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The Elephant in the Courtroom Redux

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Case Commented On: *Zoocheck Canada Inc v Alberta (Minister of Agriculture and Forestry)*, 2019 ABCA 208 (CanLII)

Lucy the Elephant lives at the Edmonton Valley Zoo and, for more than a decade, her advocates have been calling on government officials to facilitate her transfer to a warmer climate. She is a long-time resident at the Edmonton Zoo (since 1977), and zoo officials responsible for her well-being assert that Lucy is well-cared for at the zoo and that it is not in her best interest to be moved. Her advocates dispute this position, and there is a dedicated campaign for an independent scientific assessment of Lucy that would produce an expert veterinarian opinion on whether she can and/or should be moved. In addition to this battle of medical experts, Lucy's advocates have appeared before Alberta courts seeking to use the force of law to get the Edmonton Zoo to acquiesce on the move of Lucy. They have been unsuccessful at each turn. The first set of proceedings was almost 10 years ago, and I commented on them in Lucy the Elephant v. Edmonton (City) and in The Elephant in the Courtroom. The focus of this comment is the more recent proceedings and, in particular, the Court of Appeal's ruling that Lucy's advocates do not have standing to engage in legal proceedings to challenge the renewal of a permit for the Edmonton Zoo.

There is an uncanny similarity between the earlier judicial proceedings in 2010/2011 and these more recent proceedings in 2017/2019, an observation that Professor Peter Sankoff also makes in his podcast discussion of this case. Zoocheck Canada advocated on behalf of Lucy in both sets of proceedings (along with several other applicants including Tove Reece, but for the purposes of this comment I will only refer to Zoocheck as the applicant). In both proceedings, the initial application was heard in chambers by Associate Chief Justice J.D. Rooke, who dismissed it in 2010 and again in 2017 on abuse of process and standing grounds. On appeal in both cases, Zoocheck was unsuccessful but managed to convince one member of the appellate bench to dissent on the standing determination (Chief Justice Catherine Fraser in 2011 and Mr. Justice Brian O'Ferrall in 2019). Accordingly, the dispute over Lucy's well-being has never got past the preliminary stage in Alberta courts.

In 2010 Zoocheck sought a judicial declaration that the City of Edmonton (as operator of the Edmonton Zoo) was contravening section 2 of the *Animal Protection Act*, RSA 2000 c A-41, in its treatment of Lucy. Section 2 of the *Animal Protection Act* prohibits a person from causing an animal to be in distress. In *Reece v Edmonton (City)*, 2010 ABQB 538 (CanLII) Justice Rooke granted the City's motion to strike the Zoocheck application as an abuse of process. The problem for Zoocheck in these earlier proceedings is that the only legal proceeding contemplated in the *Animal Protection Act* is a regulatory prosecution which is commenced on the investigation of a peace officer. Accordingly, Justice Rooke characterized the Zoocheck application for a declaration as a colourable attempt to enforce the criminal law with a civil action (for my comments see Lucy the Elephant v. Edmonton (City)). In *Reece v Edmonton (City)*, 2011 ABCA

238 (CanLII), the Court of Appeal upheld this decision (for my comments see The Elephant in the Courtroom). In obiter, both courts in 2010/2011 questioned the justiciability of what Zoocheck was trying to litigate and cast significant doubt on whether the law could provide a remedy to an elephant held in captivity.

In its 2017 application, Zoocheck sought judicial review of the decision by the Minister of Environment and Parks to renew the permit held by the Edmonton Zoo under section 13 of the *Wildlife Act*, RSA 2000, c W-10 and sections 76 to 79 of the *Wildlife Regulation*, Alta Reg 143/1997. Unlike the earlier proceedings, this application concerns the exercise of a statutory power and is comfortably within the scope of judicial review. Nonetheless, Justice Rooke also dismissed this application as an abuse of process and on the ground that Zoocheck did not have standing to commence the proceedings. The Court of Appeal unanimously reversed Justice Rooke on the abuse of process ground (at paras 47 – 49 and 63 – 68), but the majority of the court (the Majority Decision) affirmed his finding that Zoocheck does not have standing to seek judicial review of the zoo permit renewal. Justice O'Ferrall dissents on this point about standing (the Dissent).

What the standing determination means in lay terms is that Zoocheck does not have a sufficient interest in the matter to initiate legal proceedings. The policy reason for having a standing requirement generally is that judicial resources are scarce and the adversarial system is best served by litigants who are directly affected by the matter in question and thus are motivated to make the best arguments. In this case, since the Minister's decision to renew the Edmonton Zoo permit is of no direct consequence to Zoocheck, the organization has no real stake in the outcome and should not be able to consume judicial resources to challenge the legality of the permit. Busybodies are not welcome in the courts. This would be the end of the matter, but for the doctrine of public interest standing.

In a series of decisions in the 1970s and 1980s, the Supreme Court of Canada developed a public interest exception to this traditional standing rule. The modern restatement of the test for public interest standing is in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (CanLII) (for some commentary on ABlawg see here). This exception enables a person, who would otherwise not have standing because their rights or interests are too remote or otherwise not directly affected by the decision of an official exercising legislative powers, to nonetheless be granted public interest standing to seek judicial review of the decision. The Supreme Court has emphasized the importance of granting public interest standing in appropriate cases to ensure that the exercise of state power conforms to statutory authority and that there is a practical and effective way to assess the legality of that power. The test for public interest standing involves a holistic consideration of three factors: (1) whether there is a serious justiciable issue raised by the claimant; (2) whether the claimant has a real stake or genuine interest in the matter; and (3) whether the claim represents a reasonable and effective way to bring the matter before the courts. While public interest standing does alleviate the limitations inherent in the traditional standing doctrine, it still remains an exception to the rule and is thus available only in the discretion of the court (*Downtown Eastside Sex Workers* at paras 26 - 38).

The Majority Decision affirms the ruling by Justice Rooke that Zoocheck failed to meet each of these factors in the public interest standing test.

Serious and Justiciable Issue

A key interpretation by the Majority Decision is that the serious and justiciable issue must be assessed in relation to exactly the question(s) raised by Zoocheck (at para 25). This creates a problem for Zoocheck because the majority goes on to find that the questions which Zoocheck seeks to place before the court are in relation to whether the Edmonton Zoo is compliant with animal protection legislation and the majority finds those questions are not within the scope of relevant considerations in a zoo permit renewal process under the *Wildlife Act* (Majority Decision at paras 22 – 37). The Majority Decision explains at some length how sections 76 to 79 of the *Wildlife Regulation* incorporate certain zoo standards into the permit renewal process for the Edmonton Zoo, but not all standards and in particular not standards in relation to animal care. In a theme familiar to that conveyed in all of the decisions made by Alberta courts in this legal saga, the Majority Decision identifies the regulatory scheme set out in the *Animal Protection Act* as the only legal mechanism which is available in Alberta to scrutinize whether the Edmonton Zoo is compliant with animal care rules:

> As the chambers judge acknowledged, it may seem "counterintuitive" that zoo licensing provisions are not intended to function as animal protection legislation, but this is because the legislature has allocated responsibility for animals between the *Animal Protection Act* and the *Wildlife Act*. The *Animal Protection Act*, as would be expected from its name, focuses on ensuring that animals are protected. It contains provisions that prohibit anyone from causing distress to an animal (s 2), impose duties on person who own or are in charge of animals (s 2.1), provide powers to peace officers where animals are in distress (ss 3–5, 10), deal with humane societies (s 9) and provide that anyone who contravenes the Act or regulations is guilty of an offence and liable to a fine of not more than $20,000 and an order restraining them from having custody of an animal for a specified period of time (s 12).
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> By contrast, the *Wildlife Act* is largely focused on regulating wildlife, including hunting and related activities, the transportation, possession, importation and exportation of wildlife, and related offences. Sections 76 and 78 of the *Wildlife Regulation*, which deal with zoo permits, deal primarily with the logistical considerations associated with obtaining or renewing a permit. (at paras 27, 28)

In summary, the majority finds the issues raised by Zoocheck concerning the well-being of Lucy at the Edmonton Zoo are not serious and justiciable issues in relation to the target of this judicial review application, which is the Minister's renewal of the Edmonton Zoo permit.

In reading this portion of the Majority Decision (at paras 22 – 37), I was struck by how deeply the majority dives into this factor of the public interest test. The majority's analysis really highlights the messy patchwork of legislative drafting in the *Wildlife Regulation* concerning exactly what legal rules govern the operation of zoos in Alberta. The majority also comes across as very dismissive of what otherwise seems to be an arguable point: that in a zoo permit renewal

it is relevant to consider whether the applicant zoo is compliant with animal care legislation and protocols. Indeed, it does seem very 'counterintuitive' – as the majority itself explains – to hold otherwise. The Dissent makes this point by applying principles of statutory interpretation to demonstrate it is at least arguable that section 76 of the *Wildlife Regulation* incorporates considerations of whether the zoo is compliant with animal care legislation and protocols (Dissent at paras 76 – 88). This divide between the Majority Decision and the Dissent, on its own, suggests there is a justiciable issue here. Perhaps most troubling then with this aspect of the judgment is that the Majority Decision seems to be deciding a substantive question at what should be a preliminary stage in the proceedings. In other words, rather than simply asking whether Zoocheck is raising a serious and justiciable question about the interpretation of the *Wildlife Regulation*, the majority seems to have decided that Zoocheck should not have public interest standing because it will inevitably lose the judicial review application.

A Genuine Interest in the Matter

The analysis provided by the Majority Decision under the first factor really decides this factor as well, and the majority provides only a couple paragraphs here (at paras 38, 39). Zoocheck does not have a genuine interest in whether the Edmonton Zoo permit is renewed, because its concern with the zoo permit is collateral to its true concern which is the well-being of Lucy and having her moved out of Edmonton. The Dissent takes issue with how the Majority Decision separates these two issues to marginalize and discount what is otherwise a well-established interest of Zoocheck in this matter (at paras 89-93).

A Reasonable and Effective Way to Bring the Matter Before the Courts

On this factor, the Majority Decision more or less adopts what the Court of Appeal ruled back in 2011 which is that the regulatory process under the *Animal Protection Act* is a more effective way of bringing the issue of Lucy's well-being before the court. The majority recites the same two paragraphs from *Reece v Edmonton (City)*, 2011 ABCA 238 (CanLII) which I also highlighted in The Elephant in the Courtroom, and those two paragraphs are as follows:

> There are other more appropriate remedies available to the appellants. The Court was advised that after the decision of the chambers judge a further complaint was filed with the Edmonton Humane Society. A further investigation was conducted, following which it was decided not to lay any charges under the Animal Protection Act, although the Society indicated that its investigation "will remain open in order to follow up".
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> The appellants argue that there is no other effective alternative way to bring this issue before the courts. Stating the issue in that way presupposes that this is a suitable issue for the courts. 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. As mentioned, there are other public officials who have that responsibility, and other appropriate legal procedures to possibly engage if they fail to discharge their duties. 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. There are established procedures for judicial review, which have many built in controls that reflect the constitutional relationship between the executive branch and the judicial branch. As the Court stated in Consolidated Maybrun Mines at para. 25, "... the rule of law does not imply that the procedures for achieving [executive review] can be disregarded, nor does it necessarily empower an individual to apply to whatever forum he or she wishes in order to enforce compliance with it." (cited at para 40 in the Majority Decision)

This is really the essence of both the decision by Justice Rooke and the Majority Decision to deny public interest standing to Zoocheck: to the extent there is public concern for the well-being of Lucy, then it is a matter for statutory officials under the *Animal Protection Act* and/or the Attorney General to address and bring to the court's attention if necessary. The overall message to Zoocheck here is once again that the only course of legal action concerning Lucy's well-being is to complain under the *Animal Protection Act* and hope for an investigation that will lead to some form of order, whether administrative or on conviction by regulatory prosecution, which directs the Edmonton Zoo allow for an independent scientific review and/or acquiesce in Lucy's transport to a warmer climate. It seems this path has already been travelled by Zoocheck, and it is really a hopeless suggestion by the Majority Decision given how unlikely it is that the Edmonton Zoo will ever face a prosecution on these allegations regarding Lucy (as pointed out by the Dissent at paras 98, 99). Moreover, the legislated penalty for an offence under the *Animal Protection Act* is merely a fine, and only a $20,000 maximum at that.

I have two additional problems with how the majority deals with this factor. First, as I stated back in The Elephant in the Courtroom, the court overstates the consequences of the Zoocheck application and the Majority Decision essentially commits a strawman fallacy because Zoocheck is not asking the court to operate the zoo, and this application does not ask the court to review every decision of government. The second problem with relying on this 2011 analysis, is that it is arguably no longer good law after the Supreme Court's 2012 decision in *Downtown Eastside Sex Workers* which revisited this third factor and, in particular, emphasized that the availability of another means by which to bring a matter before the court does not necessary negate public interest standing (*Downtown Eastside Sex Workers* at paras 44 – 51). Moreover, the Majority Decision seems to give insufficient regard to the role of public interest standing in ensuring that there is a practical and effective way to assess the legality of the exercise of statutory power (*Downtown Eastside Sex Workers* at paras 26 - 38)

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