Constitution and where there was an alleged infringement of the Constitution which directly affected a litigant, a litigant would not have the necessary *locus standi* (standing) to commence an action for an interpretation of the Constitution and/or for declarations related to the alleged unlawful exercise of Presidential powers pursuant to the Constitution (the jurisdiction point). On the 20th October, 2014 the trial judge's decision on standing in respect of the jurisdiction point, was set aside as plainly wrong.

22. The procedural point was also determined on the 20th October, 2014 and was in fact conceded by the Respondent on the basis of Parts 26.8 and 56 of the CPR, 1998. The judge had also fallen into error on this point. Rules of court are made pursuant to sections 77 and 78 of the

Supreme Court of Judicature Act and are intended, *inter alia*, to regulate and prescribe procedure with respect to matters which the court has jurisdiction to entertain and determine.

23. The fundamental error of the judge, was that he dealt with the procedural point first and determined the jurisdiction point on the basis of that outcome. That is, having decided that pursuant to Part 62 of the CPR, 1998 the appellant could not have brought his fixed date claim form action for an interpretation of the Constitution, or for declaratory relief,[12] he then decided that there was no jurisdiction to bring such an action.[13] In our opinion, in adopting this approach, the trial judge fell into error. The correct approach ought to have been to determine the jurisdictional point first, and then determine whether the CPR, 1998 prescribed a process to bring the claim (if there was jurisdiction and standing to do so), and if not, then what was the proper approach procedurally to bring such a claim.

Jurisdiction: Submissions

Mr. Sinanan, S.C. for the Respondent

24. Before this court, Mr. Sinanan, S.C. defended the trial judge's analysis on the jurisdictional point. In his opinion, a citizen may only approach the court for an interpretation of the Constitution or for a constitutional review of an allegedly unlawful exercise of constitutional powers, if that person "could demonstrate an interest whether directly or indirectly that touches and concerns him". In his submission and in any event, this access to the court was not "an open ended right", but was circumscribed in the following ways.

25. First, by section 14 of the Constitution, which limits a constitutional challenge to a person who alleges that any of the provisions of Chapter 1 of the Constitution "has been, is being, or is likely to be contravened in relation to him". This includes (i) challenges for alleged contraventions of the sections 4 and 5 Fundamental Rights and Freedoms in relation to the aggrieved person, as well as (ii) challenges to legislation pursuant to section 13 of the Constitution on the basis that a statute is not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

[12] See paragraphs 3 and 4 of the trial judge's judgment.
[13] See paragraph 44 of the trial judge's judgment.

26. Second, by virtue of section 108 (a) and (b) of the Constitution,[14] where a question touching and concerning the interpretation of the Constitution arises 'in any … proceedings', which Mr. Sinanan, S.C. submitted meant already existing proceedings.[15]

27. Thus, the respondent's position was that outside of sections 14 and 108 of the Constitution, which both specifically provide for access to the courts on issues touching and concerning the Constitution, there is no other legitimate basis for a citizen to raise constitutional issues before the courts. For the respondent, the gates granting access to the courts are otherwise shut and the judges as gatekeepers have no choice but to deny access to any persons, no matter what issues they may wish to raise, who fall outside of these categories.

Special Interest

28. Third, relying heavily on the 1980 **Australian Conservation Foundation** case,[16] Mr. Sinanan, S.C. also seemed to be willing to accept that outside of the above two circumstances, a citizen may have *locus standi* to raise a constitutional issue before the courts, "if he had a significant interest or some sort of interest beyond that of an ordinary citizen". However, he submitted that simply the "notion of a public interest, of being-public spirited, is not sufficient; it is not sufficient to enable you to engage the attention of the court and have an adjudication on (an alleged unconstitutional action)".

29. It is to be noted that the approach taken in the **Australian Conservation Foundation** case, is based on an acceptance that the 1903 **Boyce v Paddington Borough Council**[17] statement of the principle of standing is the correct approach. That is, where private citizens are

[14] Section 108 of the Constitution states: "An appeal to the Court of Appeal shall be as of right from the decisions of the High Court in the following, among other cases, that is to say:
(a) any order or decision in any civil or criminal proceedings on questions as to the interpretation of the Constitution;
(b) any order or decision given in exercise on the jurisdiction conferred on the High Court by section 14 (which relates to redress for contravention of the provisions for the protection of fundamental rights)."

[15] See also in this regard section 14(4) of the Constitution, which states: "Where in any proceedings in any Court other than the High Court or Court of Appeal any question arises as to the contravention of any of the provisions of this Chapter the person presiding in that Court may, and shall if any party to the proceedings requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious."

[16] [1980] HCA 53; [1980] 146 CLR 493.

[17] [1903] 1 Ch. 109, at page 114, per Buckley J..

seeking to challenge or enforce legislation, such persons "must show some personal interest which is adversely affected and not merely the same concern as all private citizens."[18]

30. On appeal to the Full Court of Australia, Gibbs J. stated the court's approach (following **Boyce v Paddington**) as follows:[19]

> "11. For the reasons I have given, the action was not brought by the Foundation to assert a private right. It is brought to prevent what is alleged to be a pubic wrong. The wrong is not one that causes, or threatens to cause, damage to the Foundation, or that affects or threatens to affect, the interests of the Foundation in any material way. The Foundation seeks to enforce the public law as a matter of principle, as part of an endeavour to achieve its objects and to uphold the values which it was formed to promote. The question is whether, in these circumstances, it has standing to sue.
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> 12. It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. There is no difference, in this respect, between the making of a declaration and the grant of an injunction. The assertion of public rights and the prevention of public wrongs by means of those remedies is the responsibility of the Attorney-General, who may proceed either ex-officio or on the relation of a private individual. A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless, of course, he is permitted by statute to do so."

31. In the opinion of Gibbs J. "the broad test of special interest is … the proper one to apply"[20] to the issue of standing in relation to legislative challenges by private citizens.

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[18] Per Aickin J, at page 506, paragraph 14.
[19] At page 526, paragraphs 11 and 12.
[20] At page 528, paragraph 15. See also Mason J. at pages 547 – 548, paragraphs 2, 3 and 4:

> "2. I also agree with Gibbs J. that, apart from cases of constitutional validity which I shall mention later, a person, whether a private citizen or a corporation, who has no special interest in the subject matter of the action over and above that enjoyed by the public generally, has no locus standi to seek a declaration or injunction to prevent the violation of a public right or to enforce the performance of a public duty.
> 3. Depending on the nature of the relief which he seeks, a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interests… and perhaps to his social or political interests.
> 4. In this difficult field there is one proposition which may be stated with certainty. It is that a mere belief or concern, however genuine, does not in itself constitute a sufficient locus standi in a case of the kind now under consideration. I entirely agree with Gibbs J. when he says that "A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be

32. It is in this context of a requirement of special interest to satisfy standing, that Gibbs J. also stated:[21]

> "I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or in debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it."

33. It is also to be noted that in the **Australian Conservation Foundation** case, the Full Court was invited to reconsider the **Boyce v Paddington** approach to the standing requirement of special interest. This invitation was declined by Gibbs J. because:[22]

> "It is for the Parliament, whose members are the elected representatives of the people, to change an established rule if they consider it to be undesirable, and not for judges, unelected and unrepresentative, to determine not what is, but what ought to be, the law."[23]

34. We have considered at length the respondent's submission on the need for a special interest where there is a challenge to the exercise of executive power pursuant to a statute, because in essence, this is at the heart of the primary issue that arose before this court. As will be demonstrated later, in Trinidad and Tobago there are good and legitimate reasons to depart

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prevented, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.""

[21] At page 531, paragraph 20.

[22] At page 529, paragraph 16.

[23] See also Mason J. at page 552, paragraph 14: "The court would exceed its function if it accepted the invitation issued by the appellant's counsel to jettison the settled principle of law relating to locus standi and substitute for it a new rule recognizing a mere belief as an adequate special interest on the part of the plaintiff. There are limits to what the courts can and should do by way of altering the law. The court is not a legislature and has no general charter to reform or change the existing law. **The court can and does elaborate the common law by judicial decision. This is an evolutionary and continuing process.** It is a process which allows little scope for radical reform of a rule of law which, except in some aspects which are not of present importance, has long been settled, when it has not been demonstrated that the foundation on which the rule is based has fundamentally changed."

from this restrictive special interest limitation on standing, where what is implicated is the exercise of a constitutional power in relation to the Police Service Commission.

35. What is significant is that the Full Court of Australia recognized that it had the power to elaborate the common law by judicial decision, in what it described as "an evolutionary and continuing process,"[24] but declined to do so, preferring to leave change to the legislature. This was in 1980 and this is also a matter to which I will return.

36. For the respondent, these three considerations created the limits of standing in relation to constitutional review in Trinidad and Tobago. The respondent therefore contended that the appellant had not demonstrated a sufficient interest to clothe him with the necessary standing to bring this constitutional challenge. In particular, the appellant's public interest justification was not sufficient, because he had not shown how the impugned action of the President had directly or indirectly affected him otherwise than as any other citizen of the Republic of Trinidad and Tobago.

Mr. Maharaj, S.C. for the Appellant

37. Mr. R. Maharaj, S.C. for the appellant took a very different approach. He summarized his position before this court as follows:

> "So we have a rule which is undisputed that the court is the guardian of the Constitution and the court must intervene, but the court can only intervene to correct an unlawful action if the matter is brought to the court, and that is the whole concept of public interest litigation. It is recognised that in judicial review there were instances where there was unlawful administrative action, and, therefore, the court decided that it cannot perform its supervisory role in Public Law unless it permitted public interest litigation. The Judicial Review Act merely codified what the common law was, and that is why Lord Diplock said it will be a great lacuna in the Public Law for the courts to hold that you had to have a direct interest. Here we are talking about the Constitution of Trinidad and Tobago."

[24] See Mason J. at page 552, paragraph 14; footnote 22 above.

38. He also placed special reliance on the Zambian case of **Mwamba v Attorney General of Zambia**,[25] and in particular on the following statements of Ngulube C.J.[26] and Musumali J.S.C.[27]:

Per Ngulube, C.J.-

"(i) "There was a further submission, with which we cannot possibly agree, that presidential acts are not subject to judicial review under whatever circumstances. As will shortly appear, this startling submission in sweeping terms cannot be entertained in any constitutional democracy … However, on the question of locus standi, we have to balance two aspects of the public interest; namely the desirability of encouraging individual citizens to participate actively in the enforcement of law, and the undesirability of encouraging meddlesome private 'Attorney Generals' to move the courts in matters that do not concern them. For present purposes, we are prepared to proceed, without coming to any firm conclusion on the point, on the footing that the appellants have a legitimate interest in the national leaders and governance of this country."

(ii) "For purposes of the arguments related to disqualification under the Constitution, we have visited some authorities and they show that in many Commonwealth countries with a written constitution like ours, the courts have not shrunk from reviewing the validity of an appointment made by a Head of State in the exercise of an executive discretion and where a person not qualified or disqualified has been appointed is liable to be struck down …

What emerges from the examples is that the courts have not been wanting in their defence of the written constitution when question arise as to the validity of the exercise of constitutional power, such as the power to make an appointment."

Per Musumali J.S.C.

"My firm view is that a citizen has a right to sue on constitutional issues unless the Constitution itself explicitly or by necessary implication has taken away that liberty. For instance, in cases of human rights, the person who 'alleges that any of the provisions of articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him …' has locus.

There may be other provisions in the Constitution where only such firmly interested persons may sue on them. In the absence of such provisions in respect of constitutional provisions, a citizen has liberty to come to the High Court, and on appeal, to this Court and seek redress… This freedom is particularly important in democratic countries as it is one way of enabling a citizen to

[25] [1993] 3 L.R.C. 166.
[26] At pages 170 and 171.
[27] At page 174.

have a say in the governance of his country. So the citizen needs to know that he enjoys this right, whether or not she/he is a meddlesome type."

39. In relation to the case of **Mwamba**, in my opinion, the following are noteworthy:

(i) The majority opinion of Ngulube, C.J., Bweupe, D.C.J., Sakala and Chirwa, J.J.S.C., did not make a definitive statement on the issue of standing, stating: "We should make it clear that the four of us do not wish to come to any firm conclusion on the issue of locus standi but our brother, Musumali, J.S.C., would like to do so ….[28]

(ii) In that case, "the appellants did not allege any specific disqualification to be found in our Constitution but they make a general proposition based on morality that unsuitable persons ought not to be appointed to ministerial positions."[29]

(iii) On the challenge based on "unsuitability on moral grounds", the challenge was disallowed, the Supreme Court opining: "We consider that the learned trial judge was on firm ground and dealt with this issue quite properly when the judge considered only those disqualifications set out in the law."[30]

(iv) The comment of Musumali, J.S.C. relied upon by Mr. Maharaj, S.C. was made in reference to the Chief Justice's comment at paragraph 37 (i) above, and was preceded by the following: "With due respect to the learned Chief Justice and my brothers, I am of the considered view that to decide on this issue in this way is to be a little equivocal. It is a little

[28] At page 170 h.
[29] At page 171 h.
[30] At page 172 h.

equivocal because the citizen will not firmly know whether she/he has locus to sue or not to sue in this kind of case."[31]

40. Of significance for our purposes, is not so much the ambit of the standing debated in the Supreme Court of Zambia, but the fact that it was and the preparedness of the court to reframe it to fit into the prevailing constitutional ethic and to meet the democratic needs of that jurisdiction. This is also a matter that will be taken up later on in this judgment.

41. Mr. Maharaj, S.C. also placed reliance on section 78 (1) (a)[32] of the Supreme Court of Judicature Act, which he submitted demonstrated that the court had the jurisdiction to entertain actions raising the interpretation of the Constitution, because under the Rules of the Supreme Court, 1975 and pursuant to this section, provision was made for such actions to be brought by virtue of Order 5 Rules 3 and 4 of the RSC, 1975. Therefore, he submitted, the jurisdiction to bring an action for the interpretation of the Constitution pre-existed the 1975 and 1998 rules of court, which cannot create or remove substantive law or rights, but which only regulate procedure in relation to them.

Jurisdiction: Analysis

The Purpose of *Locus Standi* (standing) and the Role of the Court

42. In the text 'Judicial Review of Administrative Action' (1995 edition), under the caption 'The reason for having rules of standing', the authors state as follows:

"All developed legal systems have to face the problem of resolving the conflict 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 invoking the jurisdiction of the courts in matters in which he is not concerned. The conflict has been resolved by developing principles which determine

[31] At page 174 a.

[32] Section 78(1)(a) states: "Rules of Court may be made under this Act for the following purposes:

(a) for regulating and prescribing the procedure, including the method of pleading, and practice to be followed and the fees to be taken in the Court of Appeal and the High Court respectively **in all causes and matters whatsoever in or with respect to which those Courts respectively have for the time being jurisdiction**, and any matters incidental to or relating to any such procedure or practice, including but without prejudice to the generality of the foregoing provision, the manner in which and the time within which, any applications which under this or any other Act are to be made to the Court of Appeal or to the High Court shall be made."

> who is entitled to bring proceedings: that is who has *locus standi* or standing to bring proceedings. If those principles are satisfactory they should only prevent a litigant who has no legitimate reason for bringing proceedings from doing so.

43. Essentially, the rules of standing determine *who* is allowed to bring *what* issues before the courts. When there is no standing, the courts have no jurisdiction to entertain a matter. Thus, issues of standing determine who has access to justice. This is in and of itself a matter of constitutional significance in Trinidad and Tobago.

44. The Preamble of the 1976 Republican Constitution enshrines that the people of Trinidad and Tobago:

> (c) have asserted their belief in a democratic society in which **all persons may**, to the extent of their capacity, **play some part in the institutions of the national life and thus develop and maintain due respect for lawfully constituted authority**;
>
> (d) recognise that **men and institutions remain free only when freedom is founded upon respect for** moral and spiritual values and **the rule of law**.

45. By virtue of section 11(1) of the Interpretation Act,[33] the Preamble is to be construed as a part of the Constitution and an aid to explaining its meanings and purposes.

46. Therefore, the issue of standing in relation to the vindication of the rule of law, where there is alleged constitutional default, assumes great significance given the constitutional ethic of civic republicanism – that emphasizes the responsibility, even duty, of citizens to participate in creating and sustaining a vibrant democracy and in particular in upholding the rule of law – that is implicit in the declarations of the Preamble cited above.

47. The relevant question may be posed this way:[34] Can it ever be right in Trinidad and Tobago, as a matter of principle, for a person with an otherwise meritorious challenge to the validity or vires of the exercise of a constitutional power, to be turned away by the gatekeepers

[33] Section 11(1) states: "The preamble to a written law shall be construed as a part thereof intended to assist in explaining the purport and object of the written law."
[34] Adapted from 'Judicial Review of Administrative Action', 5th ed., 1995, at page 99, 2 – 001.

of the courts on the basis that his rights or interests are not sufficiently and directly affected by the impugned decision?

48. To answer this question affirmatively, would be to assume that the primary function of the public law court's jurisdiction is to redress individual or specific grievances, and not general grievances concerned with the maintenance of the rule of law in a democracy. And also, that the primary focus of public law is to address individual rights and not public wrongs arising out of constitutional duty and responsibility.

The Common Law: Dynamic and Developing

49. By virtue of the common law, judges have traditionally played this gatekeeper role, legislation however, has also provided for it and does so increasingly. The position remains though that the courts can and do develop the law, which has historically although not always necessarily, followed an incremental and evolutionary path.[35] The common law has always been and contrives to be a dynamic and developing body of judge-made law.

England

50. In the area of public law, in the celebrated case of **Reg. v I.R.C. Ex p. National Federation of Self-Employed and Small Business Ltd**,[36] Lord Diplock in the context of judicial review had this to say, which in the process changed the pre-existing approach to standing by virtue of judicial decision:

> (i) **"The rules as to "standing" for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They were made by judges, by judges they can be changed; and so they have been over the years to meet the need to preserve the integrity of the rule of law** despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities, that have been taking place continuously, sometimes slowly, sometimes swiftly, since the rules were originally propounded. Those changes have been particularly rapid since World War II. Any

[35] See in this regard the recent Privy Council decision in **Singularis Holding Ltd. v Pricewaterhouse Coopers (Bermuda)** [2014] UKPC 36; particularly at paragraphs 65 – 81 (per Lord Collins), paragraphs 105 – 116 (per Lord Clarke), and paragraph 152 (per Lord Neuberger).
[36] [1982] A.C. 617.

judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today."[37]

(ii) "I agree in substance with what Lord Denning, M.R. said (in Ex parte Blackburn [1976] 1 WLR 550) at p. 559, though in language more eloquent than it would be my normal style to use:

> "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 or transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts *in their discretion* can grant whatever remedy is appropriate."

The reference here is to flagrant and serious breaches of the law by persons and authorities exercising governmental functions which are continuing unchecked. To revert to technical restrictions on locus standi to prevent this that were current 30 years or more would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime."[38]

(iii) **"It would, in my view, be a grave lacuna in our system of public law if a pressure group**, like the federation, or even a single public-spirited taxpayer, **were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped** … It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or department of central government is unnecessary because they are accountable to Parliament, … **they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."**[39]

51. For our purposes, what is significant about this decision of the House of Lords, is that the courts have the jurisdiction, power and duty to develop the law of standing so as to keep pace with societal changes; and in the area of public law, to do so in order to protect the rule of law, as the changing expectations of a democratic society legitimately demand. Also of significance, is

[37] At pages 639 – 640.
[38] At page 641.
[39] At page 644.

the observation that unlike the approach of the Australian Full Court in the **Conservation Foundation** case, but like the approach of the Zambian court in **Mwamba's** case, the House of Lords did not shy away from boldly reframing the rules of standing to meet the changing democratic needs and expectations of England.

52. Finally, it is also important to note that the House of Lords decision liberalized the rules of standing, out of a recognition that "public law was concerned with protecting the public interest … so as to recognize the role of individuals in asserting the public interest."[40] We make these observations fully aware that this decision was in relation to Order 53 rule 3(7) of the English rules of court and the test for standing in judicial review of 'sufficient interest'.

Other Jurisdictions

53. This approach by the courts to develop and where necessary, enlarge the rules of standing, is evident throughout the common law world. It has been adopted by judges in different ways and to different degrees, as has been deemed relevant to the particular needs of the jurisdiction in the contexts of their own unique constitutional arrangements.[41] Three examples from jurisdictions other than Australia and England will demonstrate this.

Hong Kong

54. In Hong Kong, there are a variety of approaches to the law of standing for public interest litigation, when a public spirited applicant seeks to vindicate a public grievance on behalf of the community at large. Some decisions have found it sufficient if the public spirited applicant has made out an arguable case;[42] others require the applicant to be directly prejudiced (the merits of

[40] 'Statutes, Standing and Representation', by Peter Crane, 1990 P.L. 307 – 312.

[41] See the following articles: (i) Understanding Public interest Litigation in Hong Kong, Common Law World Review, 2008, Vol. 37, Issue 3, 257; (ii) Reopening Law's Gate: Public Interest Standing and Access to Justice, (2011) 44 University of British Columbia Law Review, 255 – 285; (iii) Public Interest Standing, Access to Justice, and Democracy under the Charter: Canada (AG) v Downtown Eastside Sex Workers United Against Violence, (2013) Constitutional Forum, Vol. 22, No. 2, 21 – 31; (iv) Public interest Litigation in India: A Critical Review, Civil Justice Quarterly, (2009) 19 – 40; (v) The Supreme Court of India, International Journal of Constitution Law, (2003) Vol. 1, No. 3, 476; (vi) Pubic Interest Litigation and Constitutional Theory in Comparative Perspective, 1992 Modern Law Review, Vol. 55, Issue 1, 44 – 72.

[42] See **Society for Protection of the Harbour v Town Planning Board** [2003] 2 HKLRD 787; **Chu Hoi Dick & Ho Loy v Secretary of Home Affairs** [2007] HKEC 1471 (unreported); **Clean air Foundation & Gordon David v HKSAR** [2007] HKEC 1356 (unreported).

the case are irrelevant);[43] and finally, there is a middle position where merits are important, but other factors are also considered - to wit, whether the issue is of public importance, whether the statute under challenge permits a right to seek review, and whether the applicant has a genuine interest in the vindication of the alleged wrong.[44]

India

55. In India, from the mid 1970's to early 1980's, the courts modified and molded the traditional requirements of standing, to permit any member of the public acting bona fide and having sufficient interest, to approach the courts to redress a legal wrong, and in particular to enforce the rule of law.[45] In India, because of its particular social and economic conditions, the means used to discourage frivolous cases and only allow legitimate public interest litigation, was to permit public spirited citizens access to justice where it was undermined in relation to those others directly affected by some kind of disability.[46]

56. The Indian courts have used Article 226 of the Indian Constitution as the basis for giving constitutional authority for public interest litigation.[47] In this context, Kirpal J. explained the meaning of public interest litigation as follows:[48]

> "As I understand the phrase 'Public interest litigation,' it means nothing more than what it states, namely it is a litigation in the interest of the public. Public interest litigation is not that type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the Court would be able to give effective relief to the whole or a section of the society."

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[43] See **Ng King Luen v Rita Fan** [1997] HKLRD 757; **Mok Tai Kei v Constitutional Affairs Bureau of the HKSAR** [2005] 1 HKLRD 860.

[44] **Au Shui Yuen v Sir David Ford** [1991] 2 HKLR 79 and **Re Medical Defence Union Ltd** [1990] 2 HKLRD 44.

[45] **Gupta v Union of India** (1981) Supp S.C.C. 87, 210. See also **PUDR v Union of India AIR** 1982 SC 1473; **Bandhua Mukti Morcha v Union of India** [1984] 3 S.C.C. 161.

[46] See **Gupta v Union of India** [1981] Supp. S.C.C. 87, at 210:

> "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right … and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ."

[47] Article 226 empowers the High Court to issue 'directions, orders or writs' for the enforcement of fundamental constitutional rights "and or any other purpose" – hence for the purpose of public interest litigation.

[48] In **People's Union for Democratic Rights v Minister of Home Affairs**. [1986] LRC (Const) 546, at 575.

Canada

57. In Canada, the courts have developed a three step approach to the issue of standing in relation to public interest litigation. This initially evolved out of four decisions of the Supreme Court of Canada.[49]

58. The framework developed (between 1975–1986) by the Supreme Court of Canada to allow public interest litigation, required an applicant to show:[50]

(i) there is a serious issue of invalidity of legislation or public action;

(ii) the applicant is directly affected by or has a genuine interest in the validity of the legislation or public action; and

(iii) there is no other reasonable and effective manner in which the issue may be brought before the Court.

59. In 2005, in **Chaoulli v Quebec,**[51] the Supreme Court of Canada further liberalized the third public interest standing criterion, by restating it as a requirement for applicants to demonstrate that "there is no other effective means available to them" to "challenge the validity of the (legislation or public action) other than by recourse to the courts."[52]

60. Most recently, in 2012 in **Attorney General of Canada v Downtown Eastside Sex Workers United Against Violence Society**,[53] the Supreme Court of Canada again revisited the test for public interest standing and in particular the parameters for granting it, liberalizing the third criterion even further. This case was determined at first instance against the respondent on the basis of the third limb of the test. The decision was reversed on appeal and the decision of the court of appeal upheld by the Supreme Court.

61. What was at stake before the Supreme Court was whether a person or group not directly related to or affected by a case would be given standing in a constitutional challenge. The

[49] See **Thorson v Attorney General of Canada**, [1975] 1 SCR, 138; 43 DLR (3d) 1; **Nova Scotia Board of Censors v Mc Neil** [1976] 2 SCR 265; 55 DLR (3d) 632; **Canada v Borowski** [1981] 2 SCR 575, 130 DLR (3d) 688; and **Finlay v Canada** [1986] 2 SCR 607, 33 DLR (4th) 321.
[50] See **Canadian Council of Churches v R** [1992] LRC (Const.) 610.
[51] [2005] SCC 35; [2005] 1 SCR 791.
[52] At paragraph 35, per Deschamps J.
[53] [2012] 2 SCR 524; 2012 SCC 45.

Attorney General had argued for limiting the ambit of public interest standing to individuals or groups with a direct interest, to avoid "opening the floodgates to unnecessary litigation" and had advocated caution, because "cases will be inadequately presented by parties who have no real interest in the outcome."

62. The decision of the Supreme Court focused the third criterion analysis away from whether or not there were hypothetical private and directly affected alternatives to public interest litigation, and more on ensuring that the rule of law is enforced having due regard to the effectiveness of the proposed litigation. For example, Cromwell J. opined: "Courts should consider whether the proposed action is an economical use of judicial resources, whether the issues raised are presented in a suitable context for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principles of legality (the rule of law)."[54]

63. On the meaning and impact of the principle of legality, Cromwell J. explained:[55]

> "The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada."

64. In Cromwell J's opinion: "The importance of the principle of legality … and the courts' new concomitant constitutional role called for a 'generous and liberal' approach to standing."[56]

65. On the requisite nature of an applicant's interest in the issues being raised, Cromwell J. explained: "In my view, this factor is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise."[57] This focus also reflected the concern "to screen out the mere busybody."[58] Thus in **Finlay,** the applicant had "a direct, personal interest in the issues he sought to raise"; in **Borowski**, the applicant had "a genuine interest" and "he was a

[54] At paragraph 50.
[55] At paragraph 31.
[56] At paragraph 33.
[57] At paragraph 43.
[58] At paragraph 43.

concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means"; and in **Canadian Council of Churches,** the applicant "had a genuine interest" and enjoyed "the highest reputation and has demonstrated a real and continuing interest" in the issues being raised.

66. The Canadian jurisprudence demonstrates the courts' willingness to continually develop the principles of standing to meet the evolving needs of their constitutional ethic.

Trends?

67. What this analysis shows, is that across the common law world, as in the United Kingdom (and except for Australia), courts have been working assiduously, if not uniformly, to open the gates to general grievance public interest litigation, where an applicant is not directly affected by the impugned legislation or public/governmental action.

68. A perusal of Michael Fordham's chapter on standing in his 2012 edition of the Judicial Review Handbook, demonstrates that in the public law arena of judicial review in England, Lord Diplock's liberalization of the standing requirements in the **IRC** case has not been quelled. If anything, it has gathered momentum.

69. In **R (Kides) v South Cambridgeshire District Council,**[59] Johnathan Parker L.J. opined:

> "I cannot see how it can be just to debar a litigant who has a real and genuine interest in obtaining the relief which he seeks from relying, in support of his claim for that relief, on the grounds (which may be good grounds) in which he has no personal interest. **It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds."**

[59] [2002] EWCA Civ. 1370

70. In **R v Somerset County Council ex p Dixon**,[60] Sedley J. stated:

> "There will be, in public life, a certain number of cases of apparent abuse of power in which any individual, simply as a citizen, has a sufficient interest to bring the matter before the court."
>
> "**Public law is not at base about rights**, even though abuses of power may and often do invade private rights**; it is about wrongs** – that is to say misuses of public power; and **the courts have always been alive to the fact that a person or organization with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.** If an arguable case of such misuse can be made out on an application for [permission], the court's only concern is to ensure that it is not being done for an ill motive."

71. What is clear from the above, is that in the area of public law in England, the focus for the purpose of standing is on public law wrongs and there is a permissiveness to grant liberal access to individuals who may not be directly affected by an impugned action.[61] This is not to say that the rules of standing in public law have become otiose. The learning in Fordham shows, that the courts are vigilant to exclude busybodies whose interest is to interfere in the affairs of others, as well as persons acting out of ill-will or for some other improper purpose.[62]

72. Indeed, in the recent decision of **Walton v Scottish Ministers**,[63] Lord Reed (albeit in relation to Scottish law) explained:[64]

> "… a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates. The words "directly affected", upon which the Extra Division focused, were intended to enable the court to draw that distinction. A busybody is someone who interferes in something with which he has no legitimate concern. The circumstances which justify the conclusion that a person is affected by the matter to which an application relates, or has a reasonable concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another, depending upon the particular context and the grounds of the application."

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[60] [1998] Env. L.R. 111, 117 and 121
[61] See also Baroness Hale, 'Who Guards The Guardians?'; 14th October, 2013; Closing Address London Conference 2013 – 'Judicial Review Trends and Forecasts'.
[62] See Judicial Review Handbook, Fordham, 6th ed. (2012), pages 436 – 437.
[63] [2012] UKSC 44.
[64] See **Walton v Scottish Ministers** [2012] UKSC 44, at paragraph 92.

73. In **Walton**, Lord Reed also acknowledged that in relation to a person affected, or having a reasonable concern in a matter, that:[65]

> "There may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it."

74. However, this concern with upholding the rule of law is not open ended. It is of significance for establishing broad based standing requirements, but it is also to be circumscribed. In **Axa General Insurance Ltd. v Lord Advocate** Lord Reed explained this in terms of context:[66]

> "A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say "might", because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

What of the Caribbean Countries?

75. Three cases stand out in this area of public interest standing for non-Bill of Rights constitutional review.

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[65] See **Walton v Scottish Ministers** [2012] UKSC 44, at paragraph 94.
[66] [2011] UKSC 46, at paragraph 170.

St. Lucia

In **Lionel v Attorney General**,[67] Matthew J. (in 1995) held that the applicant had standing to challenge the appointment and sitting of a commission of inquiry, set up to look into alleged misappropriation of UN funds.

The applicant claimed that he was a citizen of St. Lucia, a person entitled to vote and required to pay taxes. He stated that he was a public-spirited citizen who had been following the events related to the alleged misappropriation of UN funds. He asserted that the impartiality of the tribunal was a matter of grave public importance and that the persons appointed were close friends of the Prime Minister of St. Lucia, and therefore incapable of being impartial in the inquiry. The Attorney General argued that being a voter, tax-payer and public-spirited person were insufficient bases for standing for the purposes of the challenge brought and relief sought.

76. Citing Lord Denning in **ex parte Blackburn,**[68] Matthew J. held that the applicant had the necessary standing to bring the action. In dismissing the matter on the merits he stated:[69]

> "I have found that the Applicant had *locus standi* to bring the action and I do not wish to discourage public-spirited citizens of St. Lucia from approaching the Courts on matters of national importance in the public interest. I therefore make no order as to costs."

St.Christopher, Nevis and Anguila

77. In **Payne v Attorney General**,[70] Mitchell J. (in 1981) held (in a judgment delivered in July 1981) that the applicant as an elected member of the unicameral House of Assembly of St. Christopher, Nevis and Anguilla and as ordinarily resident there, had the standing to seek relief in relation to non-Bill of Rights sections of the Constitution – to contend that the enacting clause of eight bills passed in the House of Assembly, vitiated the bills for repugnance with certain provisions of the Constitution of St. Christopher, Nevis and Anguilla.[71]

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[67] Action No. 357 of 1995, H.C. St. Lucia, Judgment delivered in May 1995.
[68] [1976] 3 All E.R. 185
[69] Action No. 357 of 1995, H.C. St. Lucia, at page 30.
[70] St. Kitts H.C. No. 7 of 1981 (9TH July, 1981). Reversed 2nd January, 1982 C.A.: Peterkin, C.J., Berridge and Robotham JJ.A., but not on the issue of *locus standi* (standing).
[71] In particular sections 23 and 34 of the Constitution.

78. In this Constitution, there are specific remedies provisions regarding non-Bill of Rights sections of the Constitution. These require a person to demonstrate that s/he has 'a relevant interest', which requires in turn, that s/he show that the alleged contravention of the Constitution is such as to affect his/her interests.[72]

79. In holding that Mr. St. John Payne had standing, Mitchell J. had this to say:

> "… as a member of the Legislature of Saint Christopher, Nevis and Anguilla … Mr. St. John Payne has the constitutional right and responsibility to see and ensure that the laws made by the said legislature … are in themselves lawfully made and are not invalid."[73]

> "… an elected member of the House of Assembly would be lacking in his duty, derogating from his right and abandoning his responsibilities if he was not interested and vigilant to see that the laws passed by the House of Assembly conformed with the law of the land … Mr. St. John Payne had a right, duty, a responsibility and a relevant interest to see that the bills … (were) passed … in accordance with the law of the State."[74]

80. As to what may constitute a relevant interest as required by the Constitution, Mitchell J. opined that:[75]

> "… the relevant interest required by the Constitution may be moral, religious or otherwise once it is ascertainable and … not too remote. … The interest may be a social interest as embracing the efficient working of the legal order in the society, national security, the economic prosperity of society, the protection of religious, moral, humanitarian and intellectual values or it may be a private interest which is a personal interest, or a family interest or an economic interest or a political interest and that list is not complete."[76]

81. The decision of Mitchell J. was overturned in the Court of Appeal in January 1982, but significantly not on the issue of standing.

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[72] See section 98 (1) (5) of the St. Christopher, Nevis and Anguilla Constitution.
[73] At page 14 of the judgment.
[74] At page 17 of the judgment.
[75] In liberalizing the standing requirements for non-Bill of Rights constitutional challenges, Mitchell J. differed completely from the earlier approach taken by Bishop J. in **Gordon v Minister of Finance** (1968) 12 W.I.R. 416 and **Re Blaize** H.C.A. No. 19 of 1972 (judgment delivered on the 31st January, 1972): where it was held that neither a nominated member of the House, or a leader of the Opposition, had the necessary standing to contest alleged breaches of non-Bill of Rights provisions in the St. Lucia and Grenada Constitutions.
[76] At pages 22 – 23 of the judgment.

82. Dr. Francis Alexis commenting on this decision,[77] states:

> "In any event, the reasoning of Mitchell, J., can stand on its own strength. The framers could hardly have intended that the "interest" required to sustain litigation under the non-Bill of Rights remedies provisions should be the same direct personal "right" whose infringement may occasion an application for redress under the Bill of Rights remedies provisions. There would surely be a difference between the two situations. **This kind of approach is equally applicable to those Caribbean Constitutions which do not have non-Bill of Rights remedies provisions**."

St. Vincent and the Grenadines

83. In between these decisions, stands the decision of Singh J. (in 1990) in **Richards v Attorney General.**[78]

84. In that case a non-Bill of Rights interpretation action was brought in relation to the Constitution of St. Vincent and the Grenadines. It arose out of a general election held in May 1989, in which all the seats in the House were won by one party. There being no leader of the Opposition, the Governor General was unable to appoint two of the six prescribed senators.[79]

85. The interpretation action sought answers to several questions, including whether the House of Assembly was duly and legally constituted with only four senators appointed on the advice of the Prime Minister.[80] The issues raised were constitutional issues of fundamental importance and of general public interest.

86. The applicants held themselves out to be taxpayers and voters who had voted in the election. They claimed an interest in the determination of these issues, because they wanted to be sure that they were being asked to obey laws passed by an Assembly that was properly constituted. Singh J. held that the applicants had no standing because they had failed to show a 'relevant interest'. That is, they had not demonstrated as a matter of fact that the alleged contravention of the Constitution was such as to affect their personal interests:

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[77] [1982] W.L.J. Vol. 6, No. 1, 33 – 80, at page 62.
[78] H.C.A. No. 484 of 1989; judgment delivered on the 17th January, 1990.
[79] Section 28(b) of the Constitution provided that the Governor General appoint two senators "acting in accordance with the advice of the Leader of the Opposition."
[80] Pursuant to section 28(a) of the Constitution.

> "… as I understand s. 96(5) of the Constitution, before I can hold that these two plaintiffs have a "relevant interest" in order to invoke the jurisdiction of the Court under s. 96(1), I have to be satisfied on evidence admissible by law, not only that the plaintiffs are registered voters and taxpayers or large taxpayers but also, that whatever contravention they allege is such as to affect their respective interests because, it is only then, accordingly to s. 96(5), they can have a relevant interest. I have done a fine tooth comb reading of the admissible evidence as disclosed in the affidavits of these plaintiffs and I can find no evidence to give them the crank start they need in order to put s. 96(1) in motion: All their affidavits tell me is that as voters and taxpayers, the court should answer the questions, because they want to be sure that they are taxed by an authority which is properly constituted and that they are being asked to obey laws passed by a body which is properly constituted. No where in the evidence can it be seen that these plaintiffs are saying that their interests have been or are being affected."

87. It may be noteworthy, that the 1981 opinion of Mitchell J. in **Payne v Attorney General** was not considered by Singh J. in his judgment in this matter.

Public Law Legislative Initiatives: Barbados and Trinidad and Tobago

88. In both Barbados (in 1980) and Trinidad and Tobago (in 2000), public interest litigation in judicial review is now facilitated by legislation.

Barbados

89. In Barbados section 6 of the Administrative Justice Act,[81] states:

> "The Court may on an application for judicial review grant relief in accordance with this Act-
>
> (a) to a person whose interests are adversely affected by an administrative act or omission;
>
> (b) **to any other person if the Court is satisfied that that person's application is justifiable in the public interest in the circumstances of the case.**"

Trinidad and Tobago

90. In Trinidad and Tobago section 7 of the Judicial Review Act[82] also provides for public interest litigation. Section 7(1) and (7) states:

> "(1) Notwithstanding section 6, where the court is satisfied that an application for judicial review is **justifiable in the public interest**, it may, in accordance with this section, grant leave

[81] No. 63 of 1980.
[82] No. 60 of 2000.

to apply for judicial review of a decision to an applicant **whether or not he has a sufficient interest in the matter to which the decision relates.**

(7) In determining whether an application is justifiable in the public interest the Court may **take into account any relevant factors**, including –

(a) **the need to exclude the mere busybody**;

(b) **the importance of vindicating the rule of law**;

(c) **the importance of the issue raised**;

(d) **the genuine interest of the applicant in the matter**;

(e) **the expertise of the applicant and the applicant's ability to adequately present the case**; and

(f) **the nature of the decision against which relief is sought.**"

91. This clear policy statement provides that public-spirited citizens who can demonstrate that a public law administrative review is "justifiable in the public interest", can bring actions for judicial review of administrative actions even though such a person may not be directly or adversely affected by the impugned decision. This is patently so, when one considers section 5(2)(b) of the Judicial Review Act, which states:

"The Court may, on an application for judicial review, grant relief in accordance with this Act –

(a) to a person whose interests are adversely affected by a decision; or

(b) **to a person** or a group of persons **if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case**."

92. Strikingly and significantly, the provisions of both section 6(b) in the Barbados Administrative Justice Act, 1980 and the section 5(2) (b) of the Trinidad and Tobago Judicial Review Act, 2000 are in materially identical terms – standing may be granted to a person if the court is satisfied that the application is justifiable in the public interest in the circumstances of the case.

93. What this statutory comparison illustrates, albeit in the public law arena of judicial review, is a trend in these two territories that parallels generally the case law cited above from other jurisdictions (except Australia). The approach of the courts in non-Bill of Rights

constitutional review actions in the cases of **Lionel** and **Payne** cited above, also show a similar trend. However, there are clearly other decisions which remain more conservative and restrictive on the issue of standing in these kinds of actions. There is no absolute uniformity: opinion and approaches differ across the common law world and within the region.

General Considerations

94. The analysis undertaken above traverses public law cases and statutes that cover both administrative and constitutional law. The value of this analysis is not to provide any direct precedent, as there are legislative and contextual differences in all of the jurisdictions, but rather to demonstrate trends and approaches across the common law world in the area of public law. This larger geo-jurisprudential context is useful when the courts are taking a step forward in expanding the reach of the common law.

95. From the analysis undertaken above, the following general considerations can also be articulated as arising out of the more permissive approach to standing in public interest litigation:

i. Standing goes to jurisdiction and is to be determined in the legal and factual context of each case. It is a matter of judicial discretion.

ii. The merits of the challenge and the nature of the breach raised are important considerations.

iii. The value in vindicating the rule of law (the principle of legality) is a significant consideration.

iv. The importance of the issue raised.

v. The public interest benefit in having the issue raised and determined.

vi. The bona fides and competence of the applicant to raise the issues.

vii. Whether the applicant is directly affected by, or has a genuine and serious interest and has demonstrated a credible engagement in relation to the issue raised.

viii. The capacity of the applicant to effectively litigate the issues raised.

ix. Whether the action commenced is a reasonable and effective means by which the courts can determine the issues raised.

x. The imperative to be vigilant so as to prevent an abuse of process by busybodies and frivolous and vexatious litigation.

xi. Whether the issues raised are a general or specific grievance and whether there are other challengers who are more directly impacted by the decision challenged, or more competent to litigate it.

xii. The availability and allocation of judicial resources.

96. All of these are considerations which could be relevant and appropriate to the issue of standing in public law as part of the general circumstances of the case, but we do not propose them as a checklist or as absolute criteria for determining standing.

This Case

97. In this case, the opening of the gates that is sought is in relation to the principle of standing in the context of public interest litigation by a public-spirited citizen, where there is a non-Bill of Rights generalized grievance, that Presidential executive action allegedly undermines the rule of law and is *ultra vires* a specific and prescriptive constitutional provision.

98. The relevant questions which ought to have been asked and answered in this case and which should have focused the inquiry as to standing, are:

(i) As a matter of principle, whether a constitutional matter of public importance, to wit, the lawful composition of the Police Service Commission, should evade constitutional

review and judicial determination, merely because the appellant has an interest, albeit a legitimate and worthy one, which is no different from any other citizen of the Republic.

(ii) Given that the primary purpose of rules of standing is to determine who can bring what issues before the courts, and that this is a matter for which the courts themselves have the jurisdiction and power to determine, whether the appellant should be permitted to litigate the issues he has raised in this action.

99. The appellant raises issues that go to the legality and vires of the exercise of Presidential power pursuant to section 122(3) of the Constitution. Simply put, the appellant contends that the nomination and appointment of Mrs. Achat-Saney and Dr. Armstrong are ultra vires section 122(3) of the Constitution and are unlawful. Therefore this exercise of Presidential constitutional power undermines the rule of law and frustrates the constitutional intent and purpose of section 122(3), with the consequence that a key independent constitutional organ, the Police Service Commission, has been rendered unlawful.

100. As already indicated, the appellant has *prima facie*, on the evidence put before the court, an arguable case. It concerns the vindication of the rule of law and the issues raised are undoubtedly of public importance for the reasons he has given (see paragraphs 4 – 12 above). It is in the public interest to have these constitutional issues determined. This is because of the status of the Police Service Commission and the roles it plays under the Constitution and in the society. This is especially so at this time in the history of Trinidad and Tobago, when crime control, detection and the successful prosecution of criminal cases is under siege and public trust and confidence in local policing is ambivalent at best, cynical at worst.

101. It has also been pointed out that *prima facie,* the appellant is not a busybody or a person who has undertaken this action for an ulterior motive, or some collateral purpose. Furthermore, at this stage, he has demonstrated the competence and capacity to litigate these issues effectively, and no one else has come forward to raise these issues. He has also demonstrated a credible engagement with the issues raised. Moreover, this action appears, again *prima facie*, to be a reasonable and effective means to litigate the issues raised by the appellant.

102. All of this is not to say that in every public interest matter, an ordinary citizen would, without more, have standing to raise non-Bill of Rights general grievances. This determination of standing is always a matter of law and context and consequently, of judicial discretion. This case is one in which the alleged unlawfulness is such that this applicant is entitled and competent to raise it before the courts – as a public-spirited citizen of Trinidad and Tobago who is not likely to be personally or directly affected by the impugned decision.

Trinidad and Tobago: Separation of Powers, Rule of Law, Democracy

103. In a modern, democratic society founded on the ideology of participatory democracy, such as Trinidad and Tobago, every citizen has a legitimate interest in the upholding of the Constitution and the rule of law. The courts as guardians of the Constitution, have the duty and responsibility to ensure that the Constitution and the rule of law are upheld.

104. In 2015, the common law world and all beneficiaries of British democratic governance, will mark the 800th anniversary of Magna Carta (1215), which codified, inter alia, the non-negotiable constitutional value, in Westminster influenced democratic societies, that every citizen, including the monarch, is subject to the rule of law.[83]

105. In the democratic Republic of Trinidad and Tobago, which has a written Constitution, this constitutional value is embodied and enshrined pursuant to clauses (d) and (e) of the Preamble[84] to the Constitution, which provide: "Whereas the people of Trinidad and Tobago – (d) recognize that men and institutions remain free only when freedom is founded upon **respect for moral and spiritual values and the rule of law**; (e) desire that their Constitution should

[83] The rule of law as we understand it in Trinidad and Tobago has its basis in Magna Carta. This concept, fundamental to British colonial democratic forms of government, asserts that all persons – including a king, prime minister, or president – must abide by the laws of the nation. While Magna Carta did not specifically state that the king was subject to the rule of law, the provisions of this document established that principle by imposing limits on the king's power. The fact that the barons were given the authority to enforce the provisions of this document, reinforced the principle that the king could no longer ignore or violate established laws, traditions, or customs, nor could he arbitrarily infringe on the rights of his subjects. In short, the king would be compelled to abide by the rule of law: William F. Swindler's Magna Carta: Legend and Legacy (Indianapolis: Bobbs-Merrill Co., 1965). Thus Magna Carta overturned 'divine rule', introduced representative and participatory democracy, and enshrined the rule of law.

[84] By section 11 of the Interpretation Act, the Pramble is to be construed as a part of the Constitution.

enshrine the above-mentioned principles and beliefs …". Further, section 2 of the Constitution provides that: "This Constitution is **the supreme law of Trinidad and Tobago**, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency".

106. Therefore, the rule of law is an expressly declared and avowed constitutional value that underpins the Republican Constitution of Trinidad and Tobago, which is the supreme law. Moreover, the Constitution sets out the fundamental governance structure for Trinidad and Tobago, and as has been recognised by the Privy Council, incorporates as central to that structure the principles of the separation of powers.[85] Integral to this governance structure and to the distribution of powers, are the Service Commissions. Chapter 9 of the Constitution makes specific provision for the appointment of these Service Commissions.[86]

107. Lord Diplock explained the purpose of this constitutional arrangement in **Thomas v The Attorney General**[87], when he stated (in relation to Chapter 8 of the 1962 Constitution which was the equivalent to section 9 of the 1976 Republican Constitution):

> "The whole purpose of Chapter VIII of the Constitution which bears the rubric "The Public Service" is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the Government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous commissions, although public authorities, are excluded by section 105(4)(c) from forming part of the service of the Crown."[88]

108. Lord Diplock continued:

> "In respect of each of these autonomous commissions the Constitution contains provisions to secure its independence from both the executive and the legislature."[89]

[85] In **Matthew v The State** [2004] UKPC 33, Lord Hoffman explained it this way: "the principle of the separation of powers is … a description of how the powers under a real constitution are divided". (At paragraph 28).
[86] These are the Public Service Commission; the Police Service Commission; and the Teaching Service Commission.
[87] (1981) 32 WIR 375.
[88] (1981) 32 WIR 375, at page 381 j.
[89] (1981) 32 WIR 375, at page 381 j.

109. To complete the picture in relation to the separation of powers under the Constitution of Trinidad and Tobago, as is the custom in Westminster type democracies, there is a separation of powers among the Legislature, the Executive and the Judiciary.[90] Noteworthy is the fact that though the office of the President is created by Chapter 3 of the Constitution, by sections 39 and 74 of the Constitution, the President is declared to also be a part of both the Parliament (legislature) and the Executive (the subjects of Chapters 4 and 5 of the Constitution).

110. Significantly, the members of the Public and Teaching Service Commissions "shall be appointed by the President, after consultation with the Prime Minister and the Leader of the Opposition".[91] By virtue of section 80(1)(b) of the Constitution,[92] this means that these appointments are the President's independent appointments, made in the exercise of his own deliberate judgment after the relevant consultation. With respect to the Police Service Commission and by virtue of the amendments to section 122 of the Constitution, the method of appointment is different, but the power to nominate and to appoint members remains that of the President and by virtue of section 80(1) (b) of the Constitution, in relation to nomination, this is done in the exercise of the President's own deliberate and independent judgment. This process is consistent with and intended to secure Lord Diplock's explanation of purpose stated in **Thomas** (above).

111. It is clear that the Constitution itself (sections 14 and 108) provides specific instances where aggrieved citizens can approach the courts for constitutional review, whether in relation to alleged breaches of their fundamental rights (by state action or via legislation), or when issues of constitutional interpretation arise in the course of any proceedings. The question that therefore arises is whether these specific permissions circumscribe the limits of redress for constitutional review in Trinidad and Tobago.

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[90] See Chapters 4, 5 and 7 of the Constitution.
[91] See sections 120(2) and 124(2) of the Constitution.
[92] Section 80 (1) (b) states: " In the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this Constitution or such other law, and, without prejudice to the generality of this exception, in cases where by this Constitution or such other law he is required to act—
(b) after consultation with any person or authority other than the Cabinet; …".

112. In the area of administrative law, executive action can be reviewed by way of judicial review proceedings. The courts have always assumed the responsibility for such reviews, properly so in the context of the separation of powers and the historical role of the courts in relation to prerogative writs. In this area of public law and as demonstrated above, the law has evolved to recognize the value of and to permit public interest litigation – including permitting a public spirited citizen, who is not directly affected by an administrative action, to approach the courts for a review of the impugned action. This approach has been codified and finds expression in sections 5(2) (b) and 7(1) and (7) of the Judicial Review Act, 2000, in Trinidad and Tobago.

113. Thus, the jurisdictional issue to be determined in this matter, involves asking the question: Why should constitutional review be restricted to instances of express statutory permission and not include public interest litigation, that is not frivolous or vexatious or otherwise an abuse of the court's process, that is bona fide, arguable with sufficient merit to have a real and not fanciful prospect of success and that is grounded in a legitimate and concrete public interest?

114. Mr. Sinanan, S.C. submitted that such permissiveness could lead to a debasing of the Constitution, because it would open the floodgates. Furthermore, he suggested that such permissiveness will result in the courts becoming inundated with public interest constitutional review actions and so place a further burden on an already overburdened administration of justice. He argued that restricted access to the courts in non-Bill of Rights constitutional review preserves the sacrosanct nature of the Constitution, which should be protected.

115. We have great difficulty in accepting these arguments in relation to non-Bill of Rights actions for constitutional review. If the Constitution is sacrosanct and that is to be upheld in the eyes of the Public, then unconstitutional action that is exposed and corrected, enhances that special status and does not undermine it. If the Constitution is the supreme law, and breaches of its provisions cannot be addressed, revealed and remedied, that would more likely debase it and erode public trust and confidence in the constitutional democracy that Trinidad and Tobago declares itself to be. Can it be that a law that is inconsistent with the Constitution is void

(section 2), but an executive action that is inconsistent with the Constitution is unreviewable? Why should this be so? And if it has been so, why should it be permitted to continue in 2014?

116. The Preamble to the 1976 Republican Constitution indicates that the type of democracy that the Constitution creates, includes clear elements of civic republicanism, in which there is both an encouragement and expectation of citizens' participation in the democratic process. In this sense, the encouragement of citizens' participation in the democratic process, is a part of the Trinidad and Tobago constitutional ethic and value system that must inform a court's approach to issues of standing in non-Bill of Rights constitutional review actions. Such a constitutional ethic does not rely entirely on public interest litigation being pursued by the State and its organs – usually through the Attorney General. Rather, it recognizes, both for theoretical and pragmatic reasons, that it is the right and even the duty of citizens to get involved in appropriate cases in such public interest litigation.

117. Indeed, the 1976 Republican Constitution of Trinidad and Tobago has as an underpinning ethic, a participatory political ethos, in which the upholding and vindication of the rule of law form an integral part of the model of democratic governance.

118. Furthermore, it is well accepted that Westminster style constitutions are committed to representative participatory democracy and responsible government. Such Westminster style influences also pervade the 1976 Republican Constitution. It is therefore consistent with these values, in principle, to permit public interest litigation as a means of ensuring executive, parliamentary and a fortiori, executive presidential responsibility in the exercise of constitutional powers.

119. Historically, seeking the public interest, including the observance of the rule of law, was exclusively the responsibility of the Attorney General. However, we note that in Trinidad and Tobago there is no established tradition of the Attorney General seeking the public interest in these circumstances. Australia, as shown above, follows that tradition and the courts are not prepared to intervene, preferring to leave any change to the legislature. However, in other countries, such as Zambia, Canada and India, and even here in the Caribbean, the courts have not

been shy to exercise their jurisdiction and power to enlarge the standing rules in the area of public interest constitutional review litigation.

Constitutional Culture and Values: Socio-Political Context

120. As I have attempted to show, in Trinidad and Tobago, the 1976 Republican Constitution embodies as part of the local constitutional values and culture, a public interest in upholding the rule of law. This is a part of the model of democracy that the people of Trinidad and Tobago aspire towards and expect. It is a model also informed by an evolving and unique local political and social culture.

121. I am fully aware that my brothers do not share my views on the relevance of social context as a factor and an aid to constitutional interpretation in this case. I note with respect their specific reservation about this aspect only of this judgment, which is otherwise unanimous. However, I remain convinced that socio-political context can at times be a relevant aid to constitutional interpretation, as in this case. While resort to it as an additional limb of argumentation is not absolutely necessary to come to the conclusion that we have all agreed on, I have nevertheless included it, as I am convinced that it is both relevant and informative in this case.

122. Thus, what has been created and shaped, not only by the formal written document (the Constitution as supreme law), but also by the lived experiences of people existing in an intended civic republican, representative, participatory and responsible tradition of governance, is a culture in which citizens were intended, are expected and so should be permitted to achieve social and political meaning and fulfillment by participating legitimately in issues of governance.

Independence, Revolution and Republicanism

123. Realistically, it is really only the ones who know through lived experience, whether actual or vicarious: **(i)** the colonial history of Trinidad and Tobago, in which its plantation economy was sustained by slavery and indentureship and the use of cheap immigrant labour, and where generally colonial crown colony governance was marked by the promotion of the policies of the elites and privileged and where ordinary citizens experienced themselves as excluded from

the center of power and decision making and from access to justice; and **(ii)** who know and understand the causes and consequences of the tumultuous times of the Revolutionary 1970's, with the destabilizing Black Power Revolution (and its demands for "Power to the People') and the army mutiny of 1970, of the "No Vote" campaign of the May 1971 general election (which resulted in a 33.2 percent voter turnout, down from 66 percent in 1966) in which the PNM won all 36 seats in the House of Representatives,[93] of the establishment of the June 1971 Wooding Constitutional Commission,[94] of the two nationwide states of emergency in early 1970 and late 1971;[95] and **(iii)** who know of the 1972 'guerrilla war' against the police and the state[96] – all of which above events occurred within ten years of independence; and **(iv)** who know of the subsequent labour unrests culminating in the 'Bloody Tuesday' debacle of March 1975; and **(v)** who also know of the occurrence, following upon the 'No-Vote' campaign in 1971 and with general elections due in 1976, whereby the virtually all-PNM legislature (two members had 'resigned' to form an 'opposition') decided to change the Independence Constitution before elections and to make way for the Republic of Trinidad and Tobago via the September 1976 Republican Constitution; can truly recognize and articulate the uniquely local content, meaning and imperatives of clauses (a), (b), (c) and (d) of the Preamble to the 1976 Republican Constitution. It is acknowledged that this entire narrative may be one perspective of local history and governance, but it is widely accepted as a legitimate one.[97] What is however

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[93] The PNM won with 28 percent of the voting electorate supporting the party. The Governor General declared the office of the Leader of Opposition vacant and no opposition senators were appointed.

[94] The Report of the Wooding Constitutional Commission began as follows:

> "In the speech from The Throne at the opening at June 18, 1971 of the Third Parliament since Independence of Trinidad and Tobago… His Excellency (The Governor General) stated that **the Government would be concentrating on encouraging and promoting the maximum participation of the people in the political process (and that) the first priority would be (reform of) the Constitution itself**."

The Wooding Constitution Commission Report was laid in Parliament in 1974.

[95] The Black Power Movement did not end with the first state of emergency or with the arrest of the rebel soldiers in 1970, but continued into 1971 with widespread labour unrest, prompting a declaration of a second state of emergency in late 1971.

[96] By early 1972 'guerrilla war' had broken out in Trinidad, with armed locals attacking and raiding police outposts and arms and ammunition dealers. This continued for about two years, lead by the radical National United Freedom Fighters (NUFF).

[97] See '**Democracy and Constitution Reform in Trinidad and Tobago'**, Meighoo and Jamadar, 2008; Chapter 2, "The Evolution of Government in Trinidad and Tobago"; '**Capitalism and Slavery**', Williams, 1944 – "The commercial capitalism of the eighteenth century developed the wealth of Europe by means of slavery and monopoly. … Without a grasp of these economic changes the history of the period is meaningless" – at page 210; '**The Sugar Industry and the Abolition of the Slave Trade, 1775 – 1810**', Carrington, 2002; '**The Plantation Society in Comparative Perspective**', Beckford, "… race and class make plantation society a part of 'special case' in the history of social formations" – The George Beckford Papers, Levitt, 2000; '**The Character of Caribbean**

unequivocal, is that within ten years of Independence and continuing until 1975, Trinidad and Tobago passed through a period of tumultuous times, during which the single unifying theme was a popular demand for 'Power to the People' and for a greater say in governance.

124. The understanding of a free society, human dignity, social justice, participation in governance and freedom (equality) based on the rule of law, is very different for any specific group of formerly powerless, dehumanized and desecrated people, than it could ever be for any other peoples' struggle for power, equality and justice. Though there are always common elements, in Trinidad and Tobago there are, as in all other similar circumstances, unique elements that create subtle but significant differences.

125. The content of the meaning of constitutional values such as freedom, social justice, human dignity, participation in governance and the rule of law, cannot exist entirely outside of the experiences and insights gained from living in a society and living with and through its history. These experiences and insights which 'in-form' content are not simply intellectual; they include the 'felt-sense' one gains from being embedded in the constitutional fabric, culture and history of a society.

126. Finally, it is to be noted that the 1976 Republican Constitution of Trinidad and Tobago is, in fact, an amalgam of values that reflect its stages of development and evolution over time and in response to societal changes. The point is that a constitution is not some sterile document,

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Economy', Best and Polanyi - Levitt (in Caribbean Economy, Beckford, 1975); '**Caribbean Dependence in the Phase of Informatic Capitalism**', Henry (in The Thought of New World: The Quest for Deconolisation, 2010). Henry explains the "problem of dependence … that western imperialism had cast" over the Caribbean and that continues to influence it as follows:

> "… that in this informatic phase Caribbean plantation economy has gone through a fourth 'ratooning' – a reference to the practice of reusing already cut stalks of cane rather than uprooting them and replanting new slips for the next crop; and that in addition to structural factors, this fourth repeating of the plantation pattern may also be linked to persistent effects of the colonial capture of the auto-poetic processes by which Caribbean … identities were established. By 'auto-poetic,' I am referring to the creative processes of symbolic self-representation, affirmation and negation by which we establish identities and differentiate them from other identities."

See also '**The Black Power Revolution 1970: A Retrospective**', Ryan and Stewart, 1995 (in particular '**Guerrilla War in Trinidad: 1970 – 1974'**, Millette); '**The February Revolution (1970) a Catalyst for Change in Trinidad and Tobago'**, Samaroo, 2010; and '**Black Power in the Caribbean**', Quinn, 2014. The Black Power Revolution can be legitimately interpreted as a part of a larger historical struggle for recognition and meaningful participation in governance.

written by a neutral hand, divorced from the realities out of which it was birthed. Like Magna Carta, the 1976 Republican Constitution is very much a product of its local context. Westminster may have been the dominant influence in the Independence 1962 Constitution, but the 1976 Republican Constitution, while perpetuating those traditions and values, is also imbued with the Republican ethic of the post 1970 era in Trinidad and Tobago.[98]

127. In this socio-political constitutional context, there is very good reason to adopt more relaxed standing rules for constitutional and public interest litigation, especially where it concerns and raises constitutionally related issues of unlawfulness and the observance of the rule of law. Public interest litigation in non-Bill of Rights constitutional review, permits citizens to contribute to both participatory democracy and the vindication of the rule of law. By facilitating it, one aspect of the needs and aspirations of the local society is fulfilled.

Courts: Guardians of the Constitution

128. The courts are the recognized guardians of the Constitution, not merely because sections 14 and 108 of the Constitution give the court the power to undertake constitutional review, but because in the context of the separation of powers, it is the Judiciary that has both the duty and the responsibility in a modern democratic society such as exists here, to ensure that the Constitution and the rule of law are upheld in Trinidad and Tobago.

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[98] See '**Democracy and Constitution Reform in Trinidad and Tobago',** Meighoo and Jamadar, footnote 93 above. It is necessary, in this context, to ask: (i) Why was the 1971 Wooding Constitution Commission established and what motivated its recommendations? (ii) Why was the 1976 Republican Constitution enacted and what informed its content? (iii) What influences did the Revolutionary 1970's have on either or both of the above? It is therefore noteworthy that the 1974 Wooding Constitution Report stated (at pages 13 and 112):

> "We do not accept the often expressed view that the present (1962 Independence) Constitution is quite sound and that the fault lies in our failure to operate it properly. If we cannot operate it properly, then for us it is not sound. **We are of the view that the Westminster model in its purest form as set out in our present Constitution is not suitable to the Trinidad and Tobago society**. … It is against this background that we recommend a new Constitution for Trinidad and Tobago."
>
> "We propose measures which we believe will materially contribute to a revival of parliamentary democracy**, provide for meaningful participation** in constitutional parliamentary politics … We have also sought to safeguard the rights and freedoms of the individual and **to provide avenues through which he can make his voice heard** or seek redress for any infringement of his rights."

129. This duty and responsibility was recognised by Dickson J. in the Supreme Court of Canada in **Hunter v Southam Inc**.[99]: "The Judiciary is the guardian of the constitution …". His view was explicitly adopted in **Matthew v The State**[100] by Lords Bingham, Nicholls, Steyn and Walker.[101] Lord Nicholls explained this role of the court as follows:[102]

> "This is not to substitute the personal predelictions of individual judges for the chosen language of the constitution. Rather, it is a recognition that the values underlying a constitution should be given due weight when the constitution falls to be interpreted in changed conditions. A supreme court which fails to do this is not fulfilling its proper role as guardian of the constitution. It is abdicating its responsibility to ensure that the people of a country, including those least able to protect themselves, have the full measure of protection against the executive which a constitution exists to provide."

130. Indeed, Lord Bingham in **Bobb v Manning**[103] stated this role of the court in relation to the exercise of executive power as follows:

> "13. The Board would similarly accept, with little or no reservation, the role assigned to the Trinidad courts and this Board as the ultimate guardians of constitutional compliance, recognising the Constitution (section 2) as the supreme law of Trinidad and Tobago.
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> 14 The rule of law requires that those exercising public power should do so lawfully. They must act in accordance with the Constitution and any other relevant law. In some contingencies these instruments may make quite clear what the office holder must do. … His duty was then to act as the Constitution required or (put negatively) to avoid acting inconsistently with it. "

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[99] [1984] 2 S.C.R. 145, at paragraph 16. The entire quote is as follows:

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. **Its function is to provide a continuing framework for the legitimate exercise of governmental power** and, when joined by a *Bill* or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. **The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind**. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".

[100] [2004] UKPC 33.
[101] [2004] UKPC 33, at paragraphs 42 and 71.
[102] At paragraph 71.
[103] [2006] UKPC 22, at paragraphs 13 and 14.

131. In our opinion, a Supreme Court[104] which denies access to bona fide and legitimate public interest actions for constitutional review, even in non-Bill of Rights challenges, because it is not expressly provided for, fails in its duty and denies its role as guardian of the Constitution. In abdicating this responsibility to uphold the Constitution where unconstitutional action has occurred, the Supreme Court betrays the trust of the people and participates in undermining the rule of law – all of which are the antitheses of the role and function of a constitutional court in a democratic society.

132. It is for the court to determine whether and if so, what kinds of constitutional reviews are permissible. In this exercise, the courts are discharging their constitutional responsibility to uphold the rule of law. Thus, a disproportionate focus on the particular interests of a claimant, risks losing sight of this aspect of judicial governance, which is concerned less about individual rights and more about public wrongs. In the constitutional arrangements that exist in Trinidad and Tobago, the courts are given the duty to exercise judicial scrutiny over executive action so as to ensure the legality of such action. The purpose of this is ultimately to secure the accountability of government to law – the rule of law.

Summary

133. In our opinion, barring any specific legislative prohibition, the court in the exercise of its supervisory jurisdiction and as guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights unlawful constitutional action; provided the litigation is bona fide, arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest, capable of being reasonably and effectively disposed of, and provided further that such actions are not frivolous, vexatious or otherwise an abuse of the court's process. The approach to be taken to this issue of standing is a flexible and generous approach, bearing in mind all of the circumstances of the case, including in particular the need to exclude busybody litigants and those who have no genuine interest in the issues raised and have not demonstrated credible engagement in relation to them. The public importance of the issues raised and of vindicating the rule of law are significant considerations.

[104] See section 99 of the 1976 Republican Constitution.

134. The limitations that we have articulated in this opinion satisfy the balance to be struck between allowing bona fide and legitimate public interest constitutional review and preventing those actions which are, for one reason or another, an abuse of process or ought not to be otherwise entertained. Standing is a matter of discretion. Even though the constitutional court is concerned to vindicate the rule of law by focusing on public wrongs, this is not open-ended. Ultimately (and beyond the exclusion of a busybody) context is the determining factor. In some contexts, it may be appropriate for an applicant to demonstrate a direct or particular interest in the matter complained about; in others, it may not be necessary. For example, where the alleged unlawfulness affects the public generally, no particular or direct interest in the matter may be necessary; but even then, a discretion exists in relation to standing to be exercised contextually. The constitutional function of the court's supervisory jurisdiction in the area of constitutional review of unlawful constitutional action, must always operate to protect the legitimacy of that sacrosanct purpose. This is the true role of the first gatekeeper.

135. In this case, Mr. Dumas contends that the nomination and appointment of two individuals to the Police Service Commission by the President were unconstitutional, because these individuals are not lawfully qualified to hold the positions to which they have been appointed as prescribed by the Constitution. In our judgment, this represents a legitimate interest in having a properly constituted Police Service Commission for the Republic of Trinidad and Tobago. This is a sufficient interest in the context of this case and in light of the analysis above, to vest the applicant, *prima facie*, with appropriate standing to bring and continue this action for the interpretation of the Constitution and for the declaratory relief sought. There is no evidence at this stage of any abuse of process sufficient to deny the appellant standing in this matter.

136. We note however that this appeal concerns the trial judge's analysis on the bases of procedure and jurisdiction simpliciter, and did not include a consideration of the limitations that we have suggested as apt. Thus, we make no final determination on whether or not this action is, or is not, an abuse of process. In our opinion, the trial judge erred in his analysis of the issue of standing and jurisdiction on the evidence before him at this stage of the proceedings.

Procedure

137. Mr. Sinanan, S.C. accepts that once there is standing and jurisdiction, this action is properly commenced by fixed date claim form as an administrative action pursuant to Part 56 of the CPR, 1998[105], a position which Mr. Maharaj, S.C. adopts. We note that in the present claim form, no particular part of the CPR, 1998 is invoked. However, if this action had been commenced under Part 62, that error in procedure could have been remedied pursuant to Part 26.8 of the CPR, which deals with the general power of the courts to rectify matters where there has been an error of procedure.

138. We note that this action is properly categorized as an administrative action and as such, is properly commenced pursuant to Part 56 the CPR, 1998. We also note that Part 56 requires that that administrative actions be commenced by fixed date claim form.[106] Finally, we note that this is an action against the State and that it includes among the relief sought, declaratory orders.[107]

139. In any event, we note that following the principle enumerated by Lord Diplock in **Jaundoo v Attorney General of Guyana,**[108] if the CPR, 1998 did not provide adequately or at all for this kind of constitutional review, given that there is jurisdiction to seek such a review, that the lack of procedural rules to facilitate such an action could not operate to bar it. In this regard, we say that in any event, Part 56, CPR, 1998 is the appropriate procedure for a claim such as this one.

140. In light of the judge's decision, it appears necessary to state that the rules of court made pursuant to sections 77 and 78 of the Supreme Court of Judicature Act are intended, *inter alia*, to regulate the practice and procedure with respect to matters which the court has jurisdiction to hear and determine. Therefore once jurisdiction exists, the rules of court are intended to and should be interpreted in such a way as to facilitate the ventilation of any relevant issue.

141. In the foreword to the CPR, 1998, Chief Justice Sharma explained this as follows:

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[105] See in particular Part 56.1 (1) (c) and (2), and Part 56.7 (1) (c) and (d).
[106] See Part 56.7, CPR, 1998.
[107] See Part 56.1(1) (c), CPR, 1998.
[108] PCA No. 35 of 1969; [1971] AC 979, PC. See also **Peters v Attorney General**, Civ. App. No. 21 of 2011, per de la Bastide, C.J.

> "Rules of court must be distinguished from substantive law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties.
>
> **On the other hand, rules of court are a source of procedural law the function of which is to prescribe and regulate the machinery or manner in which legal rights or status and legal duties may be enforced or recognized by a court of law. Since they are procedural in character and effect, they cannot confer, take away, alter or diminish any existing jurisdiction, rights or duties created or conferred by substantive law**: *Everett v Griffiths (1924) 1 K.B. @ p. 957.* Being made under powers given by statute, however, rules of court have themselves the force of statute: *Donald Campbell & Co. v Pollak (1927) A.C. @ p. 804.*
>
> The two branches are complementary and interdependent, and the interplay between them often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into the substantive law, gives it its effectiveness and brings it into being. Rules of court, therefore, are of fundamental importance to the good administration of justice and must accord with the cultural climate pervading society at any particular time."

142. Finally, it is to be noted that section 78(1) of the Supreme Court of Judicature Act provides that: "Rules of Court may be made … for the following purpose: for regulating and prescribing the procedure … to be followed … in the Court of Appeal and High Court … **in all causes and matters whatsoever in or with respect to which those courts respectively have for the time being jurisdiction** …". The power to make rules is therefore intended to embrace rules governing the procedure to be adopted by the court in the exercise of its jurisdiction, however it arises.

Decision/Costs

143. The appeal was allowed. The orders of the trial judge were set aside. The matter was directed to be remitted to be continued before the same trial judge. On the preliminary hearing below, the respondent was ordered to pay the appellant's full costs and on this appeal, the respondent is to pay the appellant two-thirds of the costs below.

144. The request that the matter be placed before another trial judge was declined, as we were of the opinion that the trial judge could impartially and justly deal with this matter.

P. Jamadar
Justice of Appeal

N. Bereaux, J.A. and G. Smith, J.A.

145. It is unnecessary to repeat the facts. They were fully set out in the judgment of Jamadar, J.A. On 20th October 2014, we unanimously allowed this appeal. There were two issues in the appeal:

(i) Whether the appellant (Mr. Dumas) has *locus standi* to bring the action.

(ii) If he did, was the correct procedure under the **Civil Proceedings Rules 1998 (CPR)** invoked.

146. The trial judge upheld a preliminary objection by the Attorney General that the action was wrongly brought. He found that Part 62.2 of the **CPR** does not permit the bringing of proceedings on the interpretation of section 122(3) of the Constitution. He held that any interpretation of the Constitution could only be carried out by the court where there is an allegation of a breach of the fundamental rights and freedoms set out in sections 4 and 5. He also found that the court had no power under the **CPR** to correct any error in procedure in initiating an action.

147. In allowing the appeal we found as follows:

(i) In relation to *locus standi*, the citizen had a legitimate interest in upholding the Constitution and the rule of law. As guardians of the Constitution, the courts are charged with the responsibility of upholding both the Constitution and the rule of law. A citizen has a right to approach the court for an interpretation of the Constitution where this is justifiable in the public interest and is based on a legitimate concern of upholding the constitutional provisions and the rule of law. This right however, must be balanced

against abuse. Such abuse would include considerations of bona fides, arguability and frivolousness. There also may be legitimate public interest concerns which militate against review by a court of law. Mr. Dumas' assertions that the appointments of Mrs. Achat-Saney and Mr. Armstrong were illegal reflected a legitimate interest in having a properly constituted Police Service Commission. His allegations are not without substance and are not an abuse of process.

(ii) As to the procedural question, Mr. Sinanan accepted that once the locus standi of Mr. Dumas was upheld, the matter was properly brought as an administrative action under Part 56 of the **CPR**. We went on to hold, however that even if the action did not fall to be accommodated under Part 62, then Part 26.8 of the **CPR** provides a proper basis for remedial action, in order to permit the claim to proceed.

148. Given the importance of our decision, Jamadar J.A. in his reasoned judgment has addressed the issues and reasons for our decision much more fully. While we agree with his approach and with his analysis and reasons; however we do not associate ourselves with his comments at paragraphs 120 to 127 of the judgment, set out under the rubric *"Constitutional Culture and Values: Socio-Political Context"*. Nevertheless, we certainly agree with him that there should be an expansive approach to constitutional questions which serve the public interest.

149. The Attorney General's objection as to Mr. Dumas' *locus standi* is very much out of step with a liberal construction of the Constitution so often advocated by the Privy Council itself. Such a restricted approach will exclude from judicial adjudication important constitutional questions upon which there may be a public need for judicial pronouncement. This is to be considered against the backdrop of a total absence of *ex relatione* actions by Attorneys General in Trinidad and Tobago, when such actions would involve challenges to decisions made by the Government of the day, of which they form part.

150. Viewed against this backdrop, the fact that objection to Mr. Dumas' *locus standi* is made on behalf of the Attorney General himself is beyond ironic. It fortifies us in our view that a restrictive approach to *locus standi* in Trinidad and Tobago would likely result in the suppression

of public wrong doing. Baroness Hale's comments quoted as a preamble to Jamadar J.A.'s judgment could not be more appropriate.

Nolan P.G. Bereaux
Justice of Appeal

Gregory Smith
Justice of Appeal