November 22, 2019

Public Interest Standing and Wild Horses in Alberta

By: Shaun Fluker

Case commented on: *Alberta's Free Roaming Horses Society v Alberta*, 2019 ABQB 714 (CanLII)

This decision grants public interest standing to Alberta's Free Roaming Horses Society and one individual (the 'Applicants') seeking declarations and mandamus in relation to a 2005 ministerial designation of public lands under section 9 of the *Stray Animals Act*, RSA 2000, c S-20. The Applicants assert that the Minister responsible for the administration of public lands under the Act failed to comply with a statutory requirement to form an opinion in relation to designating lands upon which persons may be licensed to capture and dispose of wild horses. They accordingly sought a judicial declaration that the 2005 land designation is void and an order requiring the Minister to form the opinion and publish it prior to making any future land designations under section 9 of the Act. The Province responded that the Applicants do not have standing to commence these proceedings and that the proceedings should be struck as an abuse of process. The Province also sought summary dismissal on the basis that the Applicants' claim is barred by a limitation period. In this decision, Mr. Justice B.A. Millar ruled that the Applicants have public interest standing, but he summarily dismissed the application because the proceedings relate to a decision made in 2005 which is far beyond the 6 month time limitation for seeking judicial review under section 3.15(2) of the *Alberta Rules of Court*, Alta Reg 124/2010.

Public policy governing the management of wild horses in Alberta has a history of controversy. Alberta considers the horses to be descendants from escaped domestic populations dating back to the early 20th century, and the Province believes it is necessary to control the number of wild horses on public lands in order to protect the ecology of rangelands. See here for a policy statement and some current information on the horse population and capture areas. Alberta thus allows, and perhaps encourages, the capture of wild horses for transport or destruction. The provincial characterization of wild horses as 'feral' is why these populations are governed by the *Stray Animals Act*. Some advocates, including Zoocheck for example, assert that Alberta's policy lacks a scientific basis and would like the province to protect the horses rather than license their eradication. Others, such as the Wild Horses of Alberta Society, appear to have a less confrontational stance in relation to the provincial policy, but would nonetheless prefer to see the conservation of wild horses in Alberta.

In a series of decisions between 1975 and 1986 the Supreme Court of Canada developed an exception to the traditional rule that only the Attorney General has standing to litigate in public interest matters, and more recently the Court revisited and affirmed this exception in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2

SCR 524, 2012 SCC 45 (CanLII). Commentators generally viewed this reformulation as giving heightened importance to contextual factors such as the capacity of the claimant to litigate in terms of their resources and expertise, and they predicted *Downtown Eastside Sex Workers* would make it easier for well-organized and dedicated public interest NGOs to obtain public interest standing to challenge the exercise of state power and enhance access to justice for marginalized voices.

Whether or not public interest standing is now easier to obtain post-*Downtown Eastside Sex Workers* is unclear. For example, public interest standing remains elusive for an NGO which seems to have the capacity and resources to litigate on the legality of confinement for Lucy the Elephant kept in the Edmonton Zoo. A series of decisions made by Alberta courts have ruled it would be preferable for the Attorney General to bring the matter of Lucy's confinement before the courts, and these decisions have also ruled the proceedings initiated by the NGO constitute an abuse of process. I summarize these decisions in The Elephant in the Courtroom Redux. Notably, in this case before Justice Millar Alberta also argued the application should be dismissed as an abuse of process. In my view, there is a troublesome conflation of abuse of process and public interest standing developing in the Alberta law. I was glad to see Justice Millar rejected Alberta's argument that standing should be denied because these proceedings constitute an abuse of process (at para 21).

The three factors relevant in a consideration of whether to grant public interest standing are: (1) is there a serious and justiciable issue; (2) does the person seeking standing have a genuine interest in the matter; (3) would the claim be a reasonable and effective manner in which to bring the issue before the courts (*Downtown Eastside Sexworkers* at para 37). In this case, the Applicants met the test for public interest standing. Justice Millar observes (1) the Applicants have a genuine interest in the plight of wild horses (at para 19), (2) the question of whether the Minister complied with the requirements in the *Stray Animals Act* is serious justiciable issue (at para 20), and (3) there does not appear to be another way for the matter to be brought before the court since the horses cannot speak for themselves and there was no evidence of current license holders (at para 19).

I note with some curiosity that Justice Millar applies factor (3) in the manner in which it was articulated (as the applicant having to establish a negative) prior to *Downtown Eastside Sex Workers*. The correct articulation of factor (3) after *Downtown Eastside Sex Workers* is, as I have set out above, whether this is a reasonable and effective manner in which to bring the issue before the courts. It is no longer necessary for a public interest applicant to establish there are no other parties directly affected by the decision or law in question.

With standing granted, the Applicants were essentially seeking judicial review to impose some transparency into the management of wild horses on public lands in Alberta. The governing provision is section 9 of the *Stray Animals Act*, and the relevant subsections here are as follows:

> 9(1) The Minister responsible for the administration of the *Public Lands Act* may designate public land for which a licence under this section may be issued if, in the opinion of the Minister, it is necessary to protect, maintain or conserve the range,

> forage, soil, reforestation, wildlife habitat or other resource or for the safety of the public or of horses or as provided for in the regulations.
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> (2) The Minister responsible for the administration of the *Public Lands Act* may, in accordance with the regulations, issue licences that authorize the licence holder to capture horses on public land designated under subsection (1) and to confine, transport and dispose of those horses.
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> (3) The Minister may
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> (a) prescribe how many horses may be captured pursuant to the licence, and
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> (b) include any other terms and conditions in the licence that the Minister considers appropriate.

These provisions give the Minister significant discretionary power over the management of wild horses, a common and familiar theme in the management of Alberta's public lands. Discretion isn't necessarily a bad thing, but unfortunately in Alberta discretionary power in executive officials is often associated with a disturbing lack of transparency in the administration and management of public resources.

The key point in this case was that the 2005 ministerial land designation was not based on any extant opinion (at para 9), and thus the argument by the Applicants that the Minister did not comply with a statutory pre-requisite in section 9(1). In response to this application, the Minister did include briefing notes regarding the rationale for the land designation in the Record of Proceedings (at para 13). On a related practice note for public interest litigants, given the sparse content of the Record filed by the Minister, Justice Millar allowed the Applicants to supplement the Record with their own affidavit (at paras 22 – 26).

Justice Millar observes that this application was filed 13 years after the land designation (at para 31), and after considering arguments from the parties on the application of the 6 month time limitation in the *Rules of Court*, Justice Millar summarily dismisses this application because it was made outside of the time limitation (at para 57). Justice Millar goes on *in obiter* to interpret section 9(1) as not requiring the Minister to form a written opinion in relation to a land designation and that it is reasonable for the Minister to form an opinion based on based on information and briefings provided by others (at paras 58 – 61).

This post may be cited as: Shaun Fluker, "Public Interesting Standing and Wild Horses in Alberta" (November 22, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/11/Blog_SF_FreeRoamingHorses.pdf