

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cassells v. University of Victoria*,
2010 BCSC 1213

Date: 20100830
Docket: S105400
Registry: Vancouver

Between:

Roslyn Cassells

Petitioner

And

University of Victoria

Respondent

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

The petitioner:

On her own behalf

Counsel for the respondent:

H.D. Edinger

Place and Date of Hearing:

Vancouver, B.C.
August 20, 2010

Place and Date of Judgment:

Vancouver, B.C.
August 30, 2010

INTRODUCTION

[1] This case, painted with broad brush strokes, concerns the manner in which a private party may act to abate a nuisance on its property, caused by wildlife, and whether another private party has standing to bring an action to restrain the property owner's actions.

[2] The wildlife is rabbits. The nuisance arises in the main from their profligate numbers and the impact they have on trees, plants, grounds and athletic fields on the campus of the defendant University of Victoria, from eating, digging burrows and leaving droppings.

[3] In this case, there is no constitutional challenge to legislation, nor is there a challenge to public administrative action or inaction. It is purely a claim between two private parties, one of whose actions allegedly contravene the *Wildlife Act*, R.S.B.C. c. 488, and its Regulations, the *Wildlife Act, Designation and Exemption Regulation*, B.C. Reg. 168/90. The property owner, the University of Victoria, is a large publicly funded university. It is, however, for the intents and purposes of this action, a corporation continued pursuant to the *University Act*, R.S.B.C. 1996, c. 468, entitled to own land and in possession of all the powers and capacity of a natural person.

[4] The person challenging the University's manner of acting with respect to the rabbits on its campus, the petitioner, Roslyn Cassells, is also a private individual, who describes herself as follows:

Roslyn Cassells is a B.C. based social justice activist and Canada's first elected Green. She is an ardent animal and human rights activist and writes, teaches and campaigns for positive social economic and ecological change everywhere.

[5] It is quite evident from reviewing the material placed before me on this application, that Ms. Cassells and others have put together an organization of dedicated, diligent and effective volunteers to address the issue of the defendant University's program to deal with the problems presented by the campus rabbits. This action is but a part of the group's efforts.

BACKGROUND

[6] The problem of the over-population of rabbits on the University campus apparently arose from people abandoning domestic animals there, starting in the mid-1980s. The present population is estimated at approximately 1,600 rabbits. The University began taking steps to deal with the problems caused by the rabbit over-population in 2007 by gathering information about the nature and extent of the problem. The University considered a variety of responses to the over-population issue, including programs to sterilize, vasectomise, relocate, and put down portions of the rabbit population.

[7] In 2008, the University put out a media release to publically identify the nature and extent of the problem. That document reads as follows:

FERAL RABBITS AT UVIC: BACKGROUNDER

The university's rabbit management plan, currently under development, is being based on background research on rabbit impacts (positive and negative) at UVic and elsewhere, ongoing monitoring of the size and distribution of rabbits in designated areas of campus, and consultations with campus and community groups and organizations.

Specific areas of rabbit management concern at UVic include the athletic fields (for the health and safety of athletes and other users, and to reduce the risk of injury due to rabbit holes or the transmission of disease via feces), Finnerty Gardens (to protect world heritage plant collections), and the Garry oak meadow at Cedar Hill and Henderson Roads (to preserve teaching programs involving threatened indigenous plant species). A narrow strip of land along Gordon Head Road adjacent to the Mt. Tolmie neighbourhood is also an area of management interest.

The exact size of the rabbit population at UVic is not known. A precise number is impossible to determine without using invasive and expensive techniques. In July 2008 an observational inventory was conducted by an external consultant to estimate rabbit numbers in two areas covering the western and northern reaches of campus. The inventory included all the locations identified above as areas of management concern. The count estimated that there are a minimum of 158 rabbits in the north control area (the athletic fields) and a minimum of 85 rabbits in the west control area (lands adjacent to Cedar Hill and Gordon Head Roads). Inventories in other areas are planned and will be repeated at different times of the year to determine population changes.

The rabbit management plan will also include: modifications to vegetation and landscaping; investigation of other control options in the specific areas of management concern; discussions with municipal authorities on toughening

up penalties for abandoning pet rabbits; and continued consultations with on and off-campus groups and volunteers on the development and application of effective non-lethal rabbit management solutions.

Most feral rabbits at UVic are unwanted pets or descendants of unspayed or unneutered pets abandoned on campus. Pet owners may think that UVic is a safe place for rabbits and that setting them loose is easier or kinder than taking them to an animal shelter. It isn't. Pet rabbits are not well-adapted for the rigours of outdoor life. Due to predation, disease, cars and dogs, as well as harassment by humans, feral rabbits at UVic often live short and difficult lives.

The external consultant conducting the initial inventory witnessed a wide variety of food items left out for rabbits by people, including birdseed, wieners, pita bread, vegetable patties, onions, carrots, apples, etc. Many of these food items, in addition to being inappropriate rabbit food, attract rats. Feeding the rabbits also helps push their numbers to unmanageable levels. As wildlife, rabbits at UVic must forage for their own food to survive.

[8] In May 2010, the University trapped 104 rabbits, 26 adults, half male, half female, 14 juveniles and 64 nestlings. Those rabbits were put down. In June 2010, the University released its "Official Feral Rabbit Management Plan" following consultations with various groups and the Ministry of the Environment, which is responsible for the administration of the *Wildlife Act*. The plan involves several methods of dealing with the rabbits, including "trapping, sterilizing, releasing, relocating and putting down rabbits". The plan reads in part as follows:

Rabbit Management Approach

The UVic Gordon Head Campus has been partitioned into designated rabbit free zones (RFZ) and rabbit control zones (RCZ). See Map - Appendix "A".

Four rabbit control zones are designated inside the Ring Road. All areas outside the Ring Road are designated as 'rabbit free'.

Reducing the population, and then controlling rabbits to sustainable populations and restricting their territory to inside Ring Road should protect UVic's neighbours from unwanted rabbit intrusions.

The University has conducted feral rabbit counts in various locations on campus at different times, and understands that the population varies from month to month. It is clear that the average number of rabbits inside the Ring Road is more than the University is currently able to accept. The damage caused and the hazards created are unacceptable. The rabbits outside the Ring Road in areas designated as "rabbit free" (estimated to be 800+) will be eliminated, and numbers inside the Ring Road must be significantly reduced. This position is also supported by the neighbourhood associations surrounding the University property.

The University has consulted with the BC Ministry of the Environment and the BCSPCA in the development of this management plan. The University is committed to following humane procedures to achieve its objectives.

Rabbits will not be allowed to be relocated from UVic without a plan in place to address their sterilization.

Rabbit Control Zones

Rabbit Control Zones 1, 2, 3 & 4 (See Appendix "A") will be managed over time to bring the population down to no more than 50 rabbits per zone for a targeted total population of 200 rabbits (this number to be monitored and re-evaluated over time). To manage these Rabbit Control Zones, the University will seek some form of community volunteer support to establish a program of trap/neuter/release or a male vasectomy program to reduce the population of those managed areas recognizing this may need to occur over a four to five year period.

The University will consider, with community support, the establishment of a feeding program to reduce the damage to vegetation, and to encourage the rabbits to remain in these zones.

Rabbit Free Zones

Rabbits in the RFZ will be trapped and euthanized using humane methods.

There are already too many rabbits in the Rabbit Control Zones, therefore rabbits will not be relocated to these areas.

UVic will examine options for controlling the population which may include hiring contractors.

Should groups or individuals come forward in advance and indicate a willingness to accept rabbits, the University will accommodate those requests subject to the necessary permits being obtained, and the costs associated with capture, neutering, and relocation being provided by the community or the receiving facility.

The University will commence trapping and euthanizing rabbits in the designated RFZ beginning in the summer months. It is expected that the remaining rabbits not captured in the summer will be trapped in the winter months when it is easier to capture them due to their hungry state, and when there are fewer young rabbits.

Should there be rabbits that can not be captured after the winter capture program the University may need to consider other humane methods to eliminate the remaining rabbits, using lessons learned to date.

Implementation

Sanctuaries willing to obtain the necessary permits and address the cost of the trap/neuter/relocate program are encouraged to contact the University at www.uvic.ca/rabbits. The Ministry of Environment permitting procedures and other information is accessible via this website.

It is hoped that a Trap/Neuter/Release (TNR) or Vasectomy Program can be incorporated into the management of the Rabbit Control Zones. It will commence in 2011, and continue for the ensuing two to three years. The

University will entertain proposals from the public and on-campus volunteers for assistance with this component of the program and for the establishment and operation of feeding stations. Should volunteers not come forward, the University will reassess its approach to managing these areas.

The University will establish an information campaign to inform students, staff and the community about the management of the feral rabbit population.

The University will provide regular updates on its website, for the benefit of the neighbouring community associations and others who may want to get involved.

[9] No rabbits have been culled since May 2010.

[10] As noted, the *Wildlife Act* is administered by the Ministry of the Environment. The position of that Ministry regarding the University's approach to addressing the over-population of rabbits is set out in two documents. The first was an email written by Don Cadden, the Regional Manager, Environmental Stewardship and Parks and Protected Areas Divisions, to an interested person enquiring about the issue. The email was dated May 3, 2010 and reads as follows:

Dear Mr. Wartel:

Thank you for your email of April 22, 2010, regarding feral rabbits at the University of Victoria. The Minister has asked that I respond on his behalf.

It is my understanding there has been some information in the media regarding the feral rabbit population at the University of Victoria and that your questions may be based on this information. The information below regarding feral European Rabbit, the *Wildlife Act*, and management techniques should clarify your inquiries.

Although British Columbia (BC) is home to one native species of hare (Snowshoe Hare; *Lepus americanus*) and two native species of rabbits (White-tailed Jackrabbit; *Lepus townsendii* and Nuttall's Cottontail; *Sylvilagus nuttalli*), Vancouver Island does not have any native species of hares or rabbits. Unfortunately, abandoned "pet" European Rabbits over the years have subsequently resulted in a feral population of between 1,500 and 3,000 rabbits at the University of Victoria campus. Without a natural predator on Vancouver Island, this population of non-native, invasive rabbits will continue to increase unless population-control efforts are applied. The University of Victoria has decided to address feral rabbits which are causing tens of thousands of dollars worth of damage becoming a safety and health concern.

With regards to your enquiry about the techniques used to manage this rabbit population, the Ministry of Environment, under the *Wildlife Act*, does not condone the use of poison to control wildlife. I can assure you that the ministry will not allow the use of poison to manage rabbits at the University of Victoria nor has the University of Victoria enquired about this method.

Similarly, the University of Victoria has not enquired about shooting rabbits at night and this method would be contrary to municipal bylaws regarding the discharge of firearms within the city limits without a permit to do so. Currently, the proposed method of removal involves live trapping, transport to a safe location and subsequent lethal injection by a licensed veterinarian. These activities would be closely monitored by the British Columbia Society for the Prevention of Cruelty to Animals (BCSPCA).

While the ministry appreciates your preference to use non-lethal control techniques, methods such as sterilization have proven ineffective at controlling invasive, non-native species and do nothing to address the current population levels. To be effective, sterilization requires that all the individuals (or all of a determined sex) be captured. If only a few are missed the probability [of] these individuals breeding is high and it does not take long for the control measure to be rendered ineffective. While it certainly was generous of a local veterinarian to offer to donate time and services, it would be impossible to capture and sterilize every rabbit from the current population.

Although the population of feral rabbits at the University of Victoria is a concern, the ministry will not be persuading University of Victoria to choose one method over another. Because these particular rabbits reside on private land and are *Schedule C* wildlife, the University of Victoria can control the population as they see fit as long as they abide by the regulations set forth under the *Wildlife Act* as well as city and municipal guidelines and bylaws.

Thank you again for taking the time to write.

[11] The second document is a letter written by Michael Stalberg, RPBio Fish & Wildlife Section Head, Environmental Stewardship Division, West Coast Sub Region. It was dated August 9, 2010 and it reads as follows:

Dear Mr. Smith:

Thank you for your phone call of August 6th, 2010, regarding the management of feral rabbits at the University of Victoria (UVic). In response to our conversation I am providing the following information for you.

Although British Columbia (BC) is home to one native species of hare (snowshoe hare, *Lepus americanus*) and two native species of rabbits (white-tailed jackrabbit, *Lepus townsendii* and Nuttall's cottontail, *Sylvilagus nuttalli*), Vancouver Island does not have any native species of hare or rabbit. It does, however, have two non-native species of rabbit that have been increasing in numbers since initial introduction. One of these, the European rabbit, originated from domestic rabbits that escaped or were released. Abandoned pet rabbits over the years have resulted in a feral population of between 1,400 and 1,600 rabbits at the UVic campus. Without a natural predator on Vancouver Island, this population of rabbits will continue to increase unless population-control efforts are applied.

The ministry is aware that UVic has decided to address the feral rabbit population on campus. The ministry has met with UVic to discuss the

management options for the feral rabbits at the UVic campus, and [the] ministry believes that the UVic has the right to kill rabbits on the UVic property.

Section 76 of the *Wildlife Act* (the Act) states, “On the escape from captivity or the release or abandonment of an animal that is not a domestic animal, the government acquires the ownership of that animal.” The ministry considers feral rabbits to be invasive, non-native wildlife species and lists them under Schedule C of the Designation and Exemption Regulation of the *Wildlife Act*. This schedule lists mostly non-native wildlife species that are known to destroy property or are detrimental to native wildlife. Species listed on Schedule C have fewer restrictions regulating their hunting, killing or capturing. European rabbits can be captured or killed anywhere, at any time, in British Columbia without requiring a hunting licence to hunt or kill them. Any capture or killing of Schedule-C wildlife must abide by provincial laws regarding the humane treatment of animals, as well as laws regarding trespass. In British Columbia, a person is authorized to use a trap, other than a leg-hold trap, for wildlife listed in Schedule C on land owned or occupied by that person, or with the permission of the owner or occupier of private land. Furthermore, the Designation and Exemption Regulation of the *Wildlife Act* states “If a person injures wildlife listed in Schedule B or C, the person must kill that wildlife.” For these reasons, organizations such as UVic can choose to trap and humanely euthanize feral rabbits as a management strategy.

We are aware that some people may prefer the use of non-lethal management methods; however, the ministry supports UVic in their efforts to manage these feral rabbits and will not compel or coerce the UVic to use non-lethal methods. Because the ministry recognizes that this is a unique situation and that this population of feral rabbits has resulted from the abandonment of pets, we have considered some unique solutions to this issue. For example, the ministry provided a permit for the possession of 51 European rabbits to a facility that was housing these animals off site. From December 2009 to February 2010 a pilot project was conducted on the UVic campus to assess the efficacy of trapping, sterilizing, and relocating feral rabbits.

Furthermore, the ministry has drafted a permit process that will allow individuals to obtain up to two feral rabbits from the UVic. This only applies to feral rabbits originating from the UVic campus, for a limited time, and only sterilized rabbits will be considered. For the possession of wildlife, we required a Wildlife Sundry Permit (Permit type 2(j) - Applicable fee \$55/year) available through the Permit and Authorization Service Permit Bureau (PASB).

The ministry has also drafted a permit process for rabbit sanctuaries. Once again, this only applies to feral rabbits originating from the UVic campus, for a limited time, and only sterilized rabbits will be considered. The sanctuary shelters will undergo an inspection prior to permit approval. The ministry would like to avoid the situation we had in Kelowna, where inadequate shelters allowed unsterilized rabbits to escape into the surrounding communities and exacerbate the situation. The ministry is also requesting letters of support from the local governments presiding over the location of the rabbit sanctuaries (for sanctuaries in other provinces or states; letters

from the applicable provincial, state, or federal government agencies are required). Please note that under the Spheres of Concurrent Jurisdiction of the *Community Charter*, a municipality may regulate, prohibit, and impose requirements in relation to invasive alien species such as European rabbits. Potential applicants are encouraged to contact PASB for permit information if they wish to pursue this option <http://www.env.gov.bc.ca/pasb/>.

As of August 9, 2010 the ministry has inspected two and approved one rabbit sanctuary (for up to 60 rabbits) and continues to help clients with their permit applications. Although it is our understanding that the UVic has been coordinating trapping efforts with rabbit advocacy groups to provide an opportunity to place rabbits in sanctuaries, the UVic is not required to, nor has the ministry asked UVic to, suspend rabbit control methods until rabbit sanctuaries are constructed and permitted.

[12] In the meantime, on July 20, 2010, the petitioner commenced this action. The petitioner seeks the following relief:

I seek an order to halt the killing of rabbits at the University of Victoria until such time as sanctuaries willing to take the rabbits have been able to obtain the required Ministry of Environment permits to capture and relocate the animals and have had a reasonable time to bring about the capture and relocation of these animals once the permits are in place. I seek an order to allow the animal rescue groups taking the rabbits access to the rabbits on campus to capture and remove them. Given that the problem has grown and developed since the 1980s and there are currently an estimated several thousand rabbits on campus, I ask for an interim period of two years for this task.

[13] On July 30, 2010, the petitioner brought an *ex parte* application before the court seeking an interim injunction. In support of her application, she swore an affidavit which reads as follows:

Since the mid-1980s, domestic rabbits have been abandoned at the University of Victoria campus. The population continued to increase during the 80s and 90s mostly within Ring Road. In 1996, complaints began to surface about rabbits when the population reaches an estimated 800 animals. University of Victoria grounds keepers relocate rabbits to Mystic Vale on the southeast edge of campus. From the mid-1990s to 2000s the population keeps increasing. Animal rescue groups make overtures to UVic regarding non-lethal population control, but are ignored or refused.

The University of Victoria starts to complain of the damage to grounds and plants, but do not make a concerted attempt to protect trees and fields using rabbit-proof fences and wrapping trees and other plants with rabbit-proof material as it [sic] effectively done in other places to reduce wildlife impacts. Fences are easily breached by rabbits as they are not build [sic] according to requirements, and bushes and trees are chewed upon because they are either not correctly wrapped, or not wrapped at all. A fence is built around

Finnerty Garden in 2006, for example, but it is not up to the task, despite a 10,000 expenditure. Around 2007 rabbits begin moving off campus into surrounding neighbourhoods, some neighbours don't like this.

In 2008 the university seeks the advice of a local animal vivisector (researcher) Michelle Martin and an exterminator (LGL Environmental Research Consultants Ltd.) to provide advice to "deal with" the rabbits. Other schools and institutions with similar overpopulation of rabbits have turned to their own biology departments and local animal groups for this advice and help. For example, Long Beach College in California has a successful trap, neuter, release or rehome program operating on campus in this manner. Kelowna in BC, and Calgary, Alberta have both instituted successful non-lethal rabbit population initiatives with local animal groups. Michelle Martin discussed various methods of killing the rabbits and has never been in favour of any plan to rescue these abandoned pets. LGL put forward lethal methods such as trapping and killing, and night time shooting as ways to control the rabbit population.

Animal groups continue to monitor the situation at UVic, campaign for changes to the Wildlife Act which would allow them to intervene to rescue rabbits without being in breach of the current Act which requires an onerous permitting procedure and long-term housing of the rabbits instead of adoption to new homes. The groups also campaign to municipal governments to put bylaws in place to stem the flow of fertile rabbits to the community, and an MLA puts forward a provincial private members bill to ban the sale of fertile rabbits in pet stores in BC.

In 2009 UVic does a pilot project to assess the feasibility of trap, neuter, release or rehoming of the rabbits, but did not have the correct permits in place and aborted the Feral Rabbit Pilot Project despite it's [sic] positive results for the rabbits and widespread community support. The contractor Common Ground in the meantime negotiated permit exemptions but UVic was unwilling to continue with the project and refused to release the final report to the public. The final report showed the ease and support for a non-lethal approach to the rabbits.

In the meantime animal groups discovered the university is using bromadiolone anti-coagulant poison in areas accessible to wildlife such as young rabbits in violation of Health Canada regulations pertaining to bromadiolone use set out in the Pest Management Regulatory Agency's Re-evaluation Decision Document RRD2006-11. The university blames this on Victoria Pest Control who UVic hired to do pest management and UVic puts out misinformation that rabbits are not attracted to the rat bait despite research to the contrary and the regular appearance of dead baby rabbits on campus who died from bromadiolone poisoning, and other who were rescued from campus and successfully treated for bromadiolone poisoning.

Animal groups lobby vocally, both on and off campus, for non-lethal alternatives for rabbit population control. Local veterinarian Nick Shaw, who owns a string of pet hospitals in the Victoria area, offers to do a pilot vasectomy project, which, if successful, he is willing to extend to the entire rabbit population at UVic. He has presented this project to UVic several times over the years, most recently spring of 2010, and has been refused

each time by UVic administration. Students, staff, faculty, and others receive negative treatment by UVic administration for their opposition to UVic's killing of the rabbits and plans to do a large-scale kill. Faculty consult their union representatives, and others consult their lawyers.

In May of 2010 UVic began trapping and killing rabbits during the breeding season on campus. At this time approximately 75% of the females have nursing babies in their burrows, and their removal caused a secondary wave of deaths of babies in their burrows. Each litter averages five babies. UVic publicly denies in the media that they are killing the rabbits. Later, in a May 15, 2010 article in the Times Colonist, Tom Smith of UVic facilities management department admits to killing approximately 100 rabbits during this time.

At the end of June 2010 UVic releases their long term rabbit management plan to the public. This report lays out their intention to kill 1200 - 1400 rabbits being this summer. In an on-air interview with Bill Good on CKNW Tom Smith agrees to holding off on the killing until the end of July to allow community groups to assemble the funds required for rabbit sterilization and the necessary permits from the Ministry of the Environment. Despite their promise to hold off till the end of July, UVic was caught trapping rabbits on campus and some of the rabbits were handed over to EARS, the first sanctuary to get its permit and arrange funding for sterilization and care of UVic rabbits. Others were trapped and removed and we do not know what their fate was.

Two other sanctuaries have come forward this month to take the UVic rabbits. The Coombs sanctuary is willing to take 400 rabbits and the Texas sanctuary is willing to take 1000 rabbits. These sanctuaries are in the process of obtaining the MOE permits. Funds were raised this month over \$70,000 to date to pay for the rabbits sterilization and care. The Fur-Bearer Defenders has donated \$50,000 to spay and neuter UVic rabbits going into sanctuaries. Over \$14,000 to date has been donated to EARS for the rabbits they are taking. Other funds are collecting money for emergency veterinary bills for UVic rabbits, transportation, and other costs associated with their rescue.

Despite all these efforts underway, UVic, after waiting over 20 years to deal with the rabbits, is now insisting on starting capture and killing of rabbits in August, commencing this weekend. Tom Smith says UVic plans to catch and kill 400 rabbits this August, whether or the [sic] groups are ready. If the permits are not in place, Smith says UVic will kill the rabbits instead of handing them over to sanctuaries. The Minister of the Environment has been requested to intervene under Section 40 of the *Wildlife Act* which allows the Minister to stop any hunting or killing of wildlife for the purposes of wildlife management, and has been asked to expedite the permits for sanctuaries willing to take the UVic rabbits. The sterilization and removal of these rabbits is the gold standard of wildlife management of domestic rabbits as it has been successfully practised in Kelowna, Vernon, Calgary, and Long Beach College, to name a few recent examples. The Minister has taken no action to date and advocates for the rabbits are concerned that UVic will go ahead with the killing despite well-developed efforts on behalf of the local and international community to remove the animals the university wants removed.

The university is well-able to wait a little longer, especially given their negligence in this matter for decades. Worst case scenario they get a few more trees chewed, while on the bright side, they don't have to pay to cut the grass. The reputation of the university is at stake as they take regressive animal control measures which are not only inhumane and unethical, but are also unsustainable and fail to address long-term concerns about rabbit overpopulation on campus. They stand to save a lot of money as they will not have to pay for trappers and exterminators and veterinarians to kill the rabbits. The groups will be trapping, removing, and caring for the animals at no cost to the university. The needs of the rabbits, the local community, and the university are best met by this non-lethal population control plan and I ask the courts for their assistance in this matter.

[14] The request of the Minister of the Environment to intervene under s. 40 of the *Wildlife Act*, referred to by Ms. Cassells in her affidavit reads as follows:

July 28, 2010

Dear Barry Penner

BC Minister of the Environment

1000 rabbits from the University of Victoria have been offered sanctuary in a refuge in Texas, another 400 have been offered sanctuary in a refuge in Coombs locally.

We are awaiting your ministry's permits for both placements.

The University of Victoria has announced their intention to go ahead with the killing of the rabbits, starting this weekend, if the MOE permits and the Texas permit is not in place immediately.

Under section 40 of the *Wildlife Act* you are empowered to intervene in this matter and order the University of Victoria to cease and desist from trapping and killing the rabbits for a specified period of time in order to allow for wildlife management of the rabbits.

The situation is urgent. We demand you act immediately.

Sincerely,

Roslyn Cassells founder, Action for UVic Rabbits

(Over 1200 members)

[15] In the result, the court issued an interlocutory order, which includes the following provisions:

1. the University of Victoria will not trap or kill any rabbits found on the University of Victoria property until this petition is heard and determined or until otherwise ordered by the court;
2. the petitioner, Roslyn Cassells, will serve the University of Victoria with a copy of this entered order, the petition, supporting affidavit, notice of hearing and material, by Tuesday, August 3, 2010 at 4:00 p.m.;
3. the University may apply to set aside this order on two clear days notice to the petitioner.

[16] Since this order was issued and since Mr. Stallberg's letter of August 9, 2010, matters have progressed with respect to additional sanctuaries receiving permits to take University of Victoria rabbits. In total, there are currently three permits allowing the rabbits, after sterilization, to be shipped to sanctuaries which will accept them. In addition to the 60 rabbits referred to in Mr. Stallberg's letter, the Ministry of Environment has permitted a sanctuary at Coombs on Vancouver Island to take 400 rabbits, and, on August 17, 2010, it issued a permit allowing up to 1,000 rabbits to be trapped, sterilized and exported to a sanctuary in Texas, which has agreed to take them. In addition, I am informed by Ms. Cassells, that a further application for a permit is pending before the Ministry for an additional 400 rabbits to be relocated to a sanctuary at Whiskey Creek.

[17] As a result of these developments, counsel for the University informed the court that the University "will be pleased to hand over trapped rabbits on its grounds" to the permit holders in accordance with the terms of the permits. Counsel for the University further informed the court that the University will adjust its trapping and management plan to accommodate the processing of the rabbits to permit them to be transported to the sanctuaries.

[18] The University will also instruct its trappers to release any nursing mothers, and I was informed that the University was having discussions with the involved

groups to have a representative of the groups and a representative of the BC SPCA observe the trapping process.

[19] A resolution of the substantive issue in this manner does not resolve the legal issue. The University, although agreeing to modify its plan to accommodate the petitioner's objectives, wishes to proceed with its application to set aside the *ex parte* injunction, in part because in any event, it is necessary to modify the injunction to permit the rabbits to be trapped, and in part on the basis that there is a point of legal principle at stake and the University is entitled to have the question of whether it should be subject to interlocutory injunctive relief determined.

THE PARTIES' POSITIONS

[20] From the petitioner's perspective, although what she was seeking in the action has been substantially achieved by the approval of the permits and the University's agreement to modify its management plan to accommodate the sanctuaries, and notwithstanding that she is willing to agree that the order be varied by allowing the University to trap the rabbits, Ms. Cassells resists the application to set aside the injunction in its entirety.

[21] Ms. Cassells' position is that there are significant logistical and temporal issues yet to be resolved to ensure that the trapping, sterilization and relocation of the rabbits is compatible with UVIC's management plan. In the meantime, she submits the injunction against killing the rabbits should be maintained.

[22] Thus, although it appears that the parties are in agreement that UVIC can and will deal with its rabbit over-population problem without the need to resort to culling the rabbits, it is necessary to deal with the question whether on an interlocutory basis, this injunction, in modified form, should be maintained or not.

[23] In her petition, the petitioner asserted a number of different factual bases to serve as the foundation for her action. She noted that:

Animal groups ... campaign for changes to the *Wildlife Act* which would allow them to intervene to rescue rabbits without being in breach of the current *Act*

which requires an onerous permitting procedure and long-term housing of the rabbits instead of adoption to new homes.

[24] She also asserted that:

The University is using Bromadiolone anti-coagulant poison in areas accessible to wildlife such as young rabbits, in violation of Health Canada regulations pertaining to Bromadiolone use set out in Pest Management Regulatory Agency's re-evaluation decision document RRD-2006-11, in connection with the University's use of the poison to control the rat population on campus.

[25] She points to:

The regular appearance of dead baby rabbits on campus who died from Bromadiolone poisoning.

[26] She asserts that in May 2010, the University trapped and killed rabbits during the breeding season and about 75% of the females had nursing babies in their burrows "...leading to a second wave of deaths". She asserted that the long-term management plan released in June 2010 "lays out [the University's] intention to kill 1,200 - 1,400 rabbits being [sic] this summer" but agrees to hold off until the end of July "to allow the community groups to assemble the funds required for rabbit sterilization and the necessary permits from the Ministry of Environment". She further alleges, however, that "UVIC was caught trapping rabbits on campus" during that period, handing some of them over to a sanctuary; others were removed and their fate is unknown.

[27] The petitioner alleged that the University of Victoria planned to catch and kill 400 rabbits in August and noted that the Ministry of the Environment "has been requested to intervene under s. 40 of the *Wildlife Act* which allows the Minister to stop any hunting or killing of wildlife for the purposes of wildlife management and has been asked to expedite the permits for sanctuaries willing to take the UVIC rabbits".

[28] The petitioner asserted:

The Minister has taken no action to date and advocates for the rabbits are concerned that UVIC will go ahead with the killing despite well developed

efforts on behalf of the local and international community to rescue the animals the University wants removed.

[29] As earlier noted, events have since over-taken the factual foundation for the petition, at least in terms of the prospect of an imminent cull of the rabbits.

[30] The legal basis asserted by the petitioner for the action underlying the injunction mirrors the factual basis. She submits the inclusion of domestic European rabbits as wildlife in the *Wildlife Act* engages a serious debate given the physiology and breeding of the European rabbits, which makes them less suited to survive in the wild and less protected under the *Wildlife Act* than they would be under the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, C. 372, which relates to domestic animals.

[31] The petitioner asserts, but provides no supporting authority that rabbits do not fall under the *Wildlife Act* for the first 30 days following their release, and therefore should fall under the *Prevention of Cruelty to Animals Act*. She asserts that the Ministry of the Environment “does not have any way of managing this interim period”, instead requiring rescue groups to go through an expensive owner’s permitting procedure before rescuing any rabbits.

[32] She identified the University’s use of Bromadiolone poison in violation of Health Canada regulations as a legal basis for her petition. She references s. 26 of the *Wildlife Act* and ss. 39 and 41 pertaining to the “unauthorized hunting or trapping of wildlife and furbearers without the permission of the owner” as a further legal basis for her petition. She cites s. 33 of the *Wildlife Act* which prohibits possession of dead wildlife or parts, and the use of snares as a violation of s. 41 of the *Act*. She also cites s. 75 of the *Wildlife Act* which requires the accidental killing or wounding of wildlife be reported to the Ministry.

[33] The petitioner further relies on the provisions of s. 40 and 41 of the *Wildlife Act* and asserts in that context that the Ministry of the Environment is relying not on their own biologists, but on “misinformation” about the UVIC rabbits, put out by the University. She asserts that the Ministry has failed to accept UVIC’s use of

Bromadiolone as a basis for action and she relies on s. 76 which vests ownership of wildlife in the Crown as a bar to UVIC's "jurisdiction" to deal with the rabbits. The petitioner also invokes sections 76, 77, and 78 of the *Wildlife Act* as sections under which the MOE could potentially act, but has not.

[34] The petitioner submits, based on her petition, her affidavit, and the voluminous materials she has put before the court, that there is a basis to conclude that the University is/has been in violation of a number of federal and provincial laws regarding their treatment of the rabbit population on campus, citing the *Wildlife Act*, the *Prevention of Cruelty to Animals Act*, and the Health Canada Regulations. She submits the failure to hand over rabbits, which could be identified by tattoos, within 30 days of their release to owners or rescue groups may be a violation of the *Prevention of Cruelty to Animals Act*, and that UVIC's practice of capturing, sterilizing and releasing rabbits in the Feral Rabbit Pilot Project without providing food or water may amount to abandonment in violation of the *Wildlife Act* or neglect, a violation of the *Prevention of Cruelty to Animals Act*.

[35] She submits the University's use of Bromadiolone may violate Health Canada Regulations and may lead to cases of secondary poisoning. She submits that deliberate poisoning may constitute offences under the *Wildlife Act*, the *Prevention of Cruelty to Animals Act* and the *Criminal Code*, R.S.C. 1985, c. C-46, and that secondary poisoning is similarly an offence under various provincial and federal statutes. The petitioner also raised the issue of the University's ownership of the land, submitting some parts of it are trust properties under the Habitat Conservation Trust, some are Crown land endowed under the *University Endowment Land Act*, R.S.B.C. 1996, C. 469, and yet other parts are First Nations lands, falling either under the relevant Nations' constitution or the *Indian Act*, R.S.C. 1985, c. I-5. The petitioner provided no authority or evidence relating to those assertions.

[36] In response to the factual assertions made by the petitioner, the University tendered an affidavit sworn by Thomas F. Smith, the Executive Director of Facilities Management of the University. He deposed in part, as follows, with respect to the

petitioner's assertions concerning the culling of the rabbits and the University's use of poison:

9. In 2010, UVic has conducted some research involving actual culling of the feral rabbit population, including a limited number of rabbits being put down. In response to paragraph 8 of the Plaintiff's affidavit, UVic trapped 104 rabbits during May 2010, of which 26 were adults, half male and half female, 14 were juveniles, and 64 were nestlings, most beyond nursing. Contrary to paragraph 8 of the Plaintiff's affidavit, there were not 75% pregnant females. Moreover, in further response to paragraph 8 of the Plaintiff's affidavit, UVic provided and continues to provide accurate information about the number of rabbits it has culled.

10. It is true that UVic has subcontracted to Victoria Pest Control ("VPC") to address UVic's problems with rats. It is true that VPC uses bromadiolone. However, in response to paragraph 6 of the Plaintiff's affidavit, VPC does not use bromadiolone in open-ended PVC tubing and the Ministry of the Environment is aware of VPC's practices at UVic and has not challenged these practices. The Ministry of the Environment itself has been clear about its stance on UVic's practices, as is made clear in a letter to Larry Wartel, activist, from Don Cadden, Regional Manager, Environment Stewardship and Parks and Protected Areas Divisions, a copy of which was provided to UVic by the Ministry of the Environment. A copy of the letter is attached hereto as Exhibit "E".

11. VPC uses specially designed traps intended solely for rats. They are small, made of moulded, black plastic, and are closed boxes with 2" x 2.25" apertures to permit entry not to rabbits but to rats. Only the smallest newborn rabbit could attempt to enter it. The rats must enter the box, travel into it, make a 90 degree turn and enter a deeper chamber, and then chew through a plastic bag to consume some amount of bromadiolone in the form of a blue powder mixed with ground grain contained by the bag which is of no nutritional value and no interest to rabbits even if they could fit inside the traps. Rabbits are not known to feed on grain based products, but rather on vegetative materials such as grasses, carrots, apples, kale, etc.

12. UVic has used this method of rat control for approximately 15 years.

13. The rat traps are carefully placed according to trapping regulations within a certain distance from buildings to target rats alone. Any of VPC's traps that have been found elsewhere have been moved by agents other than those under the control of VPC or UVic.

14. In further response to paragraph 6 of the Plaintiff's affidavit, rabbits die regularly in the absence of poison: UVic staff frequently find dead rabbits and witness attacks on young rabbits by adult rabbits, hawks, owls, and osprey. In the Spring of 2010 UVic removed all bait from the bait stations for a six-week period, yet continued to find dead rabbits at the same frequency as when the rat traps were actually baited. UVic recognizes the illegality of poisoning wildlife and has been dealing with control of rats and rabbits according to strict adherence to the law. UVic does not endorse a program for responding to the feral rabbit overpopulation that involves poisoning them.

ISSUES

[37] The University has raised four issues in support of its contention that the *ex parte* injunction should be set aside.

[38] The first issue relates to the petitioner's standing or status to bring this action. The next two issues arise from the two-pronged test for issuing an interlocutory injunction: whether there is a fair question to be tried, and secondly, whether the balance of convenience or inconvenience favours the granting of an injunction. The university says that in the circumstances of this case, the court should find that the petitioner has no standing and that neither prong of the test for the issuance of an injunction is met.

[39] The fourth and final issue raised by the applicant University goes not to the merits of the injunction granted but to the regularity of the way in which it was obtained. The applicant submits that the petitioner did not provide the court with all the evidence necessary to make full and frank disclosure of all material facts and thereby vitiated the basis for the interlocutory injunction.

[40] The applicant, although noting that the question of standing is sometimes treated as an aspect of whether there is a fair question to be tried, argued it separately as a preliminary issue which, if resolved against the petitioner, is determinative of the validity of the injunction.

SUBSEQUENT SUBMISSIONS

[41] After submissions concluded on Friday, August 20th, I adjourned to give Reasons for Judgment. In the meantime, Ms. Cassells submitted another affidavit with attachments. The affidavit included letters, photographs, media releases, news stories, and emails between Mr. Smith of the University and a representative of the groups taking charge of the rabbits to be sent to the sanctuaries concerning an anticipated schedule for trapping and turning over the rabbits.

[42] The affidavit and the materials attached to it expressed continued concern with the alleged use of poison as part of the University's response to the problems occasioned by the rabbit population on campus and repeats the concerns expressed by Ms. Cassells at the hearing that unless the court imposes terms on the lifting of the injunction against trapping the rabbits and maintains limitations respecting the rate of trapping and other contingencies, the plan to rescue the rabbits is doomed to failure and the University will in effect default to its original management plan, which involves culling the rabbits.

[43] Ms. Cassells appended to her third affidavit a letter from the Minister of the Environment, Mr. Penner, sent on August 19, 2010, in response to her letter to him of July 28, 2010. The Minister's letter reads as follows:

Thank you for your email of June 28, 2010, regarding the management of feral rabbits at the University of Victoria (UVic).

I know there has been some information in the media regarding the feral rabbit population at UVic and that your questions may be based on this information. The information below regarding feral European Rabbits, the Wildlife Act, and management techniques will hopefully help clarify the situation.

Although British Columbia (BC) is home to one native species of hare (snowshoe hare, *Lepus americanus*) and two native species of rabbits (white-tailed jackrabbit, *Lepus townsendii* and Nuttall's cottontail, *Sylvilagus nuttalli*), Vancouver Island does not have any native species of hare or rabbit. It does, however, have two non-native species of rabbit that have been increasing in numbers since initial introduction. One of these, the European rabbit, originated from domestic rabbits that escaped or were released. Non-native rabbit species have the potential to cause significant ecological damage, agricultural losses and infrastructure damage. Rabbits are also a menace to gardeners and property owners, as they can extensively damage ornamental and vegetable gardens by digging and eating plants.

Unfortunately, abandoned pet rabbits over the years have resulted in a feral population of between 1,400 and 1,600 rabbits at the UVic campus. Without a natural predator on Vancouver Island, this population of rabbits will continue to increase unless population-control efforts are applied. UVic has decided to address the feral rabbit population on campus, which is causing damage and becoming a health and safety concern.

Existing regulations allow members of the public to control these species. Despite the fact European rabbits pose a risk to property, wildlife and wildlife habitat, European rabbits are not classified as Controlled Alien Species as per section 6.4 of the Wildlife Act.

Section 76 of the Wildlife Act (the Act) states, "On the escape from captivity or the release or abandonment of an animal that is not a domestic animal, the government acquires the ownership of that animal." The Ministry considers the feral rabbit to be an invasive, non-native wildlife species and lists it under Schedule C of the Designation and Exemption Regulation of the Act. This schedule lists mostly non-native wildlife species that are known to destroy property or are detrimental to native wildlife. This means that feral rabbits are wildlife, whereas feral horses, which are designated as domestic animals (Section 12 of the Designations and Exemption Regulation to the Act), are not. Species listed on Schedule C have fewer restrictions regulating their hunting, killing or capturing. European rabbits can be captured or killed anywhere, at any time, in BC without requiring a hunting licence to hunt or kill them. Any capture or killing of Schedule C wildlife must abide by provincial laws regarding the humane treatment of animals, as well as laws regarding trespass.

In BC, a person is authorized to use a trap, other than a leg-hold trap, for wildlife listed in Schedule C on land owned or occupied by that person, or with the permission of the owner or occupier of private land. Furthermore, the Designation and Exemption Regulation of the Wildlife Act states "If a person injures wildlife listed in Schedule B or C, the person must kill that wildlife." For these reasons, organizations such as UVic can choose to trap and humanely euthanize feral rabbits as a management strategy. Please be aware that, under the Act, a person who knowingly damages or interferes with a lawfully set trap commits an offence.

Regarding potential techniques for managing this rabbit population, the Ministry of Environment, under the Wildlife Act, does not condone the use of poison to control wildlife (species such as the Norway rat and the black rat are not considered wildlife under the Act). We can assure you that the Ministry will not allow the use of poison to manage rabbits at UVic, nor has UVic enquired about this method. Similarly, UVic has not enquired about shooting rabbits at night, which is an activity that requires a permit.

We are aware that some people may prefer the use of non-lethal management methods; however, the Ministry supports UVic in their efforts to manage these feral rabbits and will not compel or coerce UVic to use non-lethal methods. Because the Ministry recognizes that this is a unique situation and that this population of feral rabbits has resulted from the abandonment of pets, we have considered some unique solutions to this issue. For example, the Ministry provided a permit for the possession of 51 European rabbits to a facility that was housing these animals off site. From December 2009 to February 2010, a pilot project was conducted on the UVic campus to assess the efficacy of trapping, sterilizing and relocating feral rabbits.

Furthermore, the Ministry has drafted a permit process that will allow individuals to obtain up to two feral rabbits from UVic. This only applies to feral rabbits originating from the UVic campus, for a limited time, and only sterilized rabbits will be considered. For the possession of wildlife, we required a Wildlife Sundry Permit (Permit type 2(j) - Applicable fee \$55/year) available through the Permit and Authorization Service Permit Bureau (PASB).

The Ministry has also drafted a permit process for rabbit sanctuaries. Once again, this only applies to feral rabbits originating from the UVic campus, for a limited time, and only sterilized rabbits will be considered. The sanctuary shelters will undergo an inspection prior to permit approval. The Ministry would like to avoid the situation we had in Kelowna, where inadequate shelters allowed unsterilized rabbits to escape into the surrounding communities and exacerbate the situation. We believe that this objective is critical to minimizing risk to native plant communities and rare ecosystems, which these feral rabbits pose. If you are considering building a sanctuary, please be aware that you will be responsible for all associated costs (our understanding is that feeding costs are one dollar per day per rabbit) and arranging for municipal and regional district approvals. Please note that, under the Spheres of Concurrent Jurisdiction of the Community Charter, a municipality may regulate, prohibit and impose requirements in relation to invasive alien species such as European rabbits. Please contact PASB for permit information if you wish to pursue this option (<http://www.env.gov.bc.ca/pasb/>).

I am aware of private fundraising efforts and the Minister of Environment is working with rabbit advocacy organizations. The Ministry has already approved some rabbit sanctuaries and continues to help clients with their permit applications. It is my understanding that UVic has been coordinating trapping efforts with rabbit advocacy groups to provide an opportunity to place rabbits in sanctuaries. UVic has indicated that they would like to trap 400 feral rabbits in August, 400 in November, and the remainder in the spring of 2011.

Thank you again for writing and sharing your interest and concern for the feral rabbit population at UVic.

[44] In her affidavit, Ms. Cassells took some issue with what she characterized as inaccuracies in the Minister's letter, concerning the University's use of poison and "correspondence between UVic and the MOE concerning shooting". She asserts the Minister's letter in referring to the limited time the permits and exemptions are in place shows a "lack of sustainable management of rabbits in B.C."

[45] In response to Ms. Cassells' affidavit, counsel for the University opposed consideration of the affidavit on the basis that it was filed outside the time provided for in the Rules and after the petitioner had sufficient time to provide reply materials, particularly given that the application was adjourned from August 16th to August 20th to give her time to seek counsel.

[46] Counsel for the University further submits that the arguments and materials contained in the third affidavit are essentially repetitive of Ms. Cassells' previous

material and submissions. The University denies that it puts poison in PVC pipes and repeats what was earlier stated in the University's material that the use of poison is no part of the UVic management plan, and is not condoned except in rat traps as set out in Mr. Smith's affidavit.

[47] Mr. Edinger submits as follows in his responsive letter:

Finally, we would urge the court not to draw the conclusion urged upon it by Ms. Cassells in her previous submissions and in her Affidavit #3 that UVic will simply kill rabbits if they cannot be placed properly in a sanctuary. As we advised the court during the opening of our submissions, UVic's first choice is to fill all the sanctuary places on a reasonable schedule, taking into account the speed with which rabbits may be processed by veterinarians and transported under the applicable permits. In our submission, the emails between Mr. Smith and Ms. Susan Vickery, attached as Exhibit 1 to Affidavit #3 of Ms. Cassells, show that UVic is trying to work with the permit holders to place as many rabbits as possible in as short a time as possible. In particular, we would not that Mr. Smith's email of August 23, 2010, to Ms. Vickery indicated what he hoped to achieve, but then stated "Can you let me know what you can accomplish and we will establish a revised schedule". If Ms. Vickery provided a response to Mr. Smith, it was not included with Ms. Cassells affidavit.

DISCUSSION AND CONCLUSION - THE ISSUE OF STANDING

[48] In *Saanich Inlet Preservation Society v. Cowichan Valley (Regional District)* (1983), 44 B.C.L.R. 121 at 123 (C.A.), Hutcheon J.A. explained that standing is "the legal entitlement of [the petitioner] to invoke the jurisdiction of the court".

[49] In *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 75, 51 B.C.L.R. (4th) 314, Finch C.J.B.C. confirmed that a ruling on standing may be addressed as a preliminary matter, where a trial of the merits is unlikely to materially change the outcome of the issue.

[50] In this case, the petitioner's claim rests upon her assertion that the applicant's Feral Rabbit Management Plan, and some of the activities occurring on its property, engage and may violate various provisions of the *Wildlife Act* and/or the *Prevention of Cruelty to Animals Act* and/or Health Canada Regulations.

[51] At the heart of her claim is an assertion that the Feral Rabbit Management Plan, as it existed, should be curtailed or prohibited under the *Wildlife Act*, in particular, by s. 40. Despite that position, no governmental or other agency responsible for the administration or enforcement of any of those *Acts* or *Regulations* is joined as a party to this action and there is nothing in this action which can be construed as a challenge to the constitutional validity of any of the *Acts* at issue, in particular, the *Wildlife Act*.

[52] Insofar as the proscriptions in the *Wildlife Act* are concerned, s. 5 of the *Offence Act*, R.S.B.C. 1996, C. 338, reads as follows:

A person who contravenes an enactment by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence against the enactment.

[53] Section 84 of the *Wildlife Act* provides for fines and penalties for a person convicted of an offence under the *Act*. Section 84.1 provides that in addition to any punishment imposed a court may make an order, among other orders:

..prohibiting the person from doing any act or engaging in any activity that may in the opinion of the court result in the continuation or repetition of the offence.

[54] The *Wildlife Act*, read with the *Offence Act*, establishes a regime of *quasi* criminal or criminal legislation under which prosecutions may be mounted by the Attorney General. This regime includes the prospect of convictions leading to prescribed penalties, including the imposition of ongoing prohibitions of offending behaviour.

[55] It is in that overall context that the issue of Ms. Cassell's standing to bring this action and seek this injunction must be considered and determined. As noted by Callaghan J. in *Greenpeace Foundation of British Columbia et al v. Minister of the Environment* (1981), 122 D.L.R. (3d) 179 at 184 (B.C.S.C.):

In general, private individuals have no inherent right to seek injunctive relief to protect the public at large from a wrongful invasion of its rights. It is for the Attorney General to discharge that function. An Attorney General is always competent to institute proceedings to protect the public at large, but a private

citizen may sue it seems in two situations. One, where interference with a public right interferes with a private right of his own, or two, where no private right of his own is interfered with but in respect of his public right he suffers special damage peculiar to himself from the interference with the public right.

[underlining added]

[56] In *Injunctions and Specific Performance*, loose leaf ed., Mr. Justice Sharpe notes at para. 3.450:

Where injunctions are sought by private individuals to restrain public nuisances or wrongs, the issue of standing rises. The law has not favoured the private enforcement of public rights unless the issue of public rights is incidental to some private cause of action asserted by the plaintiff.

[underlining added]

[57] In that same text, Justice Sharpe notes in connection with the right to sue on the basis of statutory proscriptions at paras. 3.670 to 3.680 as follows:

An important consideration is surely the regulatory and statutory framework which accompanies the statutory proscription. The Canadian courts appear unwilling to find a civil cause of action based on a breach of statute where the “statute ... itself provides comprehensively for remedies for its breach”. The body of case law dealing with the issue whether a statute which creates an offense can be read as permitting an individual to sue is notoriously difficult.

[underlining added]

[58] In *Carruthers v. Langley* (1985), 23 D.L.R. (4th) 623, (B.C.C.A.), leave to appeal to S.C.C. ref'd, (1986), 70 B.C.L.R. XI, the plaintiff brought an action seeking to have s. 251 of the *Criminal Code* clarified and enforced “so as to restrict the performance of therapeutic abortions in accredited hospitals”.

[59] The court in that case noted as follows at pg. 627:

Thus, they seek by means of a private action to redress alleged public wrongs, i.e. non-compliance with s. 251 of the *Criminal Code*.

[60] The appellant plaintiffs in that case did not challenge the validity of the legislation at issue, but submitted standing is not confined to such circumstances.

[61] In rejecting the plaintiff appellant's argument in that case, the court held, as follows at pg. 629:

We think neither of the appellants has a sufficient interest to acquire the status to bring this action in his own name. The enforcement of s. 251 of the *Criminal Code* relates to a public right. As Lord Wilberforce pointed out in *Gouriet v. Union of Post Office Workers*, [1977] 3 All E.R. 70, the distinction between public rights and private rights is fundamental. His remarks at p. 84 are particularly apposite in this case:

The distinction between public rights which the Attorney General can and the individual (absent special interest) cannot seek to enforce, and private rights is fundamental in our law. To break it, as counsel for Mr. Gouriet frankly invited us to do, is not a development of the law, but the destruction of one of its pillars.

[62] In my view, the petitioner in the present case has not demonstrated either that she has a “private right” or that she will suffer “special damage peculiar to herself” sufficient to establish her legal entitlement to invoke the court’s jurisdiction.

Pursuant to s. 2(1) of the *Wildlife Act*, ownership of all wildlife in British Columbia is vested in the government, and, accordingly, Ms. Cassells has no legal, equitable or proprietary interest in the rabbits, which would overlap with the public rights provided for in the statute. As I see it, none of Ms. Cassells’ submission touching on the University’s ownership of the land or the asserted 30 days before abandoned rabbits become wildlife alters that fundamental fact.

[63] In her submissions, Ms. Cassells focussed on her efforts as a dedicated social activist and politician who, in conjunction with others has raised funds and found sanctuaries for the UVic rabbits. There is no doubt that Ms. Cassells and her group have mounted a truly impressive and ultimately successful campaign to relocate and save the rabbit population. In her submissions, she noted that the funds she has raised may give rise to a fiduciary obligation and her reputation as an organizer and politician might suffer if in the future the defendant University might resort to its original Rabbit Management Plan. She submitted that that may give rise to damages special to her, justifying standing in the present case.

[64] I would not give effect to that submission, although it had some initial attractiveness. As I see it, the private interest or special damage which gives rise to standing, must flow from the impact of the asserted public wrong on the petitioner independently of the political or social activism which she undertook to oppose it.

Otherwise standing could be manufactured by the unilateral action of any person choosing to incur a fiduciary obligation, to put their reputation at issue, or even to contribute money to a cause which is subject to public law. That, it seems to me, would undermine the purpose of a standing requirement. In that regard, in *Injunctions and Specific Performance*, at para. 3.530, Mr. Justice Sharpe points to two factors that constrain the courts in finding standing where an individual seeks a remedy with respect to a matter of general public interest:

1. Fear of a flood of unnecessary litigation that might result from affording broad rights of standing.
2. A concern over the politicization of the judicial process; where ordinary members of the public are permitted to raise public law issues in which they have no particular interest, they may unnecessarily involve the courts in political controversies and disputes.

[65] Similarly, in *Gouriet v. Union of Post Office Workers*, *supra*, Lord Wilberforce noted that the public interest embraces broader concerns than those properly addressed by courts of law:

The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact that, as the present case very well shows, decisions are of the type that attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve.

[66] In light of these findings, I conclude the petitioner lacks standing in connection with the issues raised by this petition, based on her private rights or the existence of special damages peculiar to her, arising from a breach of a public right.

[67] An alternative means of achieving status to invoke the jurisdiction of the court is through public interest standing.

[68] An explanation of that concept can be found in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, where Cory J. stated:

30. The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government

intervention must be reviewed by courts. Even before the passage of the Charter this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases; *Thorson v. Attorney General of Canada*, *supra*, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575. Writing for the majority in *Borowski*, *supra*, Martland J. set forth the conditions which a plaintiff must satisfy in order to be granted standing, at p. 598:

... to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

Those then were the conditions which had to be met in 1981.

[69] Justice Cory noted that the advent of the Canadian *Charter of Rights and Freedoms* in 1982 indicated that a generous and liberal approach should be taken to standing, and in para. 37, he outlined the test for public interest standing:

37. It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

[70] A constitutional issue need not be raised for public interest standing to be available in pursuing public rights. In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, the court held that the approach to public interest standing reflected in *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, should be extended to a non-constitutional challenge to the statutory authority for public expenditure and other administrative action.

[71] That incremental development was characterized as involving “considerable caution”. See *Canadian Bar Association v. British Columbia (Attorney General)*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, in which Brenner C.J.S.C. observed as follows:

46. ...In my view, the balanced approach will not be served by removing the requirement that the “serious issue” must relate to the invalidity of legislation, or to a public act undertaken without or in excess of statutory authority.

[72] The balanced approach referred to by Brenner C.J.S.C. was set forth by Cory J. in *Council of Churches, supra*, in para. 35 where he stated in part, as follows:

...It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits, brought by well meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

[73] In *Society for the Preservation of the Englishman River Estuary v. Nanaimo (Regional District)*, [1999] B.C.J. No. 370 (S.C.), Macaulay J. held that a private litigant without a special interest lacks the standing to enforce a statutory regime of general application. In that case, Macaulay J. took “the special role of the Attorney General into account when applying the *Borowski* principles on an application for public interest standing”. He concluded in para. 54, in part, as follows:

The public generally, and the respondents particularly are entitled absent perhaps exceptional circumstances such as negligence or bad faith, to have public officials rather than private parties make decisions respecting the enforcement of public statutes.

[74] In two decisions of this court in which public interest standing was granted to a private entity seeking injunctive relief, the circumstances made it clear that such standing will not be granted where governmental action is not brought into question. In both cases, the relevant ministry of government was made a party and it was clear that it was the governmental action, not the private respondent’s action that justified granting public interest standing.

[75] In *Chetwynd Environmental Society v. British Columbia (Ministry of Forests Dawson Creek Forest District)*, [1995] B.C.J. No. 2080 (S.C.), Sinclair-Prowse J. held as follows at para. 14:

14 There is no dispute that public interest standing will not be granted to individuals or groups for the purpose of conducting an action against another private party (*Shiell v. Amok Ltd.* (1987), 27 Admin. L.R. (Sask. Q.B.)). The purpose of public interest status is to challenge the unlawful use of governmental authority not to pursue a claim against a private individual or group (*Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 575; and *Canadian Council of Churches v. Canada (Minster of Employment and Immigration)* (*supra*)).

[76] In *Western Canada Wilderness Committee v. Kennah*, 2001 BCSC 1840, at issue was the validity of a forest development plan granting a company the right to seek a cutting permit in an area asserted to be the habitat of an endangered species. In that case, the Ministry of Forests was a party to the action and indeed supported the petitioner's application for public interest standing to determine the legitimacy of the governmental action at issue.

[77] In the present case, the action is only brought against the University as a private entity in its capacity as a landowner, dealing with wildlife on its property. The petitioner's action does not challenge the constitutional validity of legislation. Although she takes issues with provisions of the *Wildlife Act*, this has to do with the utility of the provisions rather than their validity. Similarly, although she takes issue with the Ministry's approach to the issues she seeks to raise in her petition, she has not joined the Ministry as a party to challenge its actions or inaction. Further, she has not provided any evidence that she or others sought a specific remedy from the Ministry except to request from the Minister that he exercise his discretion under s. 40 of the *Wildlife Act*, and that the Ministry hasten the process of approving permits for the relocation of rabbits. It appears that Ms. Cassells and her group were successful in speeding up the approval process, but her petition does not implicate the Minister's exercise of discretion under s. 40, reflected in his August 19, 2010 letter.

[78] After considering the petitioner's third affidavit and the University's response to it, I am not satisfied that the legal landscape of this application is altered in any meaningful way. While the petitioner continues to express concerns about the respondent's approach to the problems occasioned by the over-population of rabbits

and about the Ministry of the Environment's and the Minister's response to those concerns, she has not formally challenged either the legislative foundation she expresses concern with or the executive action or inaction that she expresses opposition to in her petition.

[79] The University is in no position to assemble any record on behalf of the Ministry or Minister or respond on its or his behalf to the petitioner's submissions.

[80] On the basis of the materials before me, the Ministry has approved the University's Rabbit Management Plan and has also issued permits to those willing to provide sanctuaries to the rabbits, thus enabling the University to modify their plan to accommodate the proposed rescue of the rabbits.

[81] I do not consider in those circumstances that the petitioner's right to standing or the strength of her case is in any way enhanced against the University by the position of the Minister or the Ministry as revealed in her materials.

[82] In summary, therefore, in my view, this is a case which is amenable to the sort of social and political activism which the petitioner has, with her supporters, pursued vigorously and successfully. It is not, however, a case which lends itself to legal action because it lacks the indicia of a private interest or special damage peculiar to Ms. Cassells, and it lacks critical aspects of an action attracting public interest standing: a challenge to the validity of legislation or the exercise of administrative and executive authority. The only respondent in this case is the University. Its original Rabbit Management Plan was approved by the Ministry of the Environment, and the Minister's actions are not challenged in this action. Whatever issue the petitioner may have with the *Wildlife Act*, the Ministry of the Environment, the *Prevention of Cruelty to Animals Act* or the British Columbia Society for the Prevention of Cruelty to Animals are not matters that can be determined by this petition.

[83] The petitioner is in effect seeking to achieve the objectives of a criminal or *quasi* criminal prosecution through her petition and through the maintenance of the

interlocutory injunction. What she seeks would stigmatize the University with *quasi* criminal liability without the approval of the Attorney General through whom the public law is to be enforced, without an objective or full investigation by representatives of the Ministry of the Environment, and without a proper or full hearing observant of the rules of evidence and the applicable standard of proof. Although the subject matter of this case has drawn significant public concern and attention, that does not justify ignoring the need for a plaintiff or petitioner to establish a proper foundation for invoking the jurisdiction of the court particularly in cases involving criminal or *quasi* criminal public law issues.

[84] In the result, I conclude the petitioner has failed to establish that she has the requisite standing to bring this application and accordingly I set aside the injunction issued on July 30, 2010.

“A.F. Cullen J.”

The Honourable Mr. Justice A.F. Cullen