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Lucy the Elephant v. Edmonton (City)

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Cases Considered:

Reece v. Edmonton (City), 2010 ABQB 538

Lucy is a 34 year old elephant who lives in the Edmonton Valley Zoo. In recent years Lucy has attracted significant media and celebrity attention, as animal welfare activists have campaigned for her transfer to a warmer climate (details on the campaign and Lucy herself are documented here. Activists insist that Lucy is in distress because of her living conditions in the Edmonton zoo. Media celebrities including William Shatner and Bob Barker have called upon the City of Edmonton to allow Lucy to move south. Lucy's plight has attracted the attention of the local media as well (see "Free Lucy the elephant: protesters", CBC News). The Valley Zoo insists Lucy is fine and cannot be safely moved.

In the Fall of 2009, ZooCheck Canada and the People for the Ethical Treatment of Animals (PETA) retained Ontario lawyer Clayton Ruby to advise them on possible legal remedies for Lucy. In February 2010 ZooCheck, PETA, and a local Alberta resident (Tove Reece) filed an Originating Notice in the Alberta Court of Queen's Bench seeking a judicial declaration that the City of Edmonton (as operator of the Valley Zoo) was contravening section 2 of the *Animal Protection Act*, R.S.A. 2000, c. A-41, in its treatment of Lucy at the Valley Zoo. Associate Chief Justice John Rooke heard the ZooCheck application along with the City's motion to strike the proceeding under Rule 129 of the *Alberta Rules of Court*, Alta. Reg. 390/1968. In *Reece v. Edmonton (City)*, 2010 ABQB 538 Justice Rooke grants the City's motion to strike on the basis that the ZooCheck/PETA application is an abuse of process for two reasons: (1) the application does not conform with the legislative path for bringing this issue to the Court; (2) no individual can bring a civil action to enforce criminal law. Justice Rooke also makes some obiter statements on standing which I comment on below.

The legislative framework

Alberta zoos and the animals kept therein are subject to a regulatory licensing scheme governed by both the *Animal Protection Act* and the *Wildlife Act*, R.S.A. 2000, c. W-10. Applicable authorities include officials within the Department of Agriculture and Sustainable Resource Development. Zoos operating in Alberta must have a permit issued by the Minister of Sustainable Resource Development pursuant to section 76 of the *Wildlife Regulation*, Alta Reg. 143/1997. Section 141.1 (1) of the *Wildlife Regulation* states that the holder of zoo permit shall ensure that it complies with the Alberta Zoo Standards - which are guidelines that set minimum standards for zoo operations, public safety and animal care. For example, the standards include provisions that state all animals must be kept in sufficient numbers to meet social and behavioral needs, be protected from injurious heat and cold, and be kept in spaces that simulate the temperature and lighting of their natural habitat. Section 76(2) of the *Wildlife Regulation* deems

the Zoo Standards to be regulations under the legislation. Presumably a zoo permit includes the condition that the zoo complies with the Zoo Standards, such that failure to meet the standards is a contravention of the permit. Sections 12(3) and 86(1) of the *Wildlife Act* make it an offence to contravene a zoo permit.

Section 2 of the *Animal Protection Act* prohibits a person from causing an animal to be in distress. The section reads:

> 2(1) No person shall cause or permit an animal of which the person is the owner or the person in charge to be or continue to be in distress.
>
> (1.1) No person shall cause an animal to be in distress.
>
> (2) This section does not apply if the distress results from an activity carried on in accordance with the regulations or in accordance with reasonable and generally accepted practices of animal care, management, husbandry, hunting, fishing, trapping, pest control or slaughter.

"Animal in distress" is a defined in section 1(2) of the legislation as an animal: (a) deprived of adequate shelter, ventilation, space, food, water or veterinary care or reasonable protection from injurious heat or cold, (b) injured, sick, in pain or suffering, (c) abused or subjected to undue hardship, privation or neglect. It is important to note that section 2 does not prohibit animal abuse if it is in accordance with generally accepted practices. Section 12 makes it an offence to contravene section 2.

Abuse of Process

Justice Rooke never decides on the merits of the applicant's claim that the City is contravening section 2 of the *Animal Protection Act* by causing Lucy to be in distress by holding her at the Edmonton zoo. He doesn't have to decide on the merits because he finds the application for a judicial declaration on whether the City has contravened section 2 of the *Animal Protection Act* to be a colourable attempt to enforce the criminal law with a civil action. Applying the law to this case, Justice Rooke concludes the application is an abuse of process (at paras. 29 – 46). Justice Rooke also appears to accept the City's argument that because there is a comprehensive regulatory framework governing zoos in Alberta any legal remedy should be pursued within the confines of the legislation rather than the general jurisdiction of the Court.

All of this does beg the question as to why the applicants decided to pursue a judicial declaration here. It is a somewhat odd pleading since it isn't clear what purpose a declaration would serve if the application had been successful – other than to pressure the City to act. Why not seek a *mandamus* order compelling the City to move Lucy? Or a *mandamus* order requiring an investigation into whether the Edmonton zoo is complying with the Zoo standards? Why not commence a private prosecution by laying charges against the City for contravening section 2 of the *Animal Protection Act* or section 12 of the *Wildlife Act*? As an aside, Justice Rooke characterizes the applicants as attempting to act as private prosecutors (at para. 42) but I'm not sure how he gets here given it is clear this is not a private prosecution.

I suspect the reason why the applicants chose to seek a declaration rather than any of the foregoing is because the regulatory framework offers no realistic prospect of legal remedy for Lucy. There is no statutory duty on the City to move Lucy. Those persons with authority to

commence an investigation under the *Animal Protection Act* or the *Wildlife Act* are unwilling to do so. And the Court will likely characterize such decisions not to act as an exercise of policy discretion which is non-justiciable. It is also common knowledge that the Attorney General of Alberta will intervene in a private prosecution and stay the process, so going to the trouble of laying criminal charges as a private prosecutor is often futile.

Standing

And then there is Lucy, the elephant who suffers from well-documented health problems who is told by Justice Rooke in the introduction to his judgment that she isn't getting her day in court (at para. 1):

> This Decision relates to 'Lucy', the 34 year old Asian elephant resident at the Edmonton Valley Zoo. While the litigation before the Court makes allegations about the health and care of Lucy, this Decision does not address those allegations. Rather, it addresses the health of the legal system to properly consider such allegations.

Even if the applicants had survived the abuse of process allegation, Justice Rooke confirms they would not have met the test for standing. At common law, a claimant must demonstrate an interference with a private right in order to seek a judicial remedy. None of Reece, ZooCheck, or PETA can demonstrate this.

In its 1986 decision in *Finlay v. Canada*, [1986] 2 S.C.R. 607, the Supreme Court of Canada created an exception to the common law standing test that enables a person who cannot demonstrate interference with a private right to nonetheless obtain standing to litigate where: (1) there is a justiciable issue to be tried; (2) the person has a genuine interest in the matter; (3) there is no other reasonable and effective manner to bring the issue to the court. Justice Rooke comments in *obiter* that the applicants would not qualify for this exception here on the basis they don't meet criterion (3); government authorities could investigate and prosecute the City under the applicable statutes. This is of course where the parties fundamentally differ, since ZooCheck and PETA sought a declaration precisely because they have formed the opinion there is no statutory recourse.

Justice Rooke's *obiter* comments on standing conform with a line of authority decided subsequent to *Finlay* that limits the public interest exception on standing to cases where the applicant seeks to challenge administrative action (see e.g., *Society for the Preservation of the Englishman River Estuary v. Nanaimo* (1999), 28 CELR (NS) 253 (BCSC)). There is a competing line of authority, however, that states public interest standing should not be limited as such. In *Sierra Club of Canada v. Canada (Minister of Finance*, [1999] 2 FC 211 Justice Evans states "[t]he rule of law should be concerned to ensure that the legality of governmental inaction is as subject to challenge in the courts as are allegations of over-reaching by public officials" (at para. 73). The lower courts are confused over the extent of the public interest exception on standing, and it is time for the Supreme Court of Canada to revisit the matter. We all have an interest in ensuring the legality of the exercise of public power – be it a public decision to act or not act.

Of course, all of this public interest standing business would be unnecessary if the law recognized the ability of Lucy herself to challenge the City of Edmonton in this case. If this sounds far-fetched to you, why is that? We allow corporations to initial legal process, why not an elephant? Some readers may be familiar with Christopher Stone's 1972 article "Should Trees

Have Standing? Toward Legal Rights for Natural Objects" (1972) 45 S. Cal. L. Rev. 450. Stone argues for the ability of non-humans to assert legal rights, and he suggests that groups such as ZooCheck or PETA could act as guardians in the legal system for non-human claimants such as Lucy.

Conclusion

I don't expect Canadian courts to recognize legal rights in non-human entities any time soon. But at the same time it is not clear to me why Canadian courts are so reluctant to embrace public interest litigants in environmental matters. It is a mockery of the law to refuse public interest litigants on the archaic expectation that the Attorney General will bring an action in the public interest to compel government officials to act. When one considers the hurdles facing public interest litigants that attempt to use legal process to challenge government action or inaction on environmental matters – standing, justiciability, abuse of process, and cost awards – it seems that public officials are above the law.