

The Elephant in the Courtroom

By Shaun Fluker

Cases Considered:

Reece v Edmonton (City), [2011 ABCA 238](#)

In March 2011 the Court of Appeal heard an appeal by Zoocheck Canada, People for the Ethical Treatment of Animals, and Tove Reece (collectively referred to as Zoocheck here) from Justice John Rooke's August 2010 decision to strike Zoocheck's application for a declaration that the City of Edmonton is violating the *Animal Protection Act*, RSA 2000 c A-41 by keeping Lucy the Elephant in its Valley Zoo. See my previous ABlawg comment [Lucy the Elephant v Edmonton \(City\) for](#) some analysis of Justice Rooke's decision (*Reece v Edmonton (City)*, 2010 ABQB 538), the background concerning Lucy's health problems and living conditions in the zoo, the applicable legislative framework, and the City's motion to strike the Zoocheck application. In its August 2011 *Reece v Edmonton (City)* decision the Court of Appeal dismisses the Zoocheck appeal, with the majority written by Justice Frans Slatter upholding the finding at the Court of Queen's Bench that the application for a declaration constitutes an abuse of process. In her lengthy dissenting opinion, Madame Justice Catherine Fraser rules the Zoocheck application is not an abuse of process and should go to trial. This Court of Appeal decision is noteworthy to me for three reasons: (1) the sharp contrast of legal theory underlying the majority and the dissent; (2) the environmental ethic informing Justice Fraser's dissent; and (3) the comments made by Justice Fraser concerning the availability of public interest standing.

This decision is an excellent illustration in the contrast between legal positivism (majority) and legal realism (dissent) in judicial reasoning, and demonstrates how a legal perspective influences the result. The positivism in Justice Slatter's majority judgment is demonstrated in his refusal to consider the purpose of the *Animal Protection Act* and the evidence concerning Lucy's health and wellbeing at the Valley Zoo (at paras 12-13), as well as his strong adherence to the separation of powers between the judiciary and the executive. In Justice Slatter's view, the result in this appeal hinges exclusively on the application of the abuse of process doctrine which is considered apart from any factual context of the dispute. He canvasses the case law on the doctrine, noting that abuse of process is typically established where proceedings are oppressive or vexatious and bring the administration of justice into disrepute.

The Zoocheck application is characterized by Justice Slatter as a request by a private litigant to rectify a public wrong. Justice Slatter observes the law is reluctant to grant equitable or declaratory relief in such cases unless the private litigant can demonstrate extraordinary damages beyond those inflicted on the general public. Otherwise, it is for the Attorney General to pursue legal action against the wrongdoer in the name of the public interest. As well, Justice Slatter cites precedent for why courts are reluctant to grant declaratory relief concerning the breach of a penal statute: Namely, that the protections of the criminal law available to the defendant – such

as the burden of proof - are not available in civil proceedings. In short, Justice Slatter agrees with how Justice Rooke decided this matter in the first instance: The Zoocheck application is an abuse of process because it does not conform to the legislative path for bringing the issue to the courts and it is an attempt to enforce the criminal law with a civil action.

In addition, Justice Slatter questions whether the Zoocheck application raises a justiciable issue:

Whether the City is discharging its operational duties in the care of Lucy is a hotly contested issue. It is not appropriate to expect the courts to take over the animal husbandry of the animals at the City zoo through the ability to issue declarations on points of law. . . . Further, it is not the role of the superior courts to review every operational decision made by government, and the courts do not have the resources needed to deal with the volume of applications that could be generated if the procedure chosen by the appellants was endorsed. The role of the superior courts is limited to reviewing the legality of executive action, and does not extend to examining the policy choices made by the executive branch. (at para 35, emphasis in original)

With respect, I think Justice Slatter overstates the consequences of the Zoocheck application to make his point. Zoocheck is not asking the Court to operate the zoo, and this application does not ask the Court to review every decision of government. In overstating these consequences, Justice Slatter obscures the novel and important legal issues raised in this case. These issues are noted by Chief Justice Catherine Fraser in opening of her dissent (at para 47):

- Under what circumstances can citizens or advocacy groups be granted public interest standing to seek a declaratory judgment that the government itself has failed to comply with animal welfare laws?
- Under what circumstances, if any, and to whom, is a civil declaratory judgment an available remedy where the alleged unlawful government acts may also be the subject of a prosecution under a regulatory animal welfare statute?
- Is the government, and that includes the City as an arm of the state, immunized from judicial scrutiny of alleged unlawful acts?

Justice Fraser is a legal realist in her dissent. She is reluctant to strike pleadings as an abuse of process out of concern for sterilizing the ability of the law to respond to evolving societal norms and values such as the rise of animal welfarism which underlies these proceedings. Accordingly, Justice Fraser interprets the abuse of process doctrine much more narrowly than the majority does, and she notes precedent for the rule that the Court should only strike pleadings in 'plain and obvious cases' (at para 129).

Whereas the positivism in the majority judgment finds it unnecessary to address the animal welfare context of this dispute or the specific evidence on Lucy's health problems and living conditions at the zoo, Justice Fraser in contrast observes the law is all about context (at para 119) and she rules this context and evidence must be considered in order to decide whether to grant the City's motion to strike.

The context of this dispute is society's recognition that non-human animals – in particular those who feel pain and pleasure – have moral standing. Their interests must be considered in

determining how we ought to treat them, although in its utilitarian form animal welfarism allows for the suffering by non-human animals at the hands of humanity for the purpose of economic well-being, science, or recreation. Justice Fraser provides the most thorough description of this animal welfare ethic that I have read in Alberta jurisprudence (at paras 51-71), and she observes this context is reflected in the governing legislation here including the *Animal Protection Act* and the Government of Alberta zoo standards (I canvassed this governing legislation in my previous ABlawg comment on this case noted in the first paragraph above).

Justice Fraser emphasizes the purpose of these legislative rules is to protect animals with rights and obligations. And moreover Justice Fraser acknowledges these legal protections remain somewhat minimal, susceptible to being overridden by human interests, and difficult to enforce. Accordingly, to ensure the purpose of these legal rules is met Justice Fraser asserts the courts should interpret these legal rules and obligations generously and resist creating barriers towards their implementation (at paras 71, 88-91).

Justice Fraser extensively reviews the Zoocheck affidavit evidence on Lucy's health problems and living conditions at the zoo (at paras 92-127). She draws upon this analysis together with her purposive interpretation of the applicable legislation to identify the important and novel legal issues raised by the Zoocheck application which should be heard in a trial. In her view, it is not plain and obvious this application is contrary to the interests of justice and it is therefore not an abuse of process (at paras 134, 146). Moreover, Justice Fraser observes that unlawful conduct often attracts more than one form of legal process (civil and criminal). Accordingly, she questions why the prospect of a regulatory prosecution under the *Animal Protection Act* necessarily leads to the conclusion reached by the majority in the Court of Appeal and Justice Rooke in the Court of Queen's Bench that the Zoocheck application for a civil declaration amounts to an abuse of process. This is particularly so where it appears that the Zoocheck application is the only means by which the City will be held to account for adherence to the law (at paras 157-168).

Justice Fraser ends her dissent by holding that Zoocheck should be granted public interest standing in this case (I discuss the general test for public interest standing in my previous ABlawg comment on this case noted in the first paragraph above). In doing so, she reinforces some important points on public interest standing. In particular, she notes that public interest standing has strong connections to the rule of law and reminds us that the superior courts have inherent discretion to grant public interest standing to an individual or group to initiate legal proceedings that assert a public right to government in accordance with the law. Public interest standing and abuse of process are closely linked, and a finding on abuse of process cannot be used to deny standing. The two doctrines go hand-in-hand (at paras 139-143).

Justice Fraser's finding here that public interest standing is available in civil proceedings that seek a judicial declaration is not without precedent in Alberta. The Court of Queen's Bench initially applied the public interest standing rule in Alberta with its 1992 *Reese v Alberta (Minister of Forestry, Lands and Wildlife)* (1992), 87 DLR (4th) 1, 123 AR 241 decision to grant standing to an individual and 3 environmental groups who similarly were seeking a declaration on the legality of executive action under governing legislation.

In the context of public interest environmental litigation, the two challenges facing an applicant for public interest standing are typically (1) is there a justiciable issue (if not then standing is not granted) and (2) is there another reasonable and effective way to bring the issue before the courts (if so then standing is not granted). Justice Fraser has no difficulty identifying a number of

justiciable issues in this case (as noted above) and she makes a very noteworthy point in rejecting the City's argument that public interest standing is not available in civil proceedings where the Attorney General may prosecute. In my previous comment I suggested it is a mockery of the law to expect the Attorney General to prosecute the executive in this case. Justice Fraser is not quite as blunt, but she does remark that "[a] reasonable and effective alternative to a proceeding holding the executive branch to account cannot logically be a proceeding which can only occur with the effective consent of the executive branch" (at para 191). Similarly she rejects the argument that petitioning the responsible government official(s) to act is a reasonable alternative: "[A]n effective alternative is not one that can be dismissed out of hand" (at para 193). These statements could and should prove material in future public interest environmental litigation in Alberta.