Dissenting Reasons for Judgment Reserved of
The Honourable Chief Justice Fraser

I. Introduction

[39] An elephant is a social animal. Thus, according to experts and zoo standards, elephants, especially female elephants, should not be kept alone.[1]This appeal involves Lucy, a 36 year old Asian elephant. She arrived at the Edmonton Valley Zoo, owned by the City of Edmonton, when she was only about two years of age. It is alleged that since then, Lucy has been housed at the Valley Zoo by herself at various times, most recently for almost four years.[2] It is also alleged that the size and structure of the shelter in which the City has confined Lucy for years fail to comply with the City's obligations at law. And that these deprivations hav caused or aggravated a number of Lucy's long-standing health problems. Some may consider this appeal and the claims on behalf of Lucy inconsequential, perhaps even frivolous. They would be wrong. Lucy's case raises serious issues not only about how society treats sentient animals[3] – those capable of feeling pain and thereby suffering at human hands – but also about the right of the people in a democracy to ensure that the government itself is not above the law.

[40] It must be stressed that this case does not involve the actions of a private citizen, but rather of government. Municipal governments are an integral part of government in our democratic society.[4] As the creation of the Legislature, the City exercises delegated authority in the carrying out of its administrative actions. That is so regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, be described as private. Therefore, all of the City's activities in carrying out the operations of the Valley Zoo are government actions.[5]

[41] The significance is this. The rule of law, which forms part of the bedrock of our democracy, requires that all government action comply with the law.[6] No one in Canada is above the law. And that includes government itself.[7]

[42] The present legal model in Alberta defining the relationship between humans and animals is an "animal welfare" one. It is based on the concept that humans have a moral and ethical obligation to treat animals humanely. Thus, the old common law view that animals are property to be used – and sometimes abused – as humans see fit has long ago been tempered by legislative reform and the evolution of the law.

[43] In Alberta, the Legislature has enacted the *Animal Protection Act* (*Act*)[8] and the *Wildlife Act* (*Wildlife Act*)[9] to protect animals' interests to the extent defined therein. Admittedly, this legislation does not grant animals the full range of rights advocated by some. Nevertheless, as the beneficiaries of this legislation, animals have some rights, limited though they may be.[10] Within the constraints set by law, that includes the right to be free from pain and suffering, to be provided with adequate food, shelter and space and when ill, adequate care.[11] Further, an animal in a zoo is also entitled to be maintained in numbers sufficient to meet its social and behavioural needs.[12]

[44] These proceedings began when the appellants, Tove Reece, Zoocheck Canada Incorporated (Zoocheck) and People for the Ethical Treatment of Animals (PETA), which has 1849 members in Edmonton, filed an originating notice seeking a declaration that the City is in violation of the *Act*.

[13] The originating notice alleged that the City is responsible for causing or permitting Lucy to be in distress contrary to the *Act*.

[45] The chambers judge struck the originating notice on the basis that it constituted an abuse of process.[14] He found that he did not need to address the issue of public interest standing in any detail. And he did not. According to the chambers judge, by seeking a declaration that the City was in contravention of the *Act* in a civil proceeding, the appellants were attempting to enforce the criminal law privately. In his view, that was not permitted absent a private interest in the proceedings, and he determined that the appellants had none. Therefore, he concluded that the originating notice constituted an abuse of the criminal process of the courts and struck these pleadings.

[46] It is from this decision that the appellants now appeal. They also ask this Court to permit them to continue their action by statement of claim, an option available under the applicable *Rules of Court*.[15]

[47] Viewed through the animal welfare lens, this appeal raises important issues fundamental to the effective protection of animals in this province. Under what circumstances can citizens or advocacy groups be granted public interest standing to seek a declaratory judgment that the government itself has failed to comply with animal welfare laws? And under what circumstances, if any, and to whom, is a civil declaratory judgment an available remedy where the alleged unlawful government acts may also be the subject of a prosecution under a regulatory animal welfare statute? Both are linked to a crucial issue in a constitutional democracy. Is the government, and that includes the City as an arm of the state, immunized from judicial scrutiny of alleged unlawful acts?

[48] All lead back to the central issue. Did the chambers judge err in striking the appellants' pleadings? I conclude he did. Striking pleadings is a summary power that courts should exercise only in plain and obvious cases.[16] Nor should pleadings be struck where novel, that is arguable, difficult or important, points of law are in dispute.[17] If courts were to do so, this would stifle the evolution of the common law. As gatekeepers of access to justice, the courts should not readily, and summarily, bar access to the courthouse door by striking pleadings unless the action has no reasonable prospect of success.[18]For reasons explained below, this case is not within that narrow exception. Thus, the pleadings should not have been struck. Instead, since a trial is required, the chambers judge ought to have directed the pleadings to be amended and continued by statement of claim as the *Rules* permit.

[49] I begin my analysis by reviewing the historical and legal context relevant to Alberta's animal welfare legislation (Part II). I then turn to the present statutory framework under the *Act* and the interpretive approach to that legislation (Part III). This takes me to the relevant factual context relating to Lucy (Part IV) before I deal with the test for striking pleadings and its rationale (Part V). This is followed by a brief summary of the standard of review (Part VI).

[50] I next explain why the chambers judge erred in striking the pleadings as an abuse of process (Part VII). This is followed by my reasons for concluding that the appellants should be granted public interest standing (Part VIII). Finally, I confirm that the appeal should be allowed and the appellants permitted to amend their pleadings and proceed with their action by statement of claim seeking the requested declaratory relief (Part IX).

II. Historical and Legal Context of Animal Protection Laws

A. Why is Context Important?

[51] Courts are to interpret statutory legislation purposively and contextually.[19] In determining legislative intent, in addition to the words in the written text, the court should look at the context of the legislation, the overall legislative scheme, and the purpose of the statute.[20] In doing so, situating Alberta's animal protection legislation in its larger historical context helps explain its intended purpose – to protect animals to the extent defined.

[52] Judicial inquiry into the relevant legal and policy context is important for another reason. Where, as here, a court is considering whether the issues raised are novel and therefore not suitable for summary dismissal, that assessment cannot be made in a vacuum. This does not mean that a court is entitled to take into account anything it wishes.[21] This would be no more proper than a blinkered approach, untethered from reality, that sees issues only in shades of midnight black and snow white.

[53] That said, the existence of an ongoing debate about the animal welfare model and the evolution of the law in this area are part of the relevant context in which the issues raised by the appellants arise. In exploring that debate, I do not do so for the purpose of accepting as valid any view. The point is that the existence of the debate, an incontrovertible fact, demonstrates that the issues raised in this case are properly characterized as novel, in that they are not only arguable but also difficult and important. They go directly to a fundamental issue in our society: who, if anyone, is entitled to access the courts, and under what circumstances, to protect animals to the extent the Alberta Legislature has defined?

B. Changing Legal Paradigms – The Animal Welfare Model Replaces an Exploitive One

[54] Society's treatment of animals today bears no relationship to what was tolerated, indeed widely accepted, centuries ago.[22] The past 250 years have seen a significant evolution in the law relating to animals, though admittedly not as far as many might consider warranted.[23] We have moved from a highly exploitive era in which humans had the right to do with animals as they saw fit to the present where some protection is accorded under laws based on an animal welfare model.[24]

[55] Previously, animals were regarded as unthinking, unfeeling and of no value beyond that assigned to them by humans.[25] As property, they had no rights and no protection even from extreme abuse. It was not until the end of the 18th century that laws began to appear in common law countries preventing cruelty against animals. This was followed later by other animal welfare legislation which went further than simply prohibiting overt cruelty. The concept underlying animal welfare legislation is based on the utilitarian principle that "humans should avoid imposing suffering on animals unless the result of doing so create[s] greater pleasure for society than the pain it impose[s] on the animals in question".[26]

[56] This animal welfare model continues to be the norm in Canada today. The federal government, under its criminal law power, has prohibited deliberate cruelty to animals.[27] This law, which dates back even before Canada's first *Criminal Code*, is now so ingrained in our society that it is considered a rule of civilization.[28] But how society treats animals goes far beyond simply prohibiting the most egregious forms of abuse. Recognizing that humane treatment of animals calls for more, provincial governments in Alberta and elsewhere have adopted laws extending varying degrees of protection to animals. A number, including Alberta's, combine prohibitions preventing harm to animals

with affirmative duties of care to the animals to whom the protection extends.[29] Not all provinces have gone this far. But Alberta has.

[57] And yet, it must be conceded that the basic animal welfare model still involves attempting to balance animal pain against human need or pleasure. This approach is reflected in a number of areas: economic (farming, food production, animal husbandry, etc.); scientific (research, medicine, genetics, etc.); and social (entertainment, hunting, exhibition, etc.).[30] Whether and in what circumstances the balancing of competing values should be re-calibrated, or other values weighed in that balance, or perhaps an entirely different model adopted that places greater emphasis on animal rights, is largely a question for the Legislature.

[58] That said, in examining the arc of history and the relationship between humans and animals, it is clear that the development of the law has been influenced, and will continue to be, by mankind's deepened understanding of our place in the universe. Humans may be at the top of the evolutionary chain. But with rights come responsibilities and one of them is that we are stewards of the environment. That stewardship is reflected in the legal obligations we have assumed not only to the physical biosphere but also to the animals with whom we share the Earth. Should moral, ethical or spiritual considerations not serve as adequate motivation in shaping those legal obligations, then the fact that this also happens to be in humanity's own collective enlightened self-interest ought to suffice. Indeed, all evidently have.[31]

C. What Flaws have been Identified in the Animal Welfare Model?

[59] While the animal welfare model constituted a significant step forward in the protection of animals, it has attracted considerable criticism in recent years. Broadly speaking, the criticisms fall into four main categories.[32]

[60] First, it is argued that existing laws are substantively inadequate to properly protect the interests of animals. The criticism is that the laws that do exist come wrapped up with so many delimiting qualifications – such as "unreasonable", "undue", "ordinarily", "when possible" – that they are too open-ended and elastic. As a consequence, it is far too easy to step past them, meaning that they may protect against only the most extreme forms of abuse, and sometimes not even that very effectively. Further, as one scholar has noted, "the idea that animal suffering at the hands of humans should be minimized whenever possible is really only the beginning of the debate about how animals should be treated in modern society".[33]

[61] Second, it is contended that the utilitarian balancing test at the heart of the animal welfare model always gives undue weight to human needs, no matter their purpose. Thus, what constitutes improper neglect or harm to animals as well as adequate care continues to be understood primarily in terms of the interests of humans. And our privileged position invariably governs.[34]

[62] Third, it is forcefully asserted that those laws that do exist are inadequately enforced to the detriment of the animals they are designed to protect. This is attributed to several causes ranging from insufficient funding to failing to take the rights of animals seriously.

[63] Fourth, efforts by citizens or advocacy groups to protect the interests of animals may be silenced, and often are, by denying legal standing to them and the animals they seek to protect.

[64] While these criticisms raise issues primarily within the purview of either or both the legislative and executive branches of government, more than one also touches on issues arguably within the jurisdiction of the judiciary.

D. Proposals for Reform of Animal Welfare Laws

[65] Identified concerns with the present animal welfare construct have led to a number of proposals for reform from the comparatively modest to those calling for far more robust rights for animals. The general sweep of those reforms may be summarized as follows.[35]

[66] At the minimalist end are reform advocates who suggest retaining the basic animal welfare model but fixing key flaws undermining its effectiveness.[36] Suggested reforms include introducing strengthened enforcement mechanisms and expressly providing in legislation for the private enforcement of animal welfare laws.

[67] Another school of thought proposes that the law recognize a new category of property, what has been termed "living property".[37] Under this theory, the law would provide for certain duties to be imposed on owners of animals in the living property category. It would also grant animals certain rights including the right to standing at law, the right not to be put to prohibited uses, the right to be cared for, the right to have living space and the right not to be harmed.

[68] Another view suggests that the route to improving rights for animals lies in taking "one step at a time".[38] This approach acknowledges that improving animal rights faces a number of strong headwinds. It proposes as a starting point that every being with "practical autonomy" be entitled to certain basic liberty rights. These rights, including legal personhood, would be granted in proportion to the degree that the being possesses practical autonomy. Animals that are said to be on the higher scale of those possessing practical autonomy, and thus deserving to be recognized as legal persons, include elephants.

[69] At the other end of the reform spectrum, it has been proposed that the notion of animals as property be abolished and that all sentient beings be treated as legal beings.[39] Advocates of this approach assert that reform must involve more than merely touching up animal welfare laws since these laws themselves reinforce the view of animals as property. Instead, the law should abolish all human use of animals and recognize the inherent worth of animals and their right to live independently of humans.

[70] Despite substantial differences in these various reform proposals, it is noteworthy that all agree on one critical point. If animals are to be protected in any meaningful way, they, or their advocates, must be accorded some form of legal standing at law.

E. Conclusion

[71] The criticisms about the animal welfare model touch on how it is actually applied in real life at various stages of the legal process: inadequate consideration of animals' interests in law-making; priority for human interests always; restrictive judicial interpretation of protective legislation; common law precepts that treat animals as property and deny them or their advocates legal standing; limitations on what constitutes legitimate legal argument; restrictions on what is accepted as evidence; and anaemic enforcement of animal protection legislation. Understanding the nature and extent of these

deficiencies – more than one of which is arguably at play in this case – is important since they underscore why courts should interpret the animal protection laws we do have generously and why this case raises novel points of law not suitable for summary dismissal.

III. Statutory Framework for Animal Protection Laws in Alberta

A. Relevant Statutes and Regulations

[72] I now turn to the basic statutory framework of Alberta's animal welfare laws. It consists of two statutes, the *Act* and the *Wildlife Act*, and the regulations passed under each, that is the *Animal Protection Regulation* (*Regulations*)[40] and the *Wildlife Regulation* (*Wildlife Regulations*).[41] A review of the *Act* and *Regulations* reveal that they are designed to protect a vulnerable group, animals, by establishing certain minimum standards that apply to their treatment. The *Wildlife Act* and *Wildlife Regulations* include the standards that must be met by zoos, both in their treatment of captive animals and as a condition of receiving a permit to operate a zoo.

[73] Dealing first with the *Act* and s. 2(1), this is the section that the appellants allege that the City has breached by causing or permitting Lucy to be in distress. That section provides:

> 2(1) 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.[42]

[74] Distress is defined in turn in s. 1(2) of the *Act* as follows:

> 1(2) For the purposes of this Act, an animal is in distress if it is
>
> > (a) deprived of adequate shelter, ventilation, space, food, water or veterinary care or reasonable protection from injurious heat or cold,
> >
> > (b) injured, sick, in pain or suffering, or
> >
> > (c) abused or subjected to undue hardship, privation or neglect.

[75] However, the *Act* does not simply prohibit causing or permitting distress to an animal. It goes further by also imposing *affirmative duties* on owners and those in charge of animals. In particular, the *Act* provides in s. 2.1 under the heading "Animal care duties" the following:

> 2.1 A person who owns or is in charge of an animal
>
> > (a) must ensure that the animal has adequate food and water,
> >
> > (b) must provide the animal with adequate care when the animal is wounded or ill,
> >
> > (c) must provide the animal with reasonable protection

> from injurious heat or cold, and
>
> (d) must provide the animal with adequate shelter, ventilation and space.

[76] The *Act* empowers peace officers to respond to animals in distress. That includes the power to enter upon premises where there are reasonable and probable grounds to believe an animal is in distress, and to take the animal into custody.[43] From a practical perspective, the day-to-day enforcement of the*Act* in Edmonton is in the hands of the agent of the Minister of Agriculture and Rural Development, that is the Animal Protection Department of the Edmonton Humane Society (Humane Society), which has been approved by the Minister as a humane society under s. 9 of the *Act*.[44]

[77] Section 12(1) of the *Act* makes a contravention of the *Act* or *Regulations* an offence. The only penalty under this section is monetary; imprisonment is not an option. And imprisonment would never apply to a corporation (which the City is) in any event. Section 12(1) provides:

> A person who contravenes this Act or the regulations is guilty of an offence and liable to a fine of not more than $20,000.[45]

[78] An offence under the *Act* is to be prosecuted in accordance with the *Provincial Offences Procedure Act (POPA)*.[46] In turn, *POPA* incorporates the summary conviction procedure under the *Code*.[47]

[79] Of particular note, the *Regulations* expressly provide that a person who owns or controls a zoo for which a zoo permit is issued, and that includes the City as owner of the Valley Zoo, must comply with the Government of Alberta Standards for Zoos in Alberta *(GASZA)*.[48]

[80] What then does *GASZA* say that potentially has direct application to Lucy? Section III sets out *GASZA*'s overall purpose:

> The purpose of these standards is to ensure the needs of all the animals in the zoo facility are being met with regard to food, water, shelter, space and health care.

[81] Several provisions of *GASZA* may be relevant to the manner in which Lucy is being housed and sheltered by the City. The prescribed need to maintain animals with same species companions and in adequate facilities is addressed in Section III B 1 (Section III being entitled "Standards Related to the Animal Protection Act", and B being entitled "Animal Exhibit Standards") as follows:

> All animals must be maintained in numbers sufficient to meet their social and behavioural needs (unless a single specimen is biologically correct for that animal). Exhibit enclosures must be of sufficient size to provide for the physical well being of the animal. All animal exhibits must be of a size and complexity sufficient to provide for the animal's physical and social needs and species typical behaviours and movement. Exhibit enclosures must include provisions ... that encourage species typical movements and behaviours.

[82] That same Section also addresses protecting animals from cold in these terms:

> Animals must be protected from injurious ... cold associated with ambient outdoor conditions or any other weather conditions that are detrimental to their health....

[83] As for animal health care standards and maintaining proper care records, Section III C of *GASZA* includes a requirement that:

> The zoo operator must consult with the zoo veterinarian to ensure that animal diets are of a quality and quantity suitable for each animal's nutritional and psychological needs. The zoo veterinarian must record veterinary activities as per the [Wildlife Committee of the Alberta Veterinary Medical Association] health record keeping protocol. [Brackets added.]

[84] Finally, Section III B 2 of *GASZA* as follows arguably indirectly incorporates certain minimum standards set by the *American Zoo and Aquarium Association* (*AZA*) into *GASZA*:

> The Alberta Zoo Advisory Committee will use the AZA Minimum Husbandry Guidelines for Mammals to evaluate applications for an Alberta Zoo Permit.

[85] In this regard, the AZA Minimum Husbandry Guidelines for Mammals arguably include the AZA Standards for Elephant Management and Care (*AZA Guidelines*) that accredited zoos are required to meet.[49] The *AZA Guidelines* provide in Standard 2.3.1:

> Zoos should make every effort to maintain elephants in social groupings. It is inappropriate to keep highly social female elephants singly.... Institutions should strive to hold no less than three female elephants wherever possible.

[86] In addition, Standard 2.2.4 provides:

> Institutions must provide an opportunity for each elephant to exercise and interact socially with other elephants....

[87] With respect to the *Wildlife Act* and *Wildlife Regulations*, this legislation applies to licensing of zoos and the issuing of required permits for "controlled animals", including Asian elephants. This legislation too may well be relevant to the conditions in which Lucy is being housed and sheltered since those conditions may affect the City's permit for the Valley Zoo, both in terms of its continuation and renewal.

B. Consequences of Alberta's Animal Welfare Legislation

[88] Four key points may be drawn from Alberta's animal welfare legislation. First, the legislation reflects public policy and the felt need and importance of protecting animals in this province. Why are the rights of animals important in our society? Animals over whom humans exercise dominion and control are a highly vulnerable group. They cannot talk – or at least in a language we can

readily understand. They have no capacity to consent to what we do to them. Just as one measure of society is how it protects disadvantaged groups, so too another valid measure is how it chooses to treat the vulnerable animals that citizens own and control.

[89] Second, while animal rights in this province are not at the end of the spectrum advocated by some, the Alberta Legislature has nevertheless accorded animals the protection of certain rights. In doing so, the Legislature has balanced the interests as between humans and animals as considered appropriate and made a number of policy choices. This is its decision to make. Having done so, it falls to the executive branch of government to ensure that those rights are actually enforced in accordance with law.

[90] Third, since the rights adopted for the benefit of animals are limited, courts should not diminish the full import of animal protection laws by creating unnecessary barriers to those seeking to ensure compliance with them. Animals, including Lucy, cannot commence lawsuits on their own to protect themselves. They must rely on humans to give voice to the truly voiceless.[50] Thus, courts should take a generous, not impoverished, approach to the grant of public interest standing for those attempting to enforce the restrictive animal rights that do exist.[51]

[91] Fourth, the animal welfare legislation is not simply for show, to assuage our collective conscience, promising much but delivering little. There is no principle of law inviting or compelling this result. Instead, this legislation should be given a large, liberal interpretation to ensure it fulfills the Legislature's intention.[52] With respect to the *Act* and *Regulations*, that aim is clear. The overarching purpose is to protect animals – not their owners.

IV. Factual Context Relating to Lucy

A. Why is the Appellants' Affidavit Evidence Relevant and Admissible?

[92] Before reviewing what the evidentiary record reveals about Lucy, I must address the City's argument that the appellants' evidence should be ignored. The appellants filed six affidavits including sworn evidence from four doctors: an ecologist, an elephant biologist and ethologist, and two veterinarians. The City contends that this evidence is irrelevant to the issues before this Court and inadmissible in any event since it is based on hearsay. These arguments are both without merit.

[93] I begin with this. After the appellants had filed their originating notice and supporting affidavits, the City applied to strike the pleadings on two grounds in particular, first that they disclosed no reasonable cause of action and second, that they were an abuse of process.[53] It is correct that evidence is not admissible on a motion to strike pleadings on the grounds they disclose no reasonable cause of action.[54] The court is limited to considering only the pleadings themselves. However, in this case, the chambers judge did *not* strike the originating notice on the basis it disclosed no reasonable cause of action. He struck it on the basis it constituted an abuse of process. There can be no suggestion that the City did not understand that abuse of process was squarely before the court. After all, it raised the issue itself. The City was also aware that the appellants were seeking public interest standing. Thus, the City would have recognized that both issues would open up the evidentiary record to review.

[94] Why? When dealing with whether to strike pleadings based on abuse of process, a court is entitled to, indeed should, and typically would, consider relevant evidence. That is especially so where, as here, abuse of process is inextricably linked to the issue of public interest standing.[55] Further, the

appellants' affidavit evidence is relevant to three aspects of public interest standing, that is the seriousness of the dispute, the nature of the interest claimed by the appellants and the rationale for the requested declaration.

[95] Public interest standing is not granted for trivial matters; the issue at stake must be a serious one. In deciding whether the seriousness threshold has been met, evidence is essential because it allows the court to separate the minor from the potentially significant. This case is not about whether Lucy got one less load of hay for breakfast one day. It is about an alleged sustained pattern of conduct over time in the City's treatment of Lucy contrary to what the law requires and the alleged serious consequences of that conduct. Nor is public interest standing granted to busybodies. The evidence is relevant to show the justification for the appellants' involvement in defence of the public interest in the City's compliance with the law and arguably, Lucy's interests. Finally, the evidence is relevant on the question of whether a prosecution of the City under the *Act* is a reasonable and effective alternative to a civil declaration.

[96] Nonetheless, the City chose to file no evidence. Instead, it focussed on its submission that the only way the City could be held to account for its treatment of Lucy is in "criminal" proceedings under the *Act* and it ought not to be deprived of its rights as a "criminal defendant". Having put all its eggs into the "criminal defendant basket", the City elected to adduce no evidence on the issues the appellants concentrated on. Those issues included the seriousness of the dispute as reflected in the City's treatment of Lucy, the consequential impact on Lucy's health and the treatment of elephants in captivity in zoos generally and the Valley Zoo in particular, why the appellants should be granted public interest standing and why the public law issues raised are important.

[97] The City was entitled not to file any affidavit evidence. What it is not entitled to do is prevent this Court from considering the appellants' affidavit evidence in assessing the issues before this Court. Maintaining a militant silence was a strategic choice the City made. The City would have known that were it to file affidavit evidence, those swearing any affidavits on behalf of the City would be exposed to cross-examination. The City seeks to have it both ways. Not file any evidence and thereby avoid the risks inherent in doing so; and then demand that this Court ignore the evidence that has been filed by the appellants. This ought not to be permitted. What does all this mean? Just this. At this stage of the proceedings, the evidence before this Court on Lucy, her health problems, and what caused or aggravated them is unchallenged and uncontradicted.

[98] The City also asserts that the subject affidavits are not admissible because they are based on hearsay. Some of the evidence is hearsay. But it does not follow that it is *inadmissible* hearsay. A substantial portion of the hearsay consists of records that the City compiled as operator of the Valley Zoo in compliance with its statutory obligations under *GASZA* or summaries thereof.[56] These include Lucy's Veterinarian Medical Records;[57] Lucy's Daily Log Books;[58] Lucy's 2008 Walk Log; Lucy's March-July 2009 Walk Log; and a compilation of Lucy's health records entitled "Health Record for Lucy (1980-March 2009)" (Health Record for Lucy). Also included are the Medical/Husbandry Record of Inspection dated September 10, 2009 (Oosterhuis Report)[59]by Dr. Oosterhuis, a veterinarian retained by the City and Lucy's Treatment Program dated November 13, 2009 (Treatment Program), which the City developed to implement the recommendations in the Oosterhuis Report.[60]

[99] These records are all admissible for the truth of their contents on one or more of the following grounds: (1) under the common law business records exception;[61] (2) as admissions against interest;[62] (3) under s. 39 of the *Alberta Evidence Act*;[63] or (4) under the modern hearsay

rule.[64] Essentially, hearsay evidence is admissible for the truth of its contents despite its hearsay character if it meets the twin criteria of necessity and reliability. Since animals cannot tell someone what has happened to them, relying on records relating to animals is often, as here, a necessity. As for reliability, that would typically be found to exist where, as here, individuals employed by the City are required by law to maintain records concerning Lucy's health, diet, exercise regime, etc. Ironically, by disputing the admissibility of these records, the City is in essence arguing that its own records are unreliable. But there is no evidence before this Court to undermine those records.

[100] Nor does the fact that the City records are attached to, or incorporated in, the affidavits sworn by others somehow convert them or the affidavit referring to them into inadmissible hearsay.[65] To hold otherwise makes no sense. Further, a summary digest of otherwise admissible records, as is the case, for example, with respect to the Health Record for Lucy taken directly from the Valley Zoo's medical and zoo keeper records, is also itself admissible at law.[66]

[101] Finally, the argument that the affidavit of one of the experts, Dr. Joyce Poole,[67] contains what is termed double hearsay cannot be sustained. Dr. Poole does refer to information she received from Julianne Woodyer who, in turn, quoted information she received from representatives of the Valley Zoo. But this does not make Dr. Poole's opinion inadmissible. It is not a hearsay usage by Ms. Woodyer to report the fact that representatives of the Valley Zoo made comments to her. Dr. Poole's expert opinion is admissible at law even though based in part on information received from Ms. Woodyer.[68]

[102] For these reasons, at this stage, the appellants' affidavit evidence is both relevant and admissible to the issues of abuse of process and public interest standing. That evidence is properly before this Court, as it was before the chambers judge.

B. What Does the Evidentiary Record Reveal?

[103] I now turn to the evidentiary record. It must be stressed that the unchallenged affidavit evidence from the four doctors is accepted for the limited purposes of this appeal and that a trial may ultimately resolve the facts otherwise. That said, the affidavit evidence packs a powerful punch. It holds up a mirror for all to see – provided one is prepared to look into the mirror. What it reveals is a disturbing image of the magnitude, gravity and persistence of Lucy's on-going health problems and the severity of the suffering she continues to endure from the conditions in which she has been confined. And it also exposes who is responsible for those conditions and that suffering.[69]

[104] This evidence provides considerable insight into the world of elephants. Briefly, elephants are large-brained and inquisitive animals. The fact that they are capable of recognizing themselves in a mirror indicates they are self-aware. Elephants exhibit a wide variety of complex cognitive behaviours including an extensive and complex vocal and gestural repertoire. They are capable of distinguishing amongst the various voices of their relatives and companions; empathizing with others; discriminating between friendly and unfriendly people and other animals; and using and even manufacturing small tools. One of the most social of all mammals, elephants live in complex societies where mothers, daughters, granddaughters, sisters and female cousins retain close relationships for life. And because they are such highly social animals, holding elephants alone, especially females, is injurious to their health.[70]

[105] Lucy is 36 years old; an elephant's life expectancy is 65 to 70 years.[71] Lucy has been at the Valley Zoo since she arrived as a baby elephant in 1977 from the Pinnewala Animal Orphanage in Sri Lanka. The City has had full responsibility for Lucy since then. Initially, she was housed by herself for 12 years. That ended in 1989 when Samantha, an African elephant, was brought to the Valley Zoo. But then in September, 2007, the City transferred Samantha to a zoo outside Canada for breeding purposes, once again leaving Lucy alone.

[106] There is nothing in the record to indicate that the City was required by compulsion of law to arrange Samantha's transfer. Hence, a reasonable inference is that the City did this voluntarily despite the fact the City would obviously have understood that this would mean that Lucy would lose the only elephant companion she has ever had. Absent a same species companion for Lucy, this amounts to Lucy's having been kept in solitary isolation – some might use the words solitary confinement – since Samantha was moved away.

[107] Lucy's medical records (as incorporated in the affidavit evidence) reveal that she currently suffers from a litany of painful, debilitating medical conditions that she has apparently endured for years. This includes chronic respiratory problems,[72] arthritis (stiffness, swelling, soreness, lameness, pain),[73]foot disorders[74] and obesity. The affidavit evidence also explores in detail the reasons for those health problems. No matter how troubling, one cannot ignore the fact that this evidence, which I again stress is the only evidence before this Court, indicates that Lucy's health problems have been caused or aggravated by her living conditions at the Valley Zoo, including her social isolation.

[108] Dr. Philip Ensley, a veterinarian with 30 years experience in zoo and wild animal medicine, reviewed all of Lucy's health problems. His conclusion: "The impact of conditions and the standard of care at the Valley Zoo have caused unnecessary distress, (suffering or privation)" to Lucy.[75] He addresses in detail Lucy's many health problems from her respiratory difficulties, to her arthritis and foot disorders, to her obesity, citing numerous, repetitive and consistent comments about their prevalence over several years. He focusses on Lucy's living conditions and, in particular, the concrete floor of her indoor enclosure and confirms how it has caused or aggravated Lucy's foot problems and arthritis, which she began to suffer from when she was only 14 years old.[76]

[109] While Dr. Ensley was unable to identify the cause of Lucy's respiratory illness, he confirmed that he had never seen respiratory signs in an Asian elephant similar to those Lucy exhibited. In his opinion, "the freezing cold temperatures in Edmonton during winter further aggravates" Lucy's respiratory illness by exposing her to cold and limiting her exercise.[77] Elephants are warm weather animals that thrive between 15-35 degrees C.[78] Of course, the City cannot be held responsible for the cold. But since Lucy is unable to spend extended times outside in the winter months, this arguably means that the City is required to take that into account in the size, composition and layout of Lucy's indoor enclosure.

[110] Dr. Ensley also notes that Lucy's veterinary medical records document her problems in sleeping regularly. Lucy suffers as well from bed sores, or decubital ulcers (pressure sores) which are also long-standing, having been recorded as early as 2002. Dr. Ensley attributes these too to her exposure to rough, cold or unhygienic substrates. According to Dr. Ensley, Lucy's records also demonstrate a history of oral/dental problems dating back almost 15 years.[79] On this record, Lucy's living conditions and the care she receives both fall within the City's purview.

[111] Dr. William Keith Lindsay, an ecologist with over 30 years experience on ranging, habitat and demography of elephants, made similar findings. He concludes that the ultimate causes of Lucy's arthritis, foot infections and obesity are threefold: (1) severely confined living space; (2) concrete substrate in Lucy's indoor enclosure; and (3) inappropriate diet.[80] On this record, the City is responsible for Lucy's living space, concrete substrate and diet.

[112] Dr. Lindsay confirms that non-captive elephants rarely stand still for more than an hour or two during the day and are typically on the move for 18 to 20 hours covering tens of kilometres each day. According to Dr. Lindsay's calculations, Lucy's outdoor enclosure is approximately 825 square metres and the total indoor area is 194 square metres with the main room of the indoor enclosure being less than half that size (79 square metres).[81] In his view, Lucy's arthritis and foot infections are "apparently caused by the lack of opportunity to move, stretch legs, take the weight off individual feet and improve circulation that comes from having sufficient space".[82] He also adds: "... Lucy's quarters are far too small. Lucy simply is unable to engage in her species-typical behaviour of extensive walking, which is required for both physical and psychological health ...."[83]

[113] Dr. Lindsay attributes Lucy's obesity to her lack of activity, noting that her walk records show she walked an average of less than two hours each day in 2008. This was considerably less in the cold winter months when Lucy is kept largely indoors. The normal weight of an adult female Asian elephant in the wild is about 6,700 pounds. But by 2009, Lucy's weight had risen to about 9,400 pounds. He explains the effect of Lucy's obesity and living conditions this way:

> Long periods spent standing must clearly put enormous pressure on joints and feet, without any relieving movement or exercise, and the impact on limbs is likely to be additionally acute when the animal is overweight or obese and when the substrate is made of concrete, which provides no shock absorption."[84]

[114] Dr. Lindsay maintains that the way in which Lucy is exercised exacerbates her problems:

> [S]he is kept under tight control by the keepers during these walks ... [I]n the icy conditions of winter, her movements can be only slow and cautious. These brief periods of activity do not provide a significant addition to her generally immobile lifestyle.... This immobility – even if it had not resulted in arthritis – causes significant suffering and deprivation to Lucy as she is not allowed to engage in her species-typical movements.[85]

[115] Dr. Henry Melvyn Richardson, a veterinarian with 28 years experience at zoos, also reached substantially similar conclusions. Dr. Richardson asserts that Lucy suffers from chronic foot abscesses and arthritis which are "caused by the combination of being forced to stand for most of her day in her indoor enclosure (particularly during the cold winter months), the hardness of the concrete substrate and being subjected to inclement temperatures."[86] On this record, the City is responsible for the size, composition and layout of Lucy's indoor enclosure.

[116] Dr. Joyce Poole is an elephant biologist and ethologist with extensive expertise in elephants, both African and Asian. She spent several hours observing Lucy and reviewed a summary of Lucy's walk records and other records along with sketch maps of Lucy's indoor and outdoor enclosures. Her

definitive conclusions include the following:

> Lucy would be left inside the small barn standing on concrete unattended from the time her handlers go home until they come back in the morning. Standing in their own urine and feces, bacteria may become trapped in the fissures of an elephant's foot leading to infections, which may lead to all sorts of complications....Added to these problems is arthritis. Lucy has suffered chronically from both and these cause her privation and suffering.... Lucy has spent much of her life standing on concrete in a small barn and doing very little of what an elephant needs to do to maintain good physical health and mental well being....[87]

[117] This is a sampling only of the health problems Dr. Poole deposes to regarding Lucy. She points out, and again this evidence is uncontroverted, that the daily logs kept by Lucy's keepers themselves confirm that Lucy suffers from a long list of physical and mental ailments.[88]

[118] While Dr. Poole notes that the size of Lucy's indoor and outdoor space appears, at first glance, to meet the *AZA Guidelines*, she suggests that a closer assessment points to a contrary conclusion. According to a cautionary note in the *AZA Guidelines*, if a zoo is located in a cooler climate, then the "indoor space requirements must be met or, preferably, exceeded".[89] Dr. Poole concludes that Lucy's indoor space is too small. In particular, Dr. Poole points out that "Lucy's situation is further compromised due to the fact that she lives in such a cold climate and must be indoors, on concrete, much of her life."[90] Also, since elephants defecate up to 17 times every 24 hours and urinate almost as frequently, captive elephants, being in a comparatively small space, are often left standing in their own waste, thereby causing a variety of foot problems.

[119] What is the significance of this evidence? The law is all about context.[91] Lucy lives in a cold climate for an elephant. To comply with the *AZA Guidelines*, it is arguable that the City must provide Lucy with substantially larger indoor living quarters, heated appropriately and sufficiently varied so as to meet Lucy's basic needs. In other words, sometimes it may be enough to treat all elephants exactly the same when it comes to the size of their indoor enclosures. But given the climate where Lucy lives, it may arguably be necessary, as the *AZA Guidelines* themselves contemplate, to treat Lucy differently and provide a larger indoor space to accommodate her needs.

[120] In any event, more fundamentally yet, under s. 2.1(d) of the *Act*, the City must provide Lucy with "adequate shelter" and "space". Therefore, even if Lucy's indoor enclosure meets the minimum standards for an indoor enclosure under the *AZA Guidelines*, this would not necessarily be sufficient to satisfy the City's obligations if those *AZA Guidelines* fall short of the "adequate shelter and space" mark. Industry standards do not invariably equate to a proper standard of care.[92] A court would be required to assess what it takes to satisfy the legal standard of care mandated by the *Act*. This will involve consideration of all factual circumstances, including where Lucy lives. In this regard, the *AZA Guidelines*, which under Section III B 2 of *GASZA* are arguably to be used by the Alberta Zoo Advisory Committee in evaluating applications for an Alberta Zoo Permit, will be relevant but not necessarily definitive.

[121] More important, the *GASZA* requirements may also support the appellants' argument that the space in which Lucy is being confined is much too small for her. Section III B 1 of *GASZA* requires that exhibit enclosures be of "sufficient size to provide for the physical well being of the animal." It

further provides that all animal exhibits "must be of a size and complexity sufficient to provide for the animal's physical and social needs and species typical behaviours and movement." Additionally, under this Section, animals "must be protected from injurious ... cold associated with ambient outdoor conditions ... that are detrimental to their health." To the extent the *Act* confers a degree of discretion on the City in what it can and cannot do, that discretion is not unfettered.[93] Accordingly, these requirements, individually and cumulatively, would put squarely before a trial court the size, composition and layout of the indoor space in which Lucy is confined. Arguably, it is not enough to provide space that simply prevents Lucy from freezing to death; it must meet her larger basic health and other needs. The same arguably applies to her outdoor space.

[122] The Oosterhuis Report includes a plan to address certain problems that Dr. Oosterhuis identified. Among other things, he confirmed that Lucy's "indoor facilities need to be enlarged to facilitate exercise in the winter." Dr. Oosterhuis also concluded: "The small size of the indoor facilities restricts the ability to maintain a good exercise program during the winter months." He recommended securing "rubber mats for the inside facilities" since "[t]he concrete floor of the indoor facilities increases the abnormal pressures on [Lucy's] feet in the winter months". He also recommended developing "a plan for modification or replacement of the indoor facilities to meet the industry standards."[94] If, as the City's own consultant implies, Lucy's facilities do not even meet industry standards, on this record, that too is the responsibility of the City.

[123] Dr. Poole also zeroes in on the fact that Lucy has been confined by herself for years. She challenges the belief, apparently held by some, that human companions, in the form of zoo keepers or handlers, are an appropriate substitute for same species companionship for Lucy. Dr. Poole confirms that they are not. Her evidence on the effect of Lucy's isolation could not be clearer:

> Because elephants, like people, are such highly social animals, to hold them in a small space, on a solitary basis, is injurious to their mental and physical well being.... However good [human] companions may be, humans cannot meet [Lucy's] social needs, they cannot replace or be compared to the type of relationships Lucy can form with a member of her own kind. Preventing her from doing so is denying her a chance to be an elephant. It is ensuring that she is, and remains, in privation and suffering. [Brackets added.][95]

[124] The City's continuing to hold Lucy in solitary isolation may also fail to meet the *GASZA* requirements and in particular Section III B 1 which mandates that "[a]ll animals must be maintained in numbers sufficient to meet their social and behavioural needs". On this point, the unchallenged expert evidence before this Court overwhelmingly confirms that female elephants should not be kept alone. Doing so may also fail to satisfy Standard 2.3.1 of the*AZA Guidelines* that it is inappropriate to keep highly social female elephants singly. In fact, that Standard also states that institutions should strive to hold no less than three female elephants wherever possible. In addition, Standard 2.2.4 of the *AZA Guidelines* provides that institutions must provide an opportunity for each elephant to exercise and interact socially with other elephants. And yet, on this unchallenged record, the City has held Lucy alone – and continues to do so – for much of her life.

[125] The *AZA Guidelines* do provide an exception for anti-social elephants in a note to Standard 2.3.1:

> It is recognized that some socially aberrant adult females currently exist and these elephants can be managed singly if the institution has made every effort to introduce them to a social group and the [AZA Elephant Species Survival Plan] agrees that the anti-social behavior is not correctable [Brackets added].

[126] Dr. Poole states that she was advised by Ms. Woodyer that the Valley Zoo takes the position that Lucy is an anti-social elephant.[96] It must be stressed that on this record, there is no evidence to support the truth of any claim that Lucy is anti-social. The Valley Zoo's own consultant, Dr. Oosterhuis, confirmed that Lucy "is still a calm, gentle elephant...."[97] In any event, the *AZA Guidelines* confirm that the anti-social behaviour would have to be non-correctable. And appropriately so. Otherwise, this smacks of blaming the victim for being held captive in an environment in which she has been deprived of the opportunity to develop her normal social skills.

[127] The uncontradicted evidence before this Court, which I again emphasize remains to be evaluated at trial but which this Court is entitled to consider for purposes of resolving the threshold issues before us, may be summed up as follows. At 36 years of age, Lucy should be in the prime of her elephant life. She is not. Instead, Lucy suffers from numerous serious on-going health problems which, on this record, have been caused or aggravated by the conditions in which she has been confined for years at the Valley Zoo. Dr. Poole's conclusion about what this has meant for Lucy: Lucy is now "a young elephant in an old body. This causes her real privation and suffering."[98] On this unchallenged record, the conditions of Lucy's confinement fall within the sole control and responsibility of the City.

V. Test for Striking Out Pleadings

[128] A court's right to strike pleadings, including for abuse of process, is designed to protect the integrity of the judicial process by keeping the channels of justice open for bona fide litigants and genuine issues of fact and law. This power to arrest an action and decide it without trial is a potent one. It is not a purse strings rule under which courts strike actions considered impolitic or unimportant. The answer to too much demand on the court system is to enhance the system, not suppress valid claims.

[129] Accordingly, the test for striking pleadings is a high one. A court should strike pleadings only in plain and obvious cases.[99] If it is not plain and obvious, the court should permit the matter to go to trial where all the evidence and arguments might be considered by a trial judge. This is particularly so where novel points of law are in dispute.[100] It is dangerous to public confidence for courts to strike out arguable cases in these circumstances. One of the most important attributes of the common law remains its capacity for change in response to contemporary social norms and community values.[101] Courts may extend existing principles to new areas of the law where necessary to reflect the "dynamic and evolving fabric of our society".[102] This process of evolution of the common law – and the judiciary's role in it – continues.[103]

[130] Further, where deficiencies exist in pleadings, then reasonable amendments should generally be permitted, the intent of the *Rules* being to avoid striking pleadings that should have originated in another form.

VI. Standard of Review

[131] Questions of law are reviewed on a standard of correctness.[104] Whether a party has standing

to pursue a claim is a question of law and therefore reviewable on a correctness standard.[105] Whether pleadings disclose a cause of action is also a question of law, reviewable on a correctness standard.[106]

[132] A chambers judge's ruling on abuse of process is a discretionary finding based on specific facts. Therefore, the reasonableness standard of review applies, absent an error of law. However, where there is an error of law, it is reviewable on the correctness standard.[107] In other words, one must be careful not to confuse a finding of abuse of process based on a weighing of the evidence with a finding of abuse of process based, as in this case, on an extricable question of law. Here, the chambers judge found an abuse of process on the basis of his conclusion that, as a matter of law, a civil declaratory action against the City by the appellants constituted an abuse of process.

[133] The question is whether he erred in so concluding. It has been suggested that in reviewing his decision on this point, that somehow the plain and obvious test for striking pleadings has no application. This is wrong. It does.[108] One must not confuse, or conflate, the test for striking pleadings with the standard of review. These are separate, though linked, issues. The relationship between them may be explained this way. In the context of this case, the question is whether the chambers judge was correct (this is the standard of review) when he concluded that it was plain and obvious (this is the test for striking pleadings including striking based on abuse of process) that the appellants' action for a declaratory judgment against the City was an abuse of process.[109]

[134] It is not plain and obvious that allowing the appellants' action to proceed would be an abuse of process. To the contrary. As explained below, there are a number of grounds on which it can be reasonably argued that a civil declaratory judgment is an available remedy against the City in this case both in theory and in fact. The triable issues involved warrant a trial, not a summary dismissal of the appellants' claim before they have even had a chance to argue the full merits of the case.

[135] I will now explore more fully why the chambers judge erred in law in striking the pleadings and not allowing the action to be continued by statement of claim.

VII. Reviewable Errors in Striking Pleadings

A. Introduction

[136] The chambers judge struck the pleadings on the basis that the appellants were trying to act as private prosecutors and this was an abuse of process. He concluded his reasons by stating:

> Even without determining standing of the [appellants] in detail, I find that the declaration sought by the [appellants] is an abuse of the process of this Court.[110]

[137] Earlier in his reasons, the chambers judge had confirmed that he did not need to address the issue of standing "in any detail". And he did not do so. On the issue of public interest standing, the sum total of his discussion was as follows:

> While one or more of the [appellants] may qualify for a "public interest" standing ... to challenge "the limits of administrative authority", such standing is generally granted in the context of challenging legislation .... Even if I were to grant public interest standing, the issue of whether there

> was another reasonable and effective way to bring the issue before the court again arises. This question has some interrelationships with the question of abuse of process in which I have held against the [appellants].[111]

[138] There are several problems, both procedural and substantive, in this analysis. As a result, the reasons for judgment reveal serious errors warranting appellate intervention. What then are those errors?

B. Failure to Address and Resolve Issue of Public Interest Standing

[139] The chambers judge erred in law, and this is a fatal flaw, in not addressing and resolving the issue of public interest standing. Public interest standing, on the one hand, and abuse of process or no reasonable cause of action, on the other, are closely linked and tend to merge. As explained by LeDain J in ***Finlay v. Canada***:[112]

> The issue of standing and reasonable cause of action are obviously closely related, and ... tend in a case such as this to merge. Indeed, I question whether there is a true issue of reasonable cause of action distinguishable, as an alternative issue from that of standing.... Clearly, if a plaintiff has the requisite standing an action will lie for a declaration that an administrative authority has acted without statutory authority.

[140] This reasoning applies with equal force where the linked issues are standing and abuse of process. A court cannot deal with these issues – standing and abuse of process – as if they were in separate stovepipes. They are not; they are connected. Therefore, they must be considered as part and parcel of an overall analysis. The explanation is simple. If public interest standing is granted, then it will generally follow that the party granted standing will have the right to seek particular relief. That is 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. If it is, then the action cannot then be an abuse of process.

[141] Accordingly, the chambers judge ought to have first determined the central issue, namely whether the applicants should be granted public interest standing. Of course, if there is no standing, it will almost invariably follow that it is an abuse of process to continue with the litigation. That is why one can find numerous cases where a lack of standing will amount to an abuse of process or, for that matter, no reasonable cause of action.[113] But a finding of abuse of process cannot be used to deny standing. This is putting the cart before the horse. That is what happened here. As a result, the reasons for judgment are backwards and incomplete. Backwards because the finding of abuse of process was apparently used to deny standing without the reasons ever having first considered whether public interest standing ought to be granted. And incomplete because they wrongly equate lack of standing to bring a *private* action with abuse of process.

[142] On this latter point, the chambers judge concluded that absent an interference with private rights, no private individual can bring an action to enforce the criminal law. This is at best an overstatement and at worst, incorrect. Anyone can swear an information on reasonable and probable grounds about an alleged criminal act. This is expressly permitted under the *Code* for both indictable and summary conviction offences.[114] It is true that the Attorney General has the power to stay the

proceedings so initiated.[115] But the point is that, at least in the first instance, a private citizen can bring an action to enforce the criminal law. Thus, to the extent the chambers judge used the fact that a private citizen could not do so as a rationale for finding an abuse of process, he erred.

[143] Further, more critically, this statement assumes that a citizen has no right to challenge unlawful government conduct. However, where a wrongdoer is government itself, it is contrary to the rule of law to suggest that citizens are without a remedy. It is a central role of the courts to assure the legality of government action. This underscores why the chambers judge ought to have determined the central issue here. Should public interest standing be granted to the appellants to challenge the City's alleged unlawful conduct in its treatment of Lucy? As noted, that issue was never properly explored and resolved. It should have been.[116]

C. Failure to Apply Correct Test for Abuse of Process

[144] The chambers judge also erred in law by applying the wrong test for abuse of process. Abuse of process is an amorphous category rooted in a court's inherent jurisdiction to stay actions that are "unfair to the point that they are contrary to the interest of justice."[117] That inherent jurisdiction, which covers a wide range of seemingly disparate circumstances, is also codified under the *Rules*.[118] The focus is on preserving the integrity of the adjudicative process, not on the parties' interests.

[145] Here, the chambers judge directed his attention to what he characterized as the proper way to bring the issues involving Lucy before the court. That is evident from his statement that the "real and substantive issue in this application is whether a proceeding before the Court for a declaration is the correct procedure to seek a remedy for the harm alleged to Lucy".[119] In framing the issue this way, the chambers judge erred. He appears to have been considering whether there was another reasonable and effective way to bring the issue of "harm alleged to Lucy" before the court. In doing so, he confused one element of the test for public interest standing (whether there is another reasonable and effective way to bring the issue before the court) with the test for abuse of process. He also assumed, arguably wrongly, that there is only one correct procedure and others are improper.

[146] The correct test for abuse of process is whether it is plain and obvious that allowing the appellants' action to continue would be contrary to the interests of justice. Applying that test, whether the appellants can pursue and secure a declaratory judgment against the City based on its alleged unlawful conduct in its treatment of Lucy remains an arguable issue. Seeking a declaration that government action is unlawful is arguably not the same as prosecuting that government for an offence based on that conduct.[120] It is also arguably irrelevant that a different process tending to a different juridical outcome, that is a formal conviction and sanction, involves different forensic elements. In other words, the mere fact that alleged unlawful acts by the City may be the subject of a prosecution under the *Act* is arguably not dispositive of whether the declaratory remedy sought is an abuse of process. This is a question of law with significant implications for a constitutional democracy and it merits the consideration of a court following a trial.

[147] There is another problem with the chambers' judge's approach to the abuse of process issue. The chambers judge, like the City, repeatedly characterized the proceedings under the *Act* as "criminal" proceedings. The chambers judge relied on the fact that the City would be deprived of its rights as a defendant if it were exposed to civil proceedings to justify his treating the declaratory civil proceedings as an unacceptable intrusion into the criminal law.

[148] However, the chambers judge's findings on the scope of the City's rights as a defendant under the *Act* are faulty in certain key respects. Why is this important? Because if those rights are not as broad as the chambers judge assumed, this also undercuts his conclusion that a civil action would be an abuse of process.

[149] What then is the scope of the City's rights were it charged under the *Act*? It claims a right to take refuge behind the full *Charter* skirt.[121] However, a charge under the *Act* is a regulatory, not criminal, proceeding. Jail cannot be imposed; the only penalty possible under s. 12(1) is a fine.[122] It is true that the Crown would be required to prove the *actus reus* of any offence under the *Act* beyond a reasonable doubt. However, it does not follow that the full array of*Charter* rights available to a human being charged with a crime would be applicable to the City if charged under this regulatory statute.

[150] In this regard, the chambers judge concluded that the City would be deprived of its right to disclosure if the appellants were permitted to proceed with their declaratory action. This is of doubtful merit. To begin with, the constitutional right to disclosure in favour of an individual accused in criminal proceedings rests on the principles of fundamental justice under s. 7 of the *Charter*.[123] Section 7 guarantees the right to life, liberty and security of the person. But s. 7 rights can only be enjoyed by human beings, not corporations.[124] Thus, this section does not apply to the City. The chambers judge also found that the City "*may* also be entitled to the protections set out in section 11 of the *Charter*...."[125] However, this record does not even identify the extent of the fair trial rights the City claims it would have under s. 11(d) of the *Charter* (the only possibly relevant subsection), even assuming this section applied to a prosecution of the City under the *Act*. Whether the City would have, as a fair trial issue under s. 11(d), a right to some level of disclosure for what is a regulatory offence only, or some ability to withhold information not otherwise capable of being demanded from the City under freedom of information legislation, are both debatable points. Further, the City has never indicated what fair trial rights it might have that would be prejudiced in civil proceedings, and if so, how. A claimed denial of a fair trial under s. 11(d) must be based on facts and not, as here, pure speculation.[126]

[151] As for what the City might be entitled to secure by way of disclosure, the fact is that the City has already received a substantial body of information concerning what the appellants know about the points in issue along with the views of their expert witnesses. Indeed, most of the information about Lucy's treatment and condition is within the exclusive knowledge of the City itself since it is the City records that document these facts. Finally, it is particularly difficult to understand how the City could complain about lack of disclosure were it a defendant in civil declaratory proceedings since full disclosure, and a right to particulars, is a given in the civil arena in any event.

[152] On appeal, the City asserted that the *Charter* gave it another right, the right to "surprise" the Crown. However, there is no specific *Charter* "right to surprise" and it is questionable whether the principles of fundamental justice under s. 7 include this claimed "right" in a regulatory proceeding.

[153] Put simply, on this record, the City cannot claim as a matter of fact or law that it cannot have a fair trial in a civil court. The ability of the Court of Queen's Bench to proceed fairly on the declaratory application should not be denounced before the process is engaged. Again, this was a matter for a trial judge after full consideration of the evidence and argument.

[154] In summary, the City's bald assertion that, if prosecuted under the *Act*, it is entitled to the full range of procedural rights that it asserts – or more to the point that the chambers judge assumed existed

– is not a given. A number of those claimed "rights" are at the very least debatable, if not dubious. Thus, to the extent that the assumed existence of those "rights" was used by the chambers judge to equate the appellants' application for a declaration with an impermissible intrusion into the criminal law, and thus an abuse of process, this too constitutes reviewable error.

D. Failure to Recognize that the Availability of a Declaratory Judgment Could Not be Decided Summarily

[155] Linked to the abuse of process issue is whether a declaration is a permissible remedy in the circumstances of this case. A declaration, which is a discretionary remedy, confirms or denies a legal right.[127] Here, the chambers judge failed to recognize the fundamental point that whether a declaration was an available option could only be properly decided after a full hearing on the merits, and not on a one-sided summary motion brought by the City.

[156] To explain why the appellants' claim for declaratory relief has a reasonable prospect of success, I turn to why a declaratory judgment may be available against the City. I do not purport to decide the matter here, but set out a number of considerations that may be relevant in a trial judge's consideration of this issue. What then are some of those considerations?

1. Unlawful Acts May Result in More than One Proceeding

[157] The law has long recognized that a wrongful act may give rise to different legal proceedings with different consequences. In particular, that act may result in a regulatory (or criminal) proceeding as well as a civil one. Take for example a case where the driver of a car drives through a stop sign and injures an innocent person. The victim can sue civilly for those injuries regardless of whether the driver is also charged under provincial legislation with driving through the stop sign. The fact the driver may be charged with a regulatory offence is no defence to the civil proceedings. And it certainly does not make the civil proceedings an abuse of process. In the civil proceedings, proving the driver ran the stop sign need only be established on a civil balance of probabilities. It is not necessary to prove this to a criminal standard, that is beyond a reasonable doubt. Why? Because the proceedings are different; their objectives are different; the consequences are different; and the remedies that flow from them are different. In addition, the parties are not the same.

[158] That is arguably the situation here with the City and Lucy. In the example given, the victim would have an action in tort for the damages he or she incurred. Where does the right of the appellants reside to seek a declaration against the City based on actions that are allegedly unlawful? And where does the corresponding right of the judiciary to review government action for compliance with the law reside? The answer is in our Constitution and the rule of law.[128]

[159] The starting point is this. The greatest achievement through the centuries in the evolution of democratic governance has been constitutionalism and the rule of law. The rule *of* law is not rule *by* laws where citizens are bound to comply with the laws but government is not.[129] Or where one level of government chooses not to enforce laws binding another.[130] Under the rule of law, citizens have the right to come to the courts to enforce the law as against the executive branch. And courts have the right to review actions by the executive branch to determine whether they are in compliance with the law and, where warranted, to declare government action unlawful. This right in the hands of the people is not a threat to democratic governance but its very assertion. Accordingly, the executive branch of government is not its own exclusive arbiter on whether it or its delegatee is acting within the

limits of the law. The detrimental consequences of the executive branch of government defining for itself – and by itself – the scope of its lawful power have been revealed, often bloodily, in the tumult of history.

[160] When government does not comply with the law, this is not merely non-compliance with a particular law, it is an affront to the rule of law itself. In these circumstances, should it not be sufficient that citizens prove unlawful government conduct to a civil standard, that is on a balance of probabilities, rather than to a criminal standard, that is beyond a reasonable doubt? Therefore, at a minimum, it is arguable that a declaration is a permissible remedy for a government's unlawful conduct even where that conduct may be prosecuted separately as a regulatory offence.[131] Without diminishing the importance of a statutory breach, the more important law that is arguably being broken in these circumstances is the rule of law. As explained by Binnie J:

> [Judicial review] is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases ... and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.[132]

[161] In summary, the City's potential liability under the civil law is arguably a further jeopardy the City faces in addition to a regulatory prosecution under the *Act*.

2. Vindicating Animal Welfare Laws Through Civil Proceedings

[162] If it is accepted, as the Alberta Legislature has made clear, that a civilized society should show reasonable regard for vulnerable animals, at least to the degree defined by the Legislature, then should there not be some effective means of vindication of such laws as exist? The reality is that this may be more readily achieved in the civil courts. It is understandable why the City would resist being required to account for its actions in a civil court, preferring instead the proof beyond a reasonable doubt standard of the criminal courts. However, while *Charter* principles properly dominate our understanding of fundamental justice, the fact that the purpose of Alberta's animal welfare legislation is to protect vulnerable animals invites these questions. Is there no one who can intervene under any circumstances no matter how egregious to protect vulnerable animals from mistreatment by government? Can this be done through a civil action? Should it not be sufficient that the appellants prove on a civil balance of probabilities only that the City is failing to comply with its obligations to Lucy, including its affirmative duties of care, if that should be so? Would this civil burden of proof contravene the *Charter*?[133] These issues too are for a trial judge.

3. Scope of Declaratory Proceedings Is Not as Restricted as a Prosecution

[163] A declaratory action may address the legality of government action both prospectively and retrospectively. It is not limited to the four corners of a count in an information which typically speaks to a specific set of facts on a particular day or within a particular time frame.[134] Further, a declaration may be based on unlawful acts that may not constitute an "offence" under the *Act*. Section 12(1) of the *Act* provides that a breach of the *Act* is an offence. That certainly includes a breach of all the prohibitions under the *Act*. But it may be debatable whether non-compliance with a positive duty of care under s. 2.1 of the *Act* constitutes an offence. A declaration may also define what is lawful as well as what is unlawful about government action.[135] These are considerations that might affect an

assessment of whether a declaratory remedy should be available against government in addition to any other jeopardy it might face.

4. Declaratory Remedies are More Effective than Conviction for an Offence

[164] Remedies under declaratory proceedings are far broader than those on conviction. Thus, even if the City were successfully prosecuted, this would not necessarily assist Lucy in the same way a declaration could. A prosecution typically looks backwards and sanctions past acts; it does not generally enjoin future ones. By comparison, a declaration, which is not an available remedy following a conviction under the *Act*, may be accompanied by an injunction to restrain future unlawful conduct. To put this into sharp relief, on conviction under the *Act*, a court may not be able to order the City to acquire a companion (or two) for Lucy. But the court may be able to issue a declaration that keeping Lucy alone is unlawful. And equally important, it may also be entitled to issue an injunction restraining the City from doing so in the future. Again, a trial court may place this on the scale in weighing whether citizens ought to be able to pursue a declaratory judgment against the City.

5. Limiting Remedy to Regulatory Proceedings May Double Up Power of Government

[165] The City seeks to avoid civil proceedings on the grounds that to do so would deprive it of what it claims are its full *Charter* rights. The underlying purpose of the *Charter* is premised on the assumption that the state – that is government – wields substantial powers against its citizens. Thus, the *Charter*is designed to protect the people from the state. It was never intended to protect the state from the people, and certainly not a civil action by the people. In the context of this case, the claim that the City should be subject only to a prosecution under the *Act* arguably appears to be doubling up the power of the municipal government.

[166] The City makes much of what it claims it would lose if called on to answer in the civil, not criminal, courts for its actions vis à vis Lucy. This argument appears indifferent to the right of the people to access the courts to hold the executive branch of government accountable for its unlawful actions – and, in doing so, to speak for animals whose voices are not otherwise audible to the law. This case is not about what the City *might possibly lose*; it is about the people in a democracy, and the animals they seek to protect, and what they *will certainly lose* if citizens have no effective way to enjoin a government's unlawful conduct.

E. Conclusion

[167] Long lines of authority make plain that the declaratory remedy is an inherent and fundamental aspect of the power of the courts in the discharge of their obligations as defenders of the rule of law. A court's jurisdiction to declare government action unlawful can only be removed by statutory language of exceptional clarity and, in the case of a breach of constitutional law, not at all.[136]

[168] The chambers judge erred in concluding at this preliminary stage that the appellants' pleadings constituted an abuse of process and should therefore be struck. For the reasons given, whether a declaration against the City is available in theory and whether it is available to the appellants in the circumstances of this case could not, and ought not, to have been resolved summarily. These issues are for a trial judge following a trial on the merits.

VIII. Public Interest Standing

[169] I must now address the issue the chambers judge failed to resolve. Should the appellants be granted public interest standing? I have concluded that, in all the circumstances of this case, they should.

A. Historical Perspective on Public Interest Standing in Canada

[170] With the *Charter's* passage in 1982, Parliament conferred on courts the responsibility for reviewing government legislation and actions to ensure both conformed with the Constitution of Canada. In allowing citizens to be granted public interest standing to challenge the legality of legislation or the limits of administrative authority, Canada has taken a different path than the United Kingdom, United States and Australia.[137] It might be a path less well travelled but it happens to be one that has served the citizens of this country well.

[171] Our path is solidly rooted in the principle of legality, the recognition that all levels of government, federal, provincial and municipal, must comply with the law. It is also rooted in an essential corollary to this principle. If the legality principle is to be meaningful, there must be a way to hold government itself accountable where government actions do not comply with legality, including the rule of law. The route Canada has taken is to grant public interest standing to citizens or groups, in appropriate cases, to challenge government action on the basis it does not comply with the legality principle.[138] This includes granting public interest standing to allow a private individual to challenge administrative acts by government, including non-compliance with the law.[139]

B. What is the Test for Public Interest Standing?

[172] The Supreme Court has set out a three part test for granting public interest standing.[140] First, is there a serious issue raised about the limits of administrative or statutory authority or the invalidity of legislation? Second, does the plaintiff have a genuine interest in the issue? Third, is there another reasonable and effective way to bring the issue before the court?

C. Application of the Principles for Public Interest Standing to this Case

[173] The City essentially conceded the first two parts of the test before the chambers judge. Given the record before this Court, that was an appropriate and correct concession by the City.

1. Is There a Serious Issue About the Limits of Administrative or Statutory Authority?

[174] The City's challenged actions here, through the Valley Zoo, are not policy decisions.[141] These actions constitute an exercise of administrative authority and they must remain within the limits of the City's statutory authority. It cannot be reasonably disputed that the issue about the limits of the City's authority is serious. Government's compliance with the law is key to proper democratic governance. In addition, the law in question is one that is serious in its own right, affecting as it does how vulnerable animals are to be protected in our society. Finally, the alleged infractions of the law are not trivial. At this stage, the City has adduced no evidence to refute the appellants' allegations on this front. In the absence of any evidence from the City, the evidence that does exist suggests a *prima facie* case that the City has, by a long-standing pattern of behaviour in the way in which it has housed, sheltered, exercised and fed Lucy at the Valley Zoo, caused or aggravated her equally long-standing health problems.

[175] For these reasons, the significance of this case goes far beyond whether the City has acted unlawfully in its treatment of Lucy. Of course, courts should not be involved in micro-managing the City's day-to-day operations of the Valley Zoo. But that is not what this case is about. The City's treatment of Lucy over a number of years raises serious issues about the scope of the protection accorded to animals in our society and who, if anyone, is entitled to access the courts on their behalf to protect them from mistreatment, and on what basis. It also raises whether the executive branch of government may ever be held accountable by the people in the civil courts for its non-compliance with animal welfare legislation.

2. Have the Appellants Demonstrated a Genuine Interest?

[176] The City has not disputed this point. Both Zoocheck and PETA are dedicated to the protection of animals and Reece, through Voice for Animals Humane Society, is equally so. All have taken a special interest in Lucy's care and needs. Thus, they all have a real and continuing interest in the City's compliance with its legal obligations to Lucy that meets the requirements of the second part of the test.

[177] That said, an important caveat must be mentioned. The fact that the appellants are appropriate representatives of the public interest in the City's compliance with the law vis à vis Lucy does not necessarily mean that they are entitled to secure a declaration against the City. Whether they have a sufficient "interest" for this purpose is an issue to be decided at trial, assuming without deciding that a civil declaration lies against the City.

3. Is There Another Reasonable and Effective Way to Bring the Issue Before the Court?

[178] The first point that must be addressed is this. What is the issue? The issue is whether a civil declaratory judgment is available against the City based on its alleged unlawful conduct in its treatment of Lucy. At this stage, it is not whether the Attorney General can prosecute the City for an offence under the *Act*. Or whether the existence of that option bars a civil action against the City. Or whether the decision of the agent of the Attorney General not to charge the City to date can be judicially reviewed.

[179] Public interest standing will not be granted where it can be shown on a balance of probabilities that the challenged conduct will be subject to attack by a private litigant.[142] The concern is that a court should have the benefit of the contending views of the persons most directly affected by the issue. That is typically best accomplished if a private litigant directly affected were to bring the issue before the court. Applying that test here, the City has not demonstrated, nor could it reasonably do so, that there is a private litigant who would challenge the City's alleged non-compliance with the law and seek the related remedy of a civil declaration. No animal, including Lucy, the one directly affected here, can start an action on its own.[143]

[180] The City argues that unless a human being is personally affected by its alleged unlawful acts, the lawfulness of its actions can only be challenged by the Attorney General through a prosecution under the *Act*. But the existence of the prosecution option and how it might affect the appellants' ability to secure a civil declaratory judgment against the City is not relevant to the grant of public interest standing. It is tied up in an entitlement issue, namely what relief, if any, the appellants may secure against the City based on its treatment of Lucy, and that should be dealt with at trial.

[181] It must be remembered that there is a difference between standing and the right to seek particular relief, on the one hand, and entitlement to it, on the other. Or as one author so aptly observed

between the right to be heard and the right to succeed in the action.[144] There are two aspects to entitlement: entitlement in theory – is the claimed relief even available as a possible remedy – and entitlement in fact – has a case been made out on the merits for the court to grant the claimed relief? In considering whether to grant public interest standing, a chambers judge is not dealing with entitlement in fact. And unless there is no reasonable prospect of success, a chambers judge is not dealing with entitlement in theory either. In that event too, this aspect of entitlement is a triable issue for a trial judge to resolve following a full hearing on the merits.[145]

[182] In other words, the appellants should not be denied public interest standing on the basis that a court might later determine that the appellants have no entitlement to a declaratory judgment against the City in theory or in fact. It is enough at this stage of the proceedings that entitlement in theory is arguable. For the reasons already explained, it most certainly is.

[183] I am well aware that a private prosecution under the *Act* is possible in theory. But the Attorney General's agent has to date refused or declined to charge the City with an offence under the *Act*. In this regard, the evidence confirms that Zoocheck filed a written complaint dated September 26, 2007 with the Attorney General's agent, the Humane Society, regarding Lucy's solitary isolation. It alleged that by keeping Lucy alone, the Valley Zoo was violating *GASZA* which requires that "[a]ll animals must be maintained in numbers sufficient to meet their social and behavioural needs". It advised the Humane Society that it had secured a place for Lucy in an elephant sanctuary in the southern United States which was willing to pay the costs of moving Lucy. It urged the Humane Society to enforce the zoo standards and arrange to move Lucy to the sanctuary.[146]

[184] The Humane Society replied by letter dated November 19, 2007. It confirmed it had reviewed "what the Edmonton Valley Zoo handlers are doing to provide extra care and stimulation now that Samantha has moved."[147] It then proceeded to outline what that extra care and stimulation involved.

> Lucy has been placed on a strict weight control program and structured exercise to control her arthritis. She receives increased training, enrichments and exercise throughout the day. Special attention has been provided in regards to foot and skin care. Video equipment has been installed so that she can be monitored 24 hours a day remotely as to ensure that she is not exhibiting stress induced behaviors. As well extra staff has been assigned to Lucy to ensure that she receives extra care and attention.[148]

[185] It cited the opinion of Lucy's veterinarian at the Valley Zoo, advising that it would be "detrimental" to Lucy, "if not fatal to her health", to transport her. It then quoted the provisions of s. 10(1) of the *Regulations* which confirm that "no person shall transport an animal that ... would suffer unduly during transport" and concluded with this statement:

> The Animal Protection Department has concluded by the information provided that it would not be in Lucy's best interest to be transported.[149]

[186] Thereafter, on the record before this Court, no further action was taken by the Humane Society in respect of this complaint.

[187] With respect, this reply to Zoocheck's complaint is problematic on several levels. First, it

appears unresponsive to the essence of the complaint. The fact that Lucy might not be able to be transported is irrelevant to the substance of the underlying complaint. The question is not whether Lucy can be moved, it is whether the City is in breach of the law by continuing to deprive Lucy of same species companionship. Second, it is arguably no defence to the City's failing to comply with this obligation that Lucy cannot be moved. Third, assigning extra staff for Lucy or taking better care of her feet does not make up for keeping her in social isolation. Fourth, this reply does not appear to recognize the internal inconsistency in the City's position. On the one hand, the City asserts that it is complying with its obligations to Lucy and she is not in distress, a position apparently taken at the time of the subject complaint. And yet, at that time, the City claimed that Lucy, at only 32 years of age, was in such bad health that she could not even be safely transported south to an elephant sanctuary.

[188] The Court was told during oral argument that Zoocheck filed a further complaint with the Humane Society. However, that complaint and the response by the Humane Society are not before the Court. What was conceded before us was that the complaint was made, the Humane Society identified certain concerns, set certain deadlines for the City and indicated it would hold its file open for follow up. We have no evidence that those concerns have been resolved.

[189] The uncontradicted facts here reveal that four years after the City removed Samantha from the Valley Zoo, Lucy remains by herself, socially isolated. And again on this uncontradicted record, nothing has been done to deal properly with a number of the other complaints concerning the way in which Lucy is being housed and sheltered by the City except perhaps to put down some rubber mats and cover part of the floor in her indoor enclosure in sand. In fact, the City's Treatment Program indicated that "[t]he recommendation to increase the indoor space available to Lucy during the winter months (or install an elephant treadmill) will be explored by a special committee."[150] There is no evidence before this Court as to what, if anything, the City has done on this front.

[190] This situation is comparable to that in ***Canada (Minister of Justice) v. Borowski*** where the Attorney General declined to prosecute.[151] Here, the Attorney General has effectively demonstrated, through its agent, the Humane Society, that it does not intend to do so. Therefore, given this history, it is a reasonable inference that any private prosecution against the City by the appellants would be stayed by the Attorney General under s. 579 of the *Code*.

[191] In any event, even if I had concluded that the private prosecution route were a viable possibility, this would, as with the public prosecution option, be irrelevant *to the grant of public interest standing*. When a court is considering whether there is another reasonable and effective way to bring the issue in question before the court, a court is not looking at whether *government* has another way to do so, but rather whether *citizens* do.[152] That is why a court will first ask whether another private litigant will likely bring the issue before the court. Or could do so. A reasonable and effective alternative to a proceeding holding the executive branch to account cannot logically be a proceeding which can only occur with the effective consent of the executive branch.

[192] Further, there is another reason why a regulatory prosecution is not a reasonable and effective alternative to an action claiming that a civil declaratory remedy is available against the City. It is self-evident that a prosecution for breach of a regulatory statute would never address the issue of whether a civil remedy is available against the City. Thus, the possibility of a public or private prosecution against the City based on an alleged breach of the *Act* is not a bar to the grant of public interest standing and the appellants' pursuit of a civil declaratory judgment. That said, the question of whether a declaration is an available option against the City despite the possibility of a prosecution under the *Act* remains an

open issue to be resolved at trial.[153]

[193] The City claims that the appellants do have another reasonable and effective alternative – write more letters to the Minister responsible for administering the *Act*. But an effective alternative is not one that can be dismissed out of hand. It is hardly sufficient to say that the only option for citizens who sincerely believe that the executive branch is acting unlawfully is to write letters to one part of the executive branch asking it to charge another part with an offence, especially where the alleged offender is the delegatee of the charging branch. Yet that is what the City effectively asserts is the only remedy available to citizens alleging that the City is acting unlawfully vis à vis Lucy. This is not a basis on which to deny public interest standing to the appellants.

[194] Similarly, the City's suggestion that the appellants could seek to have the Minister of Sustainable Resource Development cancel the Valley Zoo's permit and that this constitutes a reasonable and effective alternative is also without merit. There is no evidence that a citizen has legal standing to accomplish this. This is simply a variation on the theme that the appellants could write more letters. It too fails.

[195] The history here, coupled with the unchallenged evidentiary record, makes it clear that the appellants have no reasonable and effective alternative to this civil action to bring before the court the issue of whether a civil declaratory remedy is available against the City based on what is, at this stage of the proceedings, a *prima facie* case of the City's unlawful conduct vis à vis Lucy. I must again stress that whether the appellants are able to prove that the City has acted unlawfully and whether they are entitled to the declaratory relief sought in theory or in fact all remain open issues to be resolved following a trial.

[196] One final point must be made. I have concluded that the appellants should be granted public interest standing. Even if I were wrong in making a preliminary determination on this issue at this stage, it is apparent that at the very least, the present case is one in which standing cannot be denied summarily. In that event, standing too would be an arguable issue that ought to be resolved only following a hearing with full evidence, argument and deliberation.[154]

IX. Conclusion

[197] Given the evidentiary record, which is uncontroverted, and given the legal issues raised, it cannot be said that it is plain and obvious that the appellants cannot succeed in their action against the City. As explained, the novel and serious issues of law involved merit the consideration of a trial court. The City has confirmed that were the originating notice considered on its merits, it would wish to adduce evidence and dispute certain facts. An originating notice is not an available option where facts are in dispute. Nor is it an available option where, as here, the issues go beyond the interpretation of a specific law or instrument. Further, the content and contours of any declaration may also be in dispute in this case.

[198] All this being so, in light of the way that this case has unfolded, an originating notice (now called an originating application under the *New Rules*) is no longer the proper vehicle for the appellants to pursue the claimed relief. The *New Rules* permit this Court to allow the appellants to continue their action by statement of claim and to seek declaratory relief against the City. For the reasons explained, I would allow the appeal and grant the appellants leave to amend their pleadings within 60 days and continue their action by way of statement of claim setting out the basis for the declaratory relief sought

and such other consequential relief as they see fit.

[199] In conclusion, this case should go to trial on the important points of law that potentially impact on both the protection of animals in this province and the public interest in the City's compliance with the law. The appellants, for the public and on behalf of Lucy, are entitled to their day in court.

Appeal heard on March 29, 2011

Reasons filed at Edmonton, Alberta
this 4th day of August, 2011