

Seeking Civil Declarations of Criminal Offences—An Abuse of Process

by Scott McAnsh and Steve Phipps

The City of Edmonton's Valley Zoo is the home of a 34-year-old Asian elephant named Lucy. For a number of years, several animal rights groups, including People for the Ethical Treatment of Animals (PETA) and Zoocheck Canada (Zoocheck), have complained to the City that Lucy is poorly treated. The City maintains that Lucy is well cared for and that the conditions at the Valley Zoo meet or exceed all regulatory standards.

On February 1, 2010, the City was served with an Originating Notice seeking a declaration that the City was in contravention of section 2 of the *Animal Protection Act*, R.S.A. 2000, c. A-41, which states, "No person shall cause or permit an animal of which the person is the owner or the person in charge to be or to continue to be in distress." The applicants were PETA, Zoocheck, and a resident, Tove Reece. The City immediately brought a motion to strike the Originating Notice on a number of grounds. The relief sought by the City was granted by Rooke A.C.J. in *Reece v. Edmonton (City)*, 2010 ABQB 538 (Aug. 20, 2010).

The City's application to strike dealt solely with the procedure used to bring the claim. As Rooke, A.C.J. stated: "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." He went on to hold that the legal system could handle such allegations, but not in the manner brought by the applicants.

The City argued that the Originating Notice should be struck on four grounds: (1) none of the applicants had standing as of right; (2) it was not an appropriate case in which to grant public interest standing; (3) the Originating Notice was an abuse of process because it sought to bypass a comprehensive regulatory regime; and (4) the Originating Notice did not comply with the *Alberta Rules of Court*. Rooke, A.C.J. dismissed the Originating Notice as an abuse of process, holding that the *Animal Protection Act* and regulations, and the *Wildlife Act*, R.S.A. 2000, c. W10, and its regulations (including the *Government of Alberta Standards for Zoos in Alberta*) provided a comprehensive regulatory scheme for bringing such a complaint. In seeking a declaration that the City was committing an offence, the applicants were lowering the requisite standard of proof, and denying the City procedural protections associated with a prosecution. Those protections included the right to disclosure, and the trial protections under the *Charter of Rights and Freedoms*. That was held to be an abuse of the Court's process and, thus, grounds for striking the Originating Notice.

Significantly—as previous decisions had not made that connection directly—the court clearly stated that enforcing quasi-criminal law by declaration was an abuse of process. Previous cases, such as the House of Lords decision in *Gouriet v. Union of Post Office Wkrs.*, [1978] A.C. 435, framed the issue primarily as one of standing.

The court also considered the issue of standing. The private interest standing argument relied on the rule in *Boyce v. Paddington*, [1903] 1 Ch. 109 (that a private individual cannot "usurp the role of the Attorney General and sue to enforce public laws"). The exception to the rule is where a private right is interfered with, or where the applicants suffer "special damage peculiar to themselves." The applicants had argued, also, that they fell within a further exception to the general rule known as the "ratepayer exception." That narrow exception arises from a series of cases, including *MacIlreith v. Hart Estate*, [1908] 39 S.C.R. 657, that allow standing for ratepayers who challenge the illegal expenditures of a municipality. Here, the court held that neither exception applied.

The City's alternative argument was that the applicants did not qualify for public interest standing. This is a discretionary form of standing granted when there is a serious issue to be tried, where the party seeking standing has a genuine interest in the application, and there is no other reasonable and effective manner in which the issue can be brought before the court. Rooke, A.C.J. held that the applicants failed on the third ground, as there was a comprehensive regulatory regime in place that could be used to bring the issue before the court. Although the applicants claimed that there was no other way to obtain a declaration, the court disagreed, finding that the type of remedy was not the critical consideration: the question was whether the issue could effectively come before the courts in another manner.

The City's final argument was that the declaration application could not be brought by way of an Originating Notice as this contravened the Rules of Court. The court agreed, finding that an Originating Notice was the wrong form. However, the proper remedy (had the action otherwise been able to proceed) would be to amend the pleadings to a Statement of Claim. Given that the action was struck as an abuse of process (and would also have failed for lack of standing), this was not appropriate.

The main finding of the Court in *Reece v. Edmonton (City)* is that a party cannot get a declaration or an injunction in relation to actions that constitute a regulatory offence. To attempt to do so constitutes an abuse of the court process. If a prosecution pursuant to a regulatory scheme is an option, this

continued on page 31

streets and commercial door hangers on residences, abandoned natural gas lines, and drafting language in service contracts that defined ownership of the written materials and drawings created from the contract. An inquiry about suspending an employee with or without pay pending an investigation morphed into questions about last-chance agreements and suspending employees who failed to earn education credits for recertification to continue performing their essential functions.

The list proves that it must a creed in the municipal attorney kingdom that the interruptions become the agenda for the day. The immediacy of the resources, including the listserve, assist getting closer to "quitting time."

For those of you who would like to join the listserv, go to http://www.municode.com and select the *Listservs* link to get the page on *Mailing Lists*. Click on *Municipal Attorneys* to bring up the subscription page. Fill it out and hit Subscribe. To sign up for the Water Cooler, send an e-mail to MunicAttyWaterCooler@yahoogroups.com that identifies you and the local government you represent. You will get a response from YahooGroups asking if you want to join. Respond to the message as directed.

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Ordinances

cont. from page 29

Notes

1. DDT is the commonly used name for the chemical dichlorodiphenyltrichloroethane.
2. Available at http://www.compoundsecurity.co.uk/. If you are curious as to how sensitive your ears are, go to the Mosquito's USA distributors site, http://www.movingsoundtech.com and listen to the different frequencies.
3. Valerie Strauss, *Amid Metro Brawl, Family's Night Out Turns Into Pandemonium*, Washington Post, Aug. 9, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/201%8/08/AR2010080802755.html.
4. "Public disturbance" standard is also referred to as a "nuisance" or "reasonableness" standard.
5. D.C. Municipal Regulations § 20-2701.01.
6. *Id.*
7. D.C. Municipal Regulations § 20-2714.01.
8. IMLA Model Ordinance Service, Art. 11-4.
9. *Id.*
10. B & W Management, Inc. v. Tasea Inv. Co., 451 A.2d 879 (D.C. 1982) (citation omitted).
11. 47 U.S.C. § 12101, *et seq.* (2006).
12. *Id.* at § 12181.
13. For more information about these ear-related medical conditions, see http://www.aafp.org/afp/ 2004 /0101/p127.html; see also http://www.ncbi.nlm.nih.gov/pmc/articles/PMC539655/.
14. Eric Fidler, *Teens and Young Adults aren't Mosquitoes* (Sept. 2, 2010), available at http://greatergreaterwashington.org/post.cgi?id=7008. ML

Inside Canada

cont. from page 28

is what must be pursued. The court did hold, however, that if those responsible for enforcing the legislation do not meet their duties under the Act, the applicants could bring a judicial review application for mandamus or an application for mandatory injunctive relief.

Lucy still resides at the Valley Zoo.

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Supreme Court

cont. from page 23

blood evidence and the infringement of Thompson's right to testify in his own defense at the murder trial violated his constitutional rights. Addressing *Monell* liability, the district court found the claims survived summary judgment: it appeared the assistant attorneys were authorized to create the office's policy on the nature of *Brady* duties and the DAO "knew to a moral certainty" that the assistants would acquire *Brady* material. Without training, it was not always obvious what *Brady* required, and withholding *Brady* material would always lead to a substantial violation of constitutional rights. Accordingly, "a reasonable jury could find that the need for training in this situation [was] so obvious that the failure to offer it could properly be characterized as 'deliberate indifference.'" After a jury trial, the trial court found liability predicated on the district attorney's failure to train, monitor, or supervise, and awarded Thompson $14 million in damages. On a motion for rehearing, the Fifth Circuit en banc panel split evenly, resulting in an affirmation of the district court decision.

The DAO sought Supreme Court review on the basis that imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravened the culpability and causation standards established by *City of Canton* and *Bd. of County Comm'rs of Bryan County*, and undermined the prosecutors' absolute immunity recognized by the Court more recently in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). However, certiorari was granted on the *Canton* and *Bryan County* issue only.

As can be expected, a large number of *amicus* briefs have been filed in this case. IMLA has signed onto a brief in support of the petitioners prepared by the State and Local Legal Center. An *amicus* brief filed on behalf of the Alliance Defense Fund and the CATO Institute in support of the respondent, Thompson, states that amici "believe the *Monell* rule unfairly circumscribes the protections of 42 U.S.C. § 1983 by imposing a restriction on municipal liability that is unwarranted by either the text or history of the statute." It urges the Court to overturn the *Monell* rule "so that municipalities hereafter may be subject to liability for the constitutional violations of their agents and employees according to the ancient common law rule of *respondeat superior*," adding "[e]very basis" for applying *respondeat superior* "to a corporate employer applies with equal logical and practical force to a municipal employer." ML