# DON'T THINK ABOUT ELEPHANTS: REECE V. CITY OF EDMONTON[1]

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*- Okay, here's me planting an idea in your head. I say to you, "Don't think about elephants." What are you thinking about?*

*- Elephants.*[2]

## INTRODUCTION

Lucy is a 36-year-old female Asian elephant who lives at the Edmonton Valley Zoo,[3] owned by the City of Edmonton. Once, when she was a baby, she was free. She was born in Sri Lanka and captured there in 1975 as an orphan less than a year old.[4] She was acquired by the Edmonton Valley Zoo in 1977, and she has been confined there ever since. She is the only elephant in the zoo, and she is the northernmost elephant housed alone in North America.[5]

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[1] *Reece et al v Edmonton (City)*, 2011 ABCA 238, affirming *Reece v Edmonton (City)*, 2010 ABQB 538 [*Reece* (QB)], leave to appeal to SCC refused, 34454 (April 26, 2012). Our thanks to Sheila Wildeman for proposing the title of this comment.

[2] This dialogue is from *Inception* (Warner Bros, 2010), a science-fiction film about spies who enter their targets' subconscious minds to extract information from them. The example – sometimes "don't think of a pink elephant" – is often used both by cognitive scientists and in popular discourse to illustrate that the paradox of trying to suppress thought; the inevitable result of hearing the instruction is to disobey it, since it cannot be processed without elephants entering the addressee's mind.

[3] "Lucy News," City of Edmonton web site, online: http://www.edmonton.ca/attractions_recreation/attractions/edmonton_valley_zoo/lucy-news.aspx (accessed November 14, 2011).

[4] Debi Zimmerman, "One Veterinarian's Search for the Truth in the 'Lucy the Elephant' Debate" (30 June 2009) at 4 (report online at http://www.savelucy.ca/expert-opinions).

[5] *Ibid.*

Concerned citizens, animal organizations and public figures have been advocating for years for Lucy to be moved from the zoo to an elephant sanctuary, where she could live with more space, in a warmer climate, and in the company of other elephants.[6] Advocates for the move argue that Lucy suffers from debilitating physical and emotional deficits caused by the basic unsuitability of life in a Canadian zoo for a very large, naturally far-ranging, and highly social animal. Her problems include respiratory disease, chronic foot problems, obesity from lack of exercise, and social isolation.[7] The zoo's position is that Lucy is well cared for and that moving her would be dangerous because of her respiratory condition.[8]

In 2010 a local animal activist, Tove Reece, together with Zoocheck and People for the Ethical Treatment of Animals, turned to the courts to try to bring about a change in Lucy's situation. Reece filed an application with the Court of Queen's Bench seeking a declaration that the City was in violation of section 2(1) of the *Animal Protection Act*, which prohibits causing or permitting an animal to be in distress.[9]

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[6] As discussed in the reasons for judgment of the Alberta Court of Appeal, in 2007 Zoocheck Canada (Zoocheck), an animal protection organization that focuses on the well-being of wild animals, wrote to the Edmonton Humane Society objecting to the conditions under which Lucy was kept, prompting an investigation by the Humane Society. *Reece, supra* note 1 at para 5. In 2009, 36 Canadian authors signed a letter to the City advocating for Lucy to be moved to an elephant sanctuary. "Canadian authors call on Edmonton to move zoo elephant," CBC News (22 May 2009), online: http://www.cbc.ca/news/canada/edmonton/story/2009/05/22/edmonton-lucy-elephant-authors.html. The text of the letter is available at http://www.zoocheck.com/campaigns_elephant_Lucyauthorsletter.html. Bob Barker, former host of *The Price is Right* and a prominent advocate for animal welfare, offered the City $100,000 if it would permit outside veterinary experts to examine Lucy. "Is price right? Bob Barker offers $100K for Edmonton elephant's checkup" The Star (22 March 2011), online: http://www.thestar.com/news/canada/article/958780--is-price-right-bob-barker-offers-100k-for-edmonton-elephant-s-checkup?bn=1.

[7] See the medical reports on Lucy (obtained from the City through a Freedom of Information request) as well as expert reports and other materials posted on Zoocheck's web site at http://www.zoocheck.com/campaigns_elephant_res.html. See also the discussion of the evidentiary record in Fraser CJA's dissenting reasons in *Reece, supra* note 1 at paras 103-107.

[8] "Investigation Confirms Zoo Complies with Legislation in Caring for Lucy" (19 January 2011), City of Edmonton, online: http://www.edmonton.ca/investigation-confirms-zoo-com.aspx.

[9] RSA 2000 c A-41. Under the Act, an animal is defined as being in distress if it is deprived of adequate shelter, ventilation, space, food, water or veterinary care or reasonable protection from injurious heat or cold; if it is injured, sick, in pain or suffering; or abused or subjected to undue hardship, privation or neglect (s 1(2)). The prohibition on causing distress (or permitting it to be caused) does not apply if 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" (s 2(2)). Section 2.1 provides that "a person who owns or is in charge of an animal" has an affirmative duty to care for it by ensuring that it has adequate food or water, providing adequate care when the animal is wounded or ill, providing reasonable protection from heat and cold, and providing the animal with adequate shelter, ventilation and space. As noted in the dissenting reasons in *Reece* (*supra* note 1 at para 73 no 42), it is not clear that the generally accepted practices exemption in s. 2(2) applies to the duties in s 2.1.

Reece's originating notice was struck out as an abuse of process and on the basis that she and the other claimants lacked standing.[10] On appeal to the Alberta Court of Appeal, this decision was upheld. The determinative issue at both the lower court and the Court of Appeal was abuse of process: as the chambers judge wrote, the proceedings were barred by the rule that "no private individual can bring an action to enforce the criminal law."[11] Adopting this reasoning, Slatter J.A., writing for the majority, held that the proceeding fell into a recognized category of abuse of process, "where proceedings are used to enforce or engage punitive penal statutes."[12] The question of standing was treated as subsidiary to this issue.

The Supreme Court of Canada dismissed Reece's application for leave to appeal.

**Thinking and Not Thinking About Elephants**

The case raised questions about how procedural doctrines like abuse of process and standing limit, and are limited by, the principle of access to justice. These questions are of special importance in cases where unorthodox legal theories are advanced – and where, as in this case, justice is sought on behalf of one of a class of beings against whom the courthouse door has traditionally been barred.

The *Reece* decision is noteworthy for a lengthy (almost five times as long as the majority reasons) and wide-ranging dissent by Fraser C.J.A. The dissent engages in remarkable depth with questions including the relationship between human beings and animals, the debate over the existence of "animal rights," and the nature and effectiveness of legal provisions for the protection of animals. These matters are gradually gaining more prominence in both scholarly and public debate, but to see them addressed at all in an appellate court decision is surprising, and that they are given such thorough and sincere consideration is little short of astonishing. The only rival worldwide to Fraser C.J.A.'s dissent for engaging at length with the debate and scholarship around animal rights is the decision of the Supreme Court of Israel in its 2003 judgment in *Noach v The Attorney General.*[13]

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[10] A third basis for the City's motion, whether Reece's action should have been commenced by filing a statement of claim rather than an originating notice, was discussed by both the Court of Queen's Bench and the Court of Appeal but did not have a significant role in either judgment. Fraser C.J.A., in dissent, would have found that the proper vehicle for the claim was by way of statement of claim, because deciding the case on the merits involved disputed facts, and would have given the appellants leave to amend their pleadings (Reece, *supra* note 1 at para 198).

[11] *Reece* (QB), *supra* note 1 at para 6.

[12] *Reece*, *supra* note 1 at para 20.

[13] HCJ 9232/01.

The disagreement between the *Reece* judgments boils down to whether there is any place for the consideration of such matters in this case, or (implicitly) in the legal arena at all. For Fraser C.J.A., the case is about the way an elephant is allegedly being treated. For the majority, it requires nothing more complicated than the near-mechanical application of a categorical rule of civil procedure. According to the majority, neither animals generally nor this elephant particularly is relevant to this exercise; the appeal "does not deal with animal rights or the propriety of Lucy's care."[14] In short, the majority reasons manifest a sustained and strenuous – not to mention unprecedentedly successful – effort not to think about elephants.

**Reasons for Judgment (Slatter J.A.)**

Slatter J.A. describes the case in his opening paragraph as being "about the proper role of the courts in supervising day-to-day governmental operations."[15] The set-up is reminiscent of the classic judgments of Lord Denning; as soon as the matter has been crystallized in this way it is easy to predict what the outcome will be.[16]

As it turns out, however, the majority judgment does not focus primarily on the role of the courts in overseeing the conduct of government officials. The crux of the reasoning is that the proceedings are an abuse of process because they involve an attempt by a private litigant in a civil proceeding to give effect to a penal provision. The cases cited by Slatter J.A. in which courts have refused relief of this nature all involve defendants who are private entities rather than public officials or bodies,[17] while in *Reece*, by contrast, it is the City of Edmonton, a governmental body, which is alleged to be violating Alberta laws enacted to protect the welfare of animals. A principle that the dissent highlights as critical – the ability of citizens to seek judicial review of unlawful government action – recedes from view in Slatter J.A.'s reasons, based as they are on a rationale mainly drawn from case law where judicial evaluation of the government's compliance with the law is not at issue.

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[14] *Ibid* at para 3.

[15] *Ibid* at para 1.

[16] For instance, it is predictable from opening line in *Miller v Jackson* [1977] QB 966 CA (Eng) at 976, "In summertime village cricket is the delight of everyone," that a nuisance injunction against the village cricketers is about to be struck down.

[17] *Ed DeWolfe Trucking Ltd v Shore Disposal Ltd* (1976), 16 NSR (2d) 538 (NSSCAD) [*Ed DeWolfe Trucking*], discussed in *ibid* at 26; *Manitoba Naturalists Society Inc v Ducks Unlimited Canada* (1991), 79 Man R (2d), 86 DLR (4th) 709 (QB), *Rabbitt v Craigmont Mines Ltd* (1963), 42 WWR 157 (BCSC) and *Mid West Television Ltd v SED Systems Inc* (1981), 9 Sask R 199, [1981 3 WWR 560 (QB), discussed in *ibid* at para 28. These cases were also relied on by the Court of Queen's Bench (see discussion in *Reece* (QB), *supra* note 1 at paras 36-40).

**1. Civil Proceedings to Enforce Criminal Law**

The majority's central objection to the appellants' action is not so much that it would subject government functions to judicial scrutiny as that it seeks to usurp the government's responsibility to enforce Alberta's animal protection laws. The declaration sought by the appellants would undermine "the jurisdiction of the criminal courts[18] and "the authority of the Attorney General in the enforcement of the law."[19]

Abuse of process is a concept perhaps most familiar in connection with attempts to re-litigate already settled issues. But this is merely a subcategory under an umbrella doctrine barring any proceeding that amounts to a misuse of the judicial system, or that "in some other way bring[s] the administration of justice into disrepute."[20] Slatter J.A. emphasizes that the residual power to strike pleadings for abuse of process is flexible and cannot be circumscribed by the particular categories of precedent like re-litigation of issues; "there is no universal test or statement of law that encompasses all of the examples"[21] and "it is...not appropriate to take any judicial statement of the ambit of the doctrine of abuse of process, and apply it mechanically to different factual settings and issues."[22]

The use of civil proceedings to enforce penal statutes is identified as a recognized category of abuse of process.[23] Slatter J.A. holds that it is improper for a litigant to attempt such proceedings unless he or she has some private interest in addition to the general public interest in enforcement of the penal law.[24] Foremost among the authorities he cites for this proposition is the English case *Gouriet v Union of Postal Workers*.[25] *Gouriet*, while it did not (like *Reece*) involve an attack on allegedly unlawful government conduct, addressed another issue that is also central to *Reece*: the scope of the discretion of government officials in making decisions about law enforcement.

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[18] *Reece, supra* note 1 at para 30.

[19] *Ibid* at para 31.

[20] *Canam Enterprises Inc v Coles* (2000), 51 OR (3d) 481 (CA) [*Canam*] at para 55, Goudge J.A., dissenting, cited in *Reece, ibid* at para 17.

[21] *Ibid* at para 16.

[22] *Ibid* at para 17.

[23] *Ibid* at para 20.

[24] *Ibid* at para 23.

[25] [1978] AC 435 HL (Eng) [*Gouriet*].

## 2. Abuse of Process, *Gouriet*, and Standing

*Gouriet* is a tale of vintage 1970s politics (and also of vintage communications technology). The case arose out of an action by the UK postal workers' union in solidarity with the struggle against apartheid in South Africa. In 1977 the union announced that for one week its members would refuse to handle any mail to or from South Africa. One Major John Prendergast Gouriet, founder of a conservative group called the National Association for Freedom,[26] applied to the Attorney General for consent to seek an injunction against the union's boycott by means of a relator action, through which the Attorney General could assert a public right in the civil courts at the proposal of a private citizen.[27] The Attorney General, a member of the Labour government in power at the time, refused consent to Gouriet's action; it had been "hinted," as Lord Diplock observed, that "there could be no reasons that were not partizan for his refusal to authorise the bringing of a relator action."[28] Gouriet then sought declarations that in refusing to pursue the relator proceedings the Attorney General had exercised his discretion wrongfully,[29] and that Gouriet was entitled to proceed against the union.[30]

The House of Lords held that Gouriet's pleadings should be struck because "only the Attorney-General can sue on behalf of the public for the purpose of preventing public wrongs and ... a private individual cannot do so on behalf of the public" unless he personally would sustain an actionable injury as a result of the public wrong.[31] The post office, its employees and the union all enjoyed broad statutory immunity from tort proceedings, so Gouriet could not have asserted that he had a private right to uninterrupted service that would be violated by the boycott.[32]

The term "abuse of process" is not actually used in *Gouriet*. The bar to Gouriet's cause of action is for the most part characterized as a lack of jurisdiction, but Gouriet's *locus standi* to pursue proceedings when the Attorney General had

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[26] It is of interest to note (in connection with a case that may or may not deal with animal rights) that in the 2001 outbreak of foot and mouth disease in the UK Major Gouriet opposed the government's policy of wholesale slaughter of infected animals and those at risk of infection, advocating the use of homeopathic borax as treatment. "Poor information on outbreaks", Letter to the Editor, *The Daily Telegraph* (28 February 2001) 29; Jon Ungoed-Thomas, "Foot and mouth slaughter toll hits a new high", *The Sunday Times* (20 May 2001) 4.

[27] *Gouriet, supra* note 25 at 477.

[28] *Ibid* at 499.

[29] *Ibid* at 473.

[30] *Ibid* at 474.

[31] *Ibid* at 490.

[32] *Ibid* at 475.

refused to do so is also at issue.[33] The test set out in *Gouriet* and applied by the *Reece* majority[34] – a private citizen cannot use civil process to enforce a penal law unless he or she has a private interest in the outcome – underscores how closely the issues of standing and a valid cause of action (or abuse of process) are related in a case of this nature. It duplicates in all essentials the general test for determining whether a private individual has standing to sue in respect of the breach of a public duty, which, as stated by the Supreme Court of Canada in *Finlay v. Canada (Minister of Finance)*[35] requires either breach of a private right of the plaintiff, or that breach of the public duty will result in damage peculiar to the plaintiff and distinct from that suffered by the public in general.[36]

But in Canadian law this general test for standing has been supplemented by the concept of public interest standing – the doctrine that courts have inherent discretion to accord public interest standing to individual plaintiffs – as developed in *Thorson v. Canada (Attorney General)*,[37] *Nova Scotia Board of Censors v. McNeil*[38] and *Minister of Justice v. Borowski*,[39] and subsequently extended to non-constitutional cases in *Finlay*. The *Reece* majority insists that whether a plaintiff has standing (either under the general rule or the public interest rule) and whether the action is an abuse of the court's process are analytically distinct questions.[40] This is a reasonable point, at least in the abstract. But when the test applied for abuse of process is substantially identical to the general test for standing *absent* the case law on public interest standing, it appears that the door opened up in the jurisprudence on public interest standing is being closed by a formalistic application of the doctrine of abuse of process.

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[33] *Ibid* at 515.

[34] One commentator on *Gouriet* notes that the case has been criticised and that in Canada it "should be applied cautiously." Thomas Cromwell, Locus Standi: *A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 184. There is little evidence of this restraint in the *Reece* majority's use of *Gouriet*.

[35] [1986] 2 SCR 607 [*Finlay*].

[36] *Ibid* at paras 18-19.

[37] [1975] 1 SCR 138.

[38] [1976] 2 SCR 265.

[39] [1981] 2 SCR 575. These three cases are often referred to collectively as the "standing trilogy."

[40] For this proposition, Slatter J.A. cites Le Dain J., in *Finlay*; "It is essential to distinguish, I think, between standing, or the right to seek particular relief, and the entitlement to such relief" (*Finlay, supra* note 35 at para 37, cited in *Reece, supra* note 1 at para 25). The invocation of this statement is somewhat disingenuous, since Le Dain J. goes on to say in the same paragraph that such questions as whether the relief sought will lie against a government official are "to be left to the trial court" (*Finlay, ibid*), which is very close to Fraser C.J.A.'s position in dissent that the availability of a declaration as a remedy could not be decided summarily, but required a hearing on the merits (see, e.g., discussion in *Reece, ibid* at paras 155-156, 168).

### 3. Relevance of Factual Allegations and Applicable Standard

The *Reece* appellants provided substantial affidavit and other evidence in support of their position, but Slatter J.A. maintains that none of this is relevant to the appeal. In interlocutory proceedings the facts are not before the court and do not need to be dealt with, even as "context."[41] Here, the majority ignores the familiar notion that if a claim is sought to be struck on a purely legal basis the facts are generally assumed as pleaded, in favour of the plaintiff. That principle is perhaps most closely associated with motions to dismiss pleadings for failure to disclose a cause of action, but it extends to other interlocutory motions. In *Gouriet*, for example, Lord Wilberforce observed that "[t]he present proceedings are interlocutory only, so that Mr. Gouriet should be allowed to go on with his action unless it is manifestly ill-founded in law."[42]

The majority also rejects the importation (again, from the law on motions to strike for failing to disclose a cause of action) of the rule that it must be "plain and obvious" that the plaintiff's action cannot succeed. The majority variously characterizes the issue as "a discretionary finding,"[43] thus insulating the chambers judge's ruling from reversal except in the case of palpable and overriding error, and "a pure question of law,"[44] thus depriving the applicants of the benefit of the rule that cases not be dismissed at the preliminary stage unless it is plain and obvious they could never succeed. As Slatter J.A. observes, it is not clear from the case law whether the "plain and obvious" standard carries over to abuse of process.[45] But it *is* clear – although not acknowledged in the majority reasons – that generally speaking in proceedings to strike out a cause of action at a preliminary stage there is at least a presumption in favour of allowing the plaintiff to proceed to a hearing on the merits, and a significant burden on the defendant to rebut it.[46]

The persuasiveness of the majority's analysis is undermined because it amounts to a justification for peremptory dismissal of the appellants' claims, lacking the full airing of the considerations on both sides that seems to be called for. Slatter

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[41] *Reece*, *supra* note 1 at para 13. The majority's insistence that the factual disagreements about Lucy's treatment are irrelevant and thus not before the court does not prevent it from referring to the factual record when such reference suits its purpose. In para 32 they note that there "is no suggestion on the record that the Attorney general has failed in his duty to enforce the law."

[42] *Supra* note 25 at 472.

[43] *Ibid* at para 10.

[44] *Ibid* at para 15.

[45] *Reece*, *supra* note 1 at para 14.

[46] See, e.g., Lord Wilberforces's statement in *Gouriet* than an action must be "*manifestly* ill-founded" if it is not to be allowed to proceed (*supra* note 42, emphasis added).

J.A. frankly states that abuse of process is a discretionary[47] and context-sensitive[48] doctrine that cannot be captured in a "universal test or statement of law."[49] But he applies this doctrine without undertaking the analysis one might expect to see of the competing principles weighed by courts when they adjudicate litigants' entitlement to advance their claims. As the Ontario Court of Appeal noted in *Canam*, "[m]aintaining open and ready access to the courts by all legitimate suitors is fundamental to our system of justice."[50] This principle is limited by other, sometimes opposed, principles, ones that are also important to the integrity and proper functioning of the justice system, such as conservation of judicial resources and the avoidance of vexatious, harassing or futile litigation. Slatter J.A. manifests no serious attempt to address how these principles should be reconciled or balanced. In short, the majority resolves each subsidiary question in a way that stacks the deck against the appellants and chooses to err on the side of shutting out claims.

### 4. Who Will Guard the Zookeepers?

Even more significantly, the majority barely addresses the question that the dissent sees as central to the appeal: the availability of judicial review of governmental action that is alleged to be unlawful, or conversely the immunity of such action from judicial oversight. This is a serious issue with potentially profound implications, and the points that Fraser CJA raises in dissent are important enough to merit at least a response from the majority. The only response they receive is the assertion that the administrators of the *Animal Protection Act*, the humane societies, "are independent agencies (not agents of the Government of Alberta)."[51] This claim – somewhat undercut by the majority's later assertion that the statute's real enforcer is the Attorney General, whose authority will be undermined if a claim of this sort is permitted[52] – is all that is expressly offered in reply to the "who will watch the watchman?" concern that is so central to the dissent's argument.

Although Slatter J.A. is unequivocal in his stance that the case is not about animals and not about an elephant, it is hard not to speculate that the thinness of the majority's analysis has something to do with a failure to take claims raised on behalf of the four-legged (and trunked) completely seriously. A hint that speculation of this nature might not be entirely unfounded can be found in one of Slatter J.A.'s

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[47] *Reece, ibid* at paras 17 and 22.

[48] *Ibid* at para 14, 16, 17, and 19 ("It is...not appropriate to take any judicial statement of the ambit of the doctrine of abuse of process, and apply it mechanically to different factual settings and issues").

[49] *Ibid* at para 16, 17.

[50] *Supra* note 20 at para 34.

[51] *Reece, supra* note 1 at para 11.

[52] *Ibid* at para 31.

concluding statements: "The appellants argue that there is no other effective alternative to bring this issue before the courts. Stating the issue in that way presupposes that this is a suitable issue for the courts."[53] This is a surprising thing to say. Leaving aside the questions at issue in the appeal about who has authority to raise the question, how is the allegation that Lucy's treatment constitutes a violation of Alberta's *Animal Protection Act* not "suitable for the courts"? Furthermore, the appellants' argument that there is no other reasonable or effective alternative to bring the issue before the courts is not just some rhetorical sound bite; it is one of the elements in the test for public interest standing[54] (which the majority does not address).

Perhaps Slatter J.A. means that the issue is unsuitable for the courts because asserting the interests of animals is not a suitable thing to do in court. It is unlikely that an analogous assertion would be made if the interests of human beings, rather than animals, were at stake. Imagine, for example, that the issue was alleged mistreatment by officials of a human somehow impeded from bringing an action on his or her own behalf, such as a child[55] – and consider the likelihood of a judge's intimating that that would not be a suitable issue for the courts. Despite the majority's suppression of any suggestion that the case might be about animals or elephants, the fact that it actually does have something to do with an elephant seems to exert a degree of influence, even if unacknowledged, on the analysis.

## Dissenting Reasons for Judgment (Fraser C.J.A.)

### 1. The *Sierra Club* of Canadian Animal Law?

Fraser C.J.A.'s reasons begin with her discussion of the evolution and motivation of laws protecting animals from mistreatment. This emphasis of the place of animal protection in law is important to her reasoning, probably the key argument in her dissent, that the case engages the rule of law and concerns "the right of the people in a democracy to ensure that the government itself is not above the law."[56] The law provides certain protections to animals; the West Edmonton Valley Zoo is run by the City, part of the government; and Lucy, the intended beneficiary of the legal protection, is not in a position to engage the legal process for herself. This is the context against which the importance of the standing question should be viewed; "if

[53] *Reece, supra* note 1 at para 35.

[54] *Canadian Council of Churches v Canada*, [1992] 1 SCR 236 at para 37.

[55] This analogy is also invoked in a blog posting by David Cheifetz ("The Elephant in the Room" (5 August 2011), online: slaw http://www.slaw.ca/2011/08/05/the-elephant-in-the-room/): "Substitute child for animal in the Alberta legislation involved...call it the Child Protection Act, and assume everything else is effectively the same. Would the majority have made the same decision and on the same grounds? If not, their analysis is wrong. If they didn't see that, they should have."

[56] *Reece, supra* note 1 at para 39.

animals are to be protected in any meaningful way, they, or their advocates, must be accorded some form of legal standing."[57]

Fraser C.J.A. goes further than simply pointing out that the Alberta legislature has recognized animal welfare as a value worth protecting. She engages in a detailed and extensively researched discussion of the development of animal-protection law, the history of ideas about animal rights, and proposals that have been advanced for legal reforms in the interest of justice for animals,[58] and refers to the work of many of the leading scholars in this area, including David Favre, Gary Fancione, Steven Wise, Cass Sunstein, Martha Nussbaum, Peter Sankoff, Lyne Letourneau and Richard Ryder[59] – as well as Jeremy Bentham,[60] who was among the first to call for legislation for the protection of animals.[61]

Of course the orientation and stances of the thinkers are not uniform, any more than are those of, say, feminists. Arguably the wholesale endorsement of these thinkers' views lends a somewhat unfocussed air to Fraser C.J.A.'s reasons. At one point she claims that the key element which grounds animals' rights in the legal system is sentience, their ability to feel pain and to suffer.[62] Elsewhere it is Lucy's higher cognitive functions, and in particular the complexity of elephants' communicative and social life, that engage Fraser C.J.A.'s concern.[63] And, in a vestigial appearance of the Great Chain of Being, all of this is coloured by the claim that humans are "at the top of the evolutionary chain."[64] Yet it would be unrealistic to expect this breakthrough assertion of the legitimacy of animal rights to be accompanied by a theoretically rigorous and consistent account of why animals (and which animals) should count in the legal system. The question in *Reece* is simply whether they get a foot in the door, and to the extent that philosophical thinking is relevant to that question it is sufficient to note that there are many lines of such thinking in support of an answer in the affirmative.

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[57] *Ibid* at para 70.

[58] *Ibid* at paras 51-71.

[59] See, e.g., *ibid* at para 54 n 24, para 61 n 34 and paras 65-70.

[60] *Ibid* at para 54 n 23. It is regrettable that the reasons of Fraser C.J.A. were written too early to contain a mention of a remarkable recent Canadian contribution to this field: Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2011).

[61] *Principles of Morals and Legislation* (New York: Hafner Publishing Co., 1961) [first published 1789] at 310.

[62] Reece, *supra* note 1 at para 39.

[63] *Ibid* at para 104.

[64] *Ibid* at para 58. This is reminiscent of the judgment for Lamer J.A. for the Québec Court of Appeal in *R v Ménard* (1978), 4 CR (3d) 333, 43 CCC (2d) 458.

It is gradually becoming more common for arguments promoting the interests of animals to be advanced in a legal setting, and occasionally to be addressed in jurisprudence, but this may the most extensive discussion of the ethical, philosophical and juridical questions implicated in the relationship between humans and other animals ever to appear in the reasons for judgment of a court of law. By contrast, consider the judgment of the Supreme Court of the United States in *U.S. v Stevens*,[65] which concerned the constitutionality of a statute criminalizing the creation, possession and sale of videos depicting cruelty to animals.[66] The Court contented itself with acknowledging almost in passing that the prohibition of animal cruelty had "a long history in American law"[67] before going on to analyze the First Amendment issues; they were hardly examined through the "animal welfare lens," to use Fraser C.J.A.'s phrase.[68] Contrast also the judgment of the Supreme Court of Canada in *Harvard College v. Canada (Commissioner of Patents*,[69] which concerned the patentability of a transgenic "oncomouse" created through genetic engineering to be susceptible to developing cancer (and so more useful for certain types of lab experimentation in cancer research). The Court dismissed the "animal welfare implications" of this technology as "only tenuously linked"[70] to the question of whether the mouse should be excluded from the patent scheme for reasons of morality or public policy. Direct comparison can be of limited value in cases involving such different legal issues and contexts, but it is fair to say that Fraser C.J.A.'s dissent demonstrates a degree of openness to treating animal welfare as a serious legal issue that is qualitatively different from the judgments in *Stevens* and *Harvard*.

Fraser C.J.A. sees the law as having evolved from an "exploitive model" to one based on a paradigm of animal welfare.[71] She may be overstating the case. The inexorable march of progress that she portrays towards an increasingly more enlightened and morally grounded relationship between humans and other animals would no doubt be a very good thing, but it could be argued that in practice the opposite is happening. The utilitarian quantum of animal suffering (in intensity of pain multiplied by the sheer number of animals affected) has increased markedly

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[65] 599 US __, 130 S Ct 1577 (2010) [*Stevens*].

[66] The types of videos that the statute was intended to suppress included films of dog fights, as well as the deeply disturbing category of sex-fetish "crush" videos depicting small animals such as kittens and baby mice being tortured and crushed to death, typically by a woman with bare feet or in high heels (130 S Ct at 1583).

[67] *Ibid* at 1585. Alito J., dissenting, would have accorded more significance to the government's "compelling interest" in preventing animal torture (*ibid* at 1600).

[68] *Reece, supra* note 1 at para 47.

[69] 2002 SCC 76, [2002] 4 SCR 45 [*Harvard*].

[70] *Ibid* at para 168.

[71] *Reece, supra* note 1 at paras 54-57.

over the past half century with the growing predominance of intensive confinement methods of raising animals for food. Canadian animal-protection law provides little protection for animals used in legally sanctioned enterprises for the benefit of humans, especially food production (as the exemption in section 2(2) of Alberta's *Animal Protection Act* for "reasonable and generally accepted practices" of animal husbandry illustrates). In this sense the legal model is arguably more "exploitive" today than it ever was in the past.

At the same time, there is a discernible evolution in the law towards recognizing animals as morally significant and providing them with better protection, as well as an understanding that the values reflected in such protections are not just incidentally but fundamentally connected to the deepest principles of the legal system. One example of this evolution, mentioned by Fraser C.J.A., is the growth of protection for the welfare of individual animals in international and European law.[72] The Council of Europe has stated on its web site that "respect for animals counts among the ideals and principles which are the common heritage of its member States as one of the obligations upon which human dignity is based."[73] Are such statements nothing more than fine expressions of sentiment that have no effect on what happens in real life? The real risk that this ostensible evolution in the law will fail to live up to its own promise animates Fraser C.J.A.'s concern to provide adequate flexibility in the judicial system to ensure that animal protection law will actually have some effect.

Fraser C.J.A.'s dissent picks up on ideas that have been developed by scholars and activists about extending notions of justice to beings other than humans – ideas that the traditional justice system has not accommodated to any significant extent so far – and it introduces those ideas into the realm of mainstream judicial reasoning.[74] It thus resembles a very famous dissent, that of Douglas J. in *Sierra Club v Morton*.[75] In his dissent in *Sierra Club*, Douglas J. adopted the arguments of environmental legal scholars (notably Christopher Stone[76]) in espousing the radical legal theory that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation"[77] through human "spokesmen."[78] In a striking

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[72] *Ibid* at para 58 n 31.

[73] Council of Europe, "Introduction: Biological safety and use of animals by humans," online: http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/biological_safety_and_use_of_animals/Introduction.asp#TopOfPage.

[74] It may be a dissenting judgment, but it is a dissent by the chief justice of a province, and that is mainstream enough.

[75] 405 US 727 (1972) [*Sierra Club*].

[76] "Should Trees Have Standing? Toward Legal Rights for Natural Objects" (1972) 45 S Cal L Rev 450.

[77] *Sierra Club, supra* note 75 at 741-42.

parallel to Douglas J.'s proposal, Fraser C.J.A. (albeit in a footnote and in a more equivocal, more Canadian tone) states that it is "an open question whether the common law has now evolved to the point where, depending on the circumstances, an animal might be able to sue through its representatives to protect itself."[79]

The idea that "valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air"[80] should have standing at law has not so far been adopted as part of American jurisprudence, but the *Sierra Club* dissent did serve to strengthen and legitimize a new way of thinking about legal protection of the non-human that has been an important influence on the subsequent development of the law in the United States and beyond. The challenge that it poses to the narrow American doctrine of standing may well have played a background part, for example, in shaping the Canadian doctrine of public interest standing.

Animal law today is at a similar stage of development to environmental law in the 1970s, and perhaps Fraser C.J.A.'s dissent is the equivalent of a *Sierra Club* for Canadian animal law. Her adoption of an "animal welfare lens" for looking at a case about an animal may not be followed in standard doctrine now or any time soon, but the ideas she articulates may well contribute to the gradual emergence of a stronger framework of legal protection for animals in this country.

As is to be expected in light of their fundamental difference in orientation, Fraser C.J.A. also disagrees with the majority on the more purely legal points raised in the appeal. An analysis of their different approaches suggests a need for clarification by the Supreme Court of the doctrines at issue in this case, as elaborated in the discussion that follows.

## 2. Public Interest Standing and Abuse of Process

For Fraser C.J.A., the "central issue" in the case is whether the appellants are entitled to public interest standing.[81] She finds, based on the factors set out in *Finlay* and the "standing trilogy," that they are.[82] She calls it a "fatal flaw"[83] in the reasoning of the chambers judge (and, by implication, of the majority) to have barred the proceedings

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[78] *Ibid* at 745.

[79] *Reece, supra* note 1 at para 179 n 143.

[80] *Sierra Club, supra* note 75 at 743.

[81] *Reece, supra* note 1 at para 141.

[82] *Ibid* at paras 172-196.

[83] *Ibid* at para 139.

as an abuse of process without first considering whether public interest standing should be granted; that, she says, "is putting the cart before the horse."[84]

Given how closely standing and the validity of a cause of action can be related – as Le Dain J. stated in *Finlay*, the questions do tend to merge[85] – it is very difficult to tease out which really is the cart and which is the horse. Fraser C.J.A. does not provide an entirely satisfactory response to the majority's point that a plaintiff must have *both* standing and a cognizable legal basis for his or her claim, and having one does not make up for lacking the other.[86] Fraser C.J.A. argues that if the appellants are entitled to standing then their action cannot be an abuse of process, because "the threshold test for granting public interest standing will already have addressed the question of whether the relief sought is justiciable and amenable to an action grounded in public interest standing."[87]

But this contention does not so much resolve how the two tests work together as it reiterates a substantive disagreement with the majority about the result of their application in this case. Slatter J.A. might respond that because the appellants' action is an abuse of process it is not justiciable or amenable to an action grounded in public interest standing, and so they cannot be entitled to public interest standing. Fraser C.J.A. undermines her own position by arguing both that the proceedings cannot be an abuse of process if the test for public interest standing is met (as she finds it to be, as a matter of law), and that the abuse of process issue "could only be properly decided after a full hearing on the merits."[88]

It is regrettable that clarification was not provided by the Supreme Court of Canada on this point, which is potentially relevant to many cases where concerned citizens employ creative legal strategies to uphold law and public policy in areas such as environmental protection. When a plaintiff seeks to be granted public interest standing, does the doctrine of abuse of process retain an independent role, or is it subsumed in the "justiciable or amenable to action" branch of the test for standing? And if it is a separate question, how are the two concepts to be applied in a coherent manner? In connection with this question we suggest that the *Reece* majority's approach to abuse of process, which amounts to the formalistic application of (to use yet another zoological metaphor) a pigeon-hole category, seems inconsistent with the spirit of *Finlay* – because it gets to the conclusion that

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[84] *Ibid* at para 141.

[85] *Supra* note 35 at para 38, cited in *Reece*, *ibid* at para 139.

[86] *Ibid* at para 25.

[87] *Reece*, *ibid* at para 140.

[88] *Ibid* at para 155.

the action should be barred without getting to a full exploration of the policy considerations involved in public interest standing.

### 3. Judicial Review and the Use of Criminal Law by Private Citizens

The fatal shortcoming of the appellant's claim according to the majority – what places it in the abuse of process pigeon-hole – is that it involves an attempt to enforce the criminal law. Fraser C.J.A. is right to highlight a problematic formalism in the majority's reasoning here. As she observes, the law in question is "criminal" only in a rather technical sense; charges under the *Animal Protection Act* are regulatory proceedings and the penalties for violations are fines, not jail terms.[89] Such an expansive construal of what constitutes "penal law," and thus the scope of the category of forbidden proceedings, increases the risk of barring cases that should be allowed to proceed. A rule that private actions cannot be used to enforce criminal law is obviously sensible in the context of a busybody harassing his or her neighbour over an alleged crime that the authorities have declined to prosecute. The issue is different and more nuanced when the proceedings involve allegations that a governmental body that is carrying on a regulated activity has violated rules designed to protect a vulnerable class.

The "penal law" argument also implicates an important issue concerning the relationship between civil lawsuits and private prosecution, which is not fully explored in either the majority or the dissenting judgment. In Canada, private citizens do have an avenue to initiate enforcement of penal or criminal law, and that avenue is private prosecution. [90] Private prosecution has been used successfully to promote enforcement of environmental and wildlife protection law – notably in the prosecution and conviction of Syncrude Canada over the deaths of 1600 ducks that had landed in its tailings pond,[91] which was initiated by the environmental group Ecojustice – and also (so far unsuccessfully) in cases involving allegations of cruelty to animals.[92]

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[89] *Ibid* at para 149.

[90] Section 504 of the *Criminal Code*, RSC 1985, c C-46 [*Code*], provides that "[a]ny one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice" and commence a private prosecution. S 795 of the *Code* extends this provision to summary conviction offences (see *Reece, ibid* at para 142 n 114). Offences under the *Animal Protection Act* are prosecuted under the *Provincial Offences Procedure Act*, RSA 2000 c P-34, which incorporates the summary conviction procedures of the *Code* (s 3; *Reece, ibid* at para 78).

[91] *R v Syncrude Canada*, 2010 ABPC 229, 53 CELR (3d) 194, [2010] 12 WWR 524.

[92] *Hamilton v British Columbia (AG)* (1986), 30 C.C.C. (3d) 65 (BCSC) [*Hamilton*]; *Walters v Red River Exhibition Ass'n*, 119 Man R (2d) 237, [1998] 2 WWR 422 (Prov Ct).

Fraser C.J.A. considers the possibility of a private prosecution in this case by assessing whether there is another reasonable and effective way to bring the matter to court, which is an element of the test for public interest standing. Reviewing the evidentiary record that the Alberta Humane Society, the agent of the Attorney General, has "to date refused or declined to charge the City with an offence" over Lucy's treatment,[93] she concludes that "it is a reasonable inference that any private prosecution against the City by the appellants would be stayed by the Attorney General."[94] To proceed from this inference to a conclusion that the appellants can seek a remedy in civil court has interesting implications for the Attorney General's traditional discretion to control criminal prosecutions. The Crown has "the discretionary right to intervene in criminal matters" and "a private prosecutor does not have a legal right or liberty to continue a prosecution in the face of Crown intervention."[95] Permitting a potential private prosecutor to circumvent the process controlled by the Crown by going through the civil courts instead could be seen as undermining that principle.

Perhaps Fraser C.J.A.'s reasons should inspire consideration of whether the private prosecution mechanism, hitherto considered to be entirely subject to the unfettered discretion of the Crown, properly fulfills its function in a twenty-first century democracy where the law in some meaningful sense belongs to the citizenry – *in particular in cases where illegal conduct by the Crown itself is alleged*. There are now at least some limits on the Crown's traditional absolute immunity from civil liability for decisions *to* prosecute, through the tort of malicious prosecution.[96] (Additionally, in U.S. law, the executive's broad discretion over prosecutorial decisions is subject to the doctrine of selective prosecution, which a defendant may (theoretically) invoke as a defence if she can show that she was singled out for prosecution on constitutionally prohibited grounds such as race.[97])

As a parallel or mirror-image to the availability of a remedy for prosecution for the wrong reasons, some possibility for judicial review and redress for citizens when the Crown fails to prosecute, or prevents a prosecution from proceeding, may well be called for if the Crown's decision is made in bad faith or based on a conflict of interest. A carefully formulated, liberalized approach to the availability of declarations or injunctions through the civil court may be the appropriate way to realize that possibility.

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[93] *Reece, supra* note 1 at para 183.

[94] *Ibid* at para 190.

[95] *Hamilton, supra* note 92 at para 6.

[96] *Nelles v Ontario*, [1989] 2 SCR 170; *Miazga v Kello Estate*, 2009 SCC 51, [2009] 3 SCR 339.

[97] See, e.g., *United States v* Armstrong, 517 U.S. 456 (1996).

## CONCLUSION

As with many cases, the differing conclusions of the majority and the dissent in *Reece* flow directly from how the issue is framed. For the majority the concern is the legal system and in particular its criminal and regulatory branch, framed narrowly in terms of its three principal actors: the Crown, the accused and the courts. The Crown must have the exclusive right to initiate proceedings, or at least to decide whether proceedings started by outsiders may continue, so in this case the applicants' request for a declaration undermines and abuses that procedural arrangement and may not be permitted. For the dissent the frame is broader. It is the polity as a whole, including the executive branch and the public, with emphasis of the rights of the latter to hold the former to account according to the principles of the rule of law. What seems to impel this wider framing of the question is a concern that is broader still: a welcome, if overdue, appreciation that there are beings who have hitherto been excluded from the polity and whose interests and lives have had little weight in determining either the scope or the content of the justice system.

Lucy, the elephant who once roamed the Sri Lankan jungle, now shut in her small enclosure in a cold Canadian city, is a potent symbol of something profoundly amiss in the relationship between human beings and other animals – something which could be described as our failure to accord justice to them. Dale Jamieson has argued that the problem with zoos goes beyond all the specific failures to meet the welfare needs of the animals housed there (although they are many and significant) and ultimately is "more difficult to articulate but...even more important":

> Zoos teach us a false sense of our place in the natural order. The means of confinement mark a difference between humans and other animals. They are there at our pleasure, to be used for our purposes. Morality and perhaps our very survival require that we learn to live as one species among many rather than one species over many. To do this, we must forget what we learn at zoos.[98]

It will take more than legal developments to bring about the change in consciousness that Jamieson calls for. (There are some positive signs that such a change is already starting to take place in the actions of the public officials responsible for running Canadian zoos; last fall the Toronto City Council voted to approve a motion to move the Toronto Zoo's three surviving African elephants, Toka, Thika and Iringa, to the same California sanctuary that has been proposed for

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[98] "Against Zoos" in Peter Singer, ed, *In Defense of Animals: The Second Wave* (Malden, MA: Blackwell, 2006) 132 at 142.

Lucy.[99]) But the dissenting and majority decisions in *Reece* exemplify, respectively, how the law could contribute – or how it could stand in the way.

[99]The Calgary Zoo has announced that its four Asian elephants will be moved to other zoos rather than elephant sanctuaries, but to zoos where they can live with larger groups of elephants. This decision was reportedly based on increased appreciation of the importance of the social structure of a large herd to the welfare of the elephants. "Elephants at Calgary Zoo to be relocated" (19 April 2012), online: CBC News <http://www.cbc.ca/news/canada/calgary/story/2012/04/19/calgary-zoo-elephants-move-relocate.html>.