In the Court of Appeal of Alberta

Citation: Zoocheck Canada Inc v Alberta (Minister of Agriculture and Forestry), 2019 ABCA 208

Date: 20190524
Docket: 1703-0244-AC
Registry: Edmonton

Between:

Zoocheck Canada Inc., Voice for Animals Humane Society and Tove Reece

Appellants
(Plaintiffs)

- and -

Her Majesty the Queen In Right of Alberta (Minister of Agriculture and Forestry and Minister of Environment and Parks) and the City of Edmonton

Respondents
(Defendants)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Jo'Anne Strekaf

Reasons for Judgment Reserved of the Honourable Madam Justice Strekaf
Concurred in by the Honourable Mr. Justice Wakeling

Dissenting Reasons for Judgment Reserved of the Honourable Justice O'Ferrall

Appeal from the Order of
The Honourable Associate Chief Justice J.D. Rooke
Dated the 7th day of September, 2017
Filed on the 3rd day of November, 2017
(2017 ABQB 764, Docket: 1703 06666)

Reasons for Judgment Reserved
of the Honourable Madam Justice Strekaf

I. Introduction

[1] The appellants have a longstanding and genuine concern about an elephant named Lucy, who they would like to have moved from the Edmonton Valley Zoo ("Zoo") to what, in their view, is a more appropriate facility. The issue on this appeal, however, is not whether Lucy should continue to reside at the Zoo, or whether public interest standing may be available to someone advocating on behalf of animals in an appropriate case. It is the much narrower question of whether this court should overturn the discretionary decision of the chambers judge to deny the appellants public interest standing to seek judicial review of a decision by the Minister of Environment and Parks ("Minister") to renew the Zoo's permit under section 13(1) of the *Wildlife Act*, RSA 2000, c W-10.

[2] A decision to grant or refuse public interest standing is a discretionary decision, and is afforded appellate deference. The chambers judge applied the correct legal test and exercised his discretion in a reasonable fashion. He made no reviewable error when he declined to grant the appellants standing to seek judicial review. While others may have exercised their discretion differently, that is not grounds for appellate intervention.

[3] The chambers judge also concluded that the application constituted an abuse of process, as a collateral attack on a decision arising out of a previous attempt by some of the appellants to have the court determine whether the Zoo was violating the *Animal Protection Act*, RSA 2000, c A-41 in relation to Lucy: *Reece v Edmonton (City)*, 2010 ABQB 538 at para 46, aff'd 2011 ABCA 238, leave to appeal to the SCC denied [2011] SCCA No 447 (2010/2011 Proceedings). In doing so, the chambers judge erred in law by applying an overly broad approach to the doctrine of collateral attack. This aspect of his decision is set aside.

[4] The appeal is dismissed, except for the appeal of the enhanced costs awarded by the chambers judge. That award, which was based upon the finding that there was an abuse of process, is set aside and replaced with the usual award under column 1 of Schedule C of the *Rules of Court*.

II. Background

[5] The decision that gave rise to this appeal is the third judicial proceeding initiated by some of the appellants to have their concerns about Lucy's welfare addressed by the courts.

[6] In 2010, the appellants Zoocheck Canada Inc and Tove Reece (together with People for the Ethical Treatment of Animals) sought a declaration that the Zoo was in violation of the *Animal Protection Act* for causing or permitting Lucy to be in distress. The majority of this court concluded that the application was an abuse of process. They noted that civil proceedings "to enforce or engage punitive penal statues, other than by charging the party allegedly responsible with the applicable offence ...are generally found to be an abuse of process": *Reece CA* at para 20.

[7] In 2016, the appellants applied for judicial review of the decision to renew the Zoo's 2017 permit. That application was discontinued before it was decided ("2016 Application").

III. The Chambers Decision

[8] In April 2017, the appellants brought this application for judicial review of the Minister's decision to renew the Zoo's permit for 2017/2018. At a preliminary application, the appellants sought a declaration that they had standing to seek judicial review and an order permitting them to rely upon evidence from the 2016 Application and certain expert reports. The chambers judge dismissed the application for standing and denied the application to adduce additional evidence: unreported oral reasons; Supplementary Reasons at *Zoocheck Canada Inc. v Alberta (Minister of Agriculture and Forestry)*, 2017 ABQB 764, 33 Admin LR (6th) 351 ("2017 Application").

[9] The chambers judge applied the test for public interest standing set out in *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45, [2012] 2 SCR 524 at para 2:

> ... whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court.

[10] The chambers judge concluded that the appellants had not raised a serious and justiciable issue in the context of the decision they were asking the Court to review: the renewal of the Zoo's permit under the *Wildlife Act*. The chambers judge found the *Wildlife Act* is not animal protection legislation, as animal protection issues are addressed through the *Animal Protection Act*. As a result, the appellants' stated animal protection purpose did not raise a serious issue in the context of the decision to renew the Zoo's permit.

[11] The chambers judge found that the appellants had not demonstrated they had a real stake or genuine interest in the matter they seek to judicially review—the renewal of the Zoo's permit. The appellants' real concern is Lucy's well-being. Their pursuit of animal protection in an application for judicial review of a decision which did not engage animal protection issues, indicated that the appellants did not have a direct interest in the challenged decision.

[12] Finally, the chambers judge found the appellants had failed to prove that their judicial review of the decision to renew the Zoo's permit was a reasonable and effective way to bring the issue of Lucy's well-being before the Court, especially in light of the 2010/2011 Proceedings. The majority of this court in the earlier proceedings had already noted that the complaint system under the *Animal Protection Act* was available to the appellants.

[13] The chambers judge concluded that the appellants failed to meet the test for public interest standing and denied their application. It was therefore not necessary for him to determine whether the appellants should be permitted to rely on additional evidence.

[14] Having concluded that the appellants did not have standing to apply for judicial review, the chambers judge then considered the argument that the application was a collateral attack on the

2010/2011 Proceedings. He noted that both the Court of Queen's Bench and this Court had previously concluded that "the appropriate mechanism by which the Applicants could raise their concerns about Lucy's health and well-being were those set out in the *Animal Protection Act*": para 18. The chambers judge concluded that this new application was a collateral attack on the previous ruling, as it was "another attempt to use an improper mechanism to achieve a collateral purpose, and an attempt to find a way around the [2010/2011 Proceedings]": *ibid.*

[15] The chambers judge awarded enhanced costs against the appellants to each of the City and the Province, calculated under column 4 of Schedule C of the *Rules of Court* because of the abuse of process and collateral attack aspect of the 2017 Application.

IV. Grounds of Appeal

[16] The grounds of appeal are that the chambers judge erred in:

(a) finding that the application for judicial review was a collateral attack and an abuse of process;

(b) failing to allow the procedural wrong to be cured;

(c) not properly considering or applying the test for public interest standing;

(d) refusing to admit the additional evidence; and

(e) awarding costs to each of the respondents.

V. Standard of Review

[17] The decision to grant public interest standing is an exercise of the court's discretionary role: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37, [2012] 2 SCR 524. Discretionary decisions of chambers judges attract deference absent an extricable question of law, which is reviewable on a correctness standard: *Decock v Alberta*, 2000 ABCA 122 at para 13, 255 AR 234; *Housen v Nikolaisen*, 2002 SCC 33 at para 27, [2002] 2 SCR 235. A decision to grant or deny public interest standing is owed considerable deference: *Miner v Kings (County)*, 2017 NSCA 5 at para 21.

[18] The conclusions of a chambers judge with respect to abuse of process and costs are also discretionary decisions entitled to deference. Such decisions will only be set aside if the judge has misdirected himself on the applicable law or made a palpable and overriding error in his assessment of the facts: *Deans v Thachuk*, 2005 ABCA 368 at para 16, 376 AR 326 (in reference to costs awards); *Enron Canada Corp v Husky Oil Operations Limited*, 2007 ABCA 27 at para 31, 401 AR 291 (in reference to an abuse of process).

VI. Analysis

A. Public Interest Standing

[19] Standing to commence legal proceedings was traditionally limited to persons whose private rights were affected, or who were otherwise specially affected by an issue. The rationale for

restricting standing in this way included properly allocating scarce resources and preserving the proper role of the courts and their constitutional relationship to the other branches of government: *Downtown Eastside* at para 25. Canadian courts have relaxed the traditional limitations and have adopted a "flexible discretionary approach" to grant public interest standing in appropriate cases: *Downtown Eastside* at para 1. The court in *Downtown Eastside* explained the approach at para 37:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the matter before the courts.

[20] This approach recognizes that "[l]imitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere 'busybody' litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government": *Downtown Eastside* at para 1, citing *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at 631, 33 DLR (4th) 321. Ultimately, the question of whether public interest standing should be afforded is "one to be resolved through the wise exercise of judicial discretion. [...] The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). [...] [T]he factors to be considered in exercising the discretion should not be treated as technical requirements and the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner": *Downtown Eastside* at para 35 [citations omitted]. The factors "should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purpose": *Downtown Eastside* at para 36.

[21] The chambers judge correctly set out the test from *Downtown Eastside* in deciding whether to grant the appellants public interest standing. He declined to do so, concluding that all three factors militated against granting public interest standing to bring the proposed judicial review application. Each of the factors is discussed further below.

a) A Serious Justiciable Issue

[22] The two aspects of this factor—that the issue be both "serious" and "justiciable"—relate to the concerns animating the law of standing.

[23] A justiciable question is one that is appropriate for judicial determination. "By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role": *Downtown Eastside* at para 40.

[24] "To constitute a 'serious issue', the question raised must be a 'substantial constitutional issue' or an 'important one'. The claim must be 'far from frivolous', although courts should not examine the merits of the case in other than a preliminary manner": *Downtown Eastside* at para 42 [citations omitted].

[25] The chambers judge found that a "serious and justiciable issue is not simply one that engages the public interest, or indeed, one that poses serious questions" but that it "must be viewed in the context of the actual decision the Applicant asks the Court to review." [emphasis in original]: at para 7. I agree that, in assessing whether the appellants have raised a "serious justiciable issue", it is necessary to consider the context of the application actually before the court. In this case, the appellants' concern is with the care of Lucy and whether the Zoo is in compliance with animal protection legislation and those zoo standards that they say should apply. However, there is no decision under animal protection legislation (which would be under the purview of a different Minister, the Minister of Agriculture and Forestry) to be reviewed. The application before the court is for judicial review of the decision by the Minister of Environment to renew a zoo permit pursuant to the *Wildlife Act*. The issue, as approached by the chambers judge, is whether there is a serious justiciable issue, appropriate for the court's determination and "far from frivolous", within the context of that proposed judicial review.

[26] The chambers judge concluded that there was not such an issue, noting at paras 8–9:

> 8 Here, the issue is the decision to renew the Edmonton Valley Zoo's permit under the *Wildlife Act*. The requirements for zoo permit eligibility are set out in ss.76 to 79 of the *Wildlife Regulation*, AR143/97 ("the Regulation"). Section 76(1) of the *Regulation* adopts and incorporates certain portions of the "Government of Alberta Standards for Zoos in Alberta" ("Standards for Zoos"), prepared by the Alberta Zoo Standards Committee. However, Part III of the Standards for Zoos, "Standards Related to the Animal Protection Act" is expressly not incorporated into the *Regulation*. Under the applicable renewal *Regulation*, zoo permit renewal applicants must submit a $100 payment and a number of records to the Minister, including a Zoo Development Plan, an animal inventory, an existing written agreement between the zoo and a licensed Alberta veterinarian, proof of comprehensive liability insurance and municipal approvals, and a decommission plan.
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> 9 I agree with the Respondents that the *Wildlife Act* and the *Regulation* deal with logistics such as licensing and permitting zoos and other animal use endeavours, and the zoo licensing provisions thereof were never intended and do not function as animal protection legislation. If this seems counterintuitive, it is helpful to keep in mind that there are other mechanisms that bear upon the treatment of zoo animals like Lucy. For example, the Edmonton Valley Zoo is accredited through an organization called Canada's Accredited Zoos and Aquariums ("CAZA"), and is subject to the provisions of the *Animal Protection Act*, RSA 2000 c A-41. (underlined emphasis in original, bold emphasis added)

[27] As the chambers judge acknowledged, it may seem "counterintuitive" that zoo licensing provisions are not intended to function as animal protection legislation, but this is because the legislature has allocated responsibility for animals between the *Animal Protection Act* and the *Wildlife Act*. The *Animal Protection Act*, as would be expected from its name, focuses on ensuring that animals are protected. It contains provisions that prohibit anyone from causing distress to an animal (s 2), impose duties on person who own or are in charge of animals (s 2.1), provide powers to peace officers where animals are in distress (ss 3–5, 10), deal with humane societies (s 9) and provide that anyone who contravenes the Act or regulations is guilty of an offence and liable to a

fine of not more than $20,000 and an order restraining them from having custody of an animal for a specified period of time (s 12).

[28] By contrast, the *Wildlife Act* is largely focused on regulating wildlife, including hunting and related activities, the transportation, possession, importation and exportation of wildlife, and related offences. Sections 76 and 78 of the *Wildlife Regulation*, which deal with zoo permits, deal primarily with the logistical considerations associated with obtaining or renewing a permit.

[29] The chambers judge recognized that, given the nature of the application the appellants seek to bring, there must be a serious justiciable issue with respect to the renewal of the Zoo's permit in accordance with the *Wildlife Regulation*. In the course of that proposed judicial review, the appellants would be asking the court to make a determination that the Zoo breached the provisions of, and committed an offence under, the *Animal Protection Act* and the *Animal Protection Regulations*, even though no proceedings have been commenced against the Zoo under that legislation by the responsible authorities.

[30] The appellants' submission that the permit should not have been renewed because the Zoo is not complying with the applicable zoo standards and is, therefore, in breach of the *Wildlife Regulation*, the *Animal Protection Act* and the *Animal Protection Regulations*, is not well-founded, having regard to the wording of the legislation.

[31] Section 76 of the *Wildlife Regulation* sets out eligibility for a zoo permit and, in doing so, defines "zoo standards" for purposes of that section. In the section, "zoo standards" are defined narrowly to mean only certain portions of the "Government of Alberta Standards for Zoos in Alberta" (GASZA), prepared by the Alberta Zoo Standards Committee. The definition of "zoo standards" for the purposes of zoo permit eligibility expressly includes:

- Section II of GASZA, which is entitled "Standards within the mandate of Alberta Environment and Sustainable Resource Development – the Wildlife Act and Regulations". Section II deals with matters such as documentation, record keeping, animal transportation standards, species conservation, and public and staff safety.

- Section IVA, Appendix I of GASZA, which establishes the criteria for obtaining a zoo permit for new and renewal permit applicants. In particular, it establishes that the applicant in either the case of a new permit or a renewal permit, must submit an Animal Care Protocol as outlined in Section III of GASZA. That requirement does not apply to zoos with professional accreditation, such as the Zoo here.

- All the definitions set out in Appendix 4 Section IVD of GASZA, except the definition of "accredited zoo".

[32] As the chambers judge noted, the definition of "zoo standards" for the purpose of s 76 excludes Section III of GASZA, entitled "Standards Related to the *Animal Protection Act*". Section III includes protocols for animal care. Although applicants for new or renewed zoo permits must submit an Animal Care Protocol as part of the application process, this requirement does not apply to accredited zoos like the Zoo here.

[33] The requirements for the renewal of a zoo permit are clear. They are set out in section 76 of the *Wildlife Regulation*. They reference GASZA, but the legislature chose to include only certain portions of that document in the definition of zoo standards to be met for purposes of renewing a zoo permit. The appellants do not allege that the Zoo's permit renewal failed to satisfy the requirements of the zoo standards as defined in s 76, or that the Minister erred in issuing the permit on that basis. The appellants' argument requires that a broader meaning of zoo standards be incorporated into the requirements for permit renewal.

[34] Pursuant to s 76(4) of the *Wildlife Regulation*, the "Minister may issue a zoo permit to ... a business corporation or a society ... (b) that, and whose zoo, fully meet all applicable laws and all additional requirements of the zoo standards". The appellants argue that this provision essentially reincorporates all of the standards contained in GASZA, including those expressly excluded from the definition of "zoo standards", as well as additional standards that the GASZA incorporates by reference. They argue that s 2(3) of the *Animal Protection Regulations* is to the same effect. This argument would require the court to disregard the decision made by the legislature to define zoo standards narrowly for the purpose of the issuance of a zoo permit. To reincorporate a broader definition of zoo standards into the provision, not only would the Court have to disregard the clear and unambiguous words of the legislation, but also the words in GASZA itself, which states that the Animal Care Protocols in Section III are not required to be submitted by professionally accredited zoos. The Zoo is professionally accredited by the Canadian Zoo and Aquarium Association (CAZA), which has its own set of accreditation standards that must be met and maintained by members. CAZA has specifically granted a variance to the Zoo of the protocols concerning elephants.

[35] The appellants also argue that the Zoo is breaching a "broader duty" to prevent Lucy from being in distress, contrary to section 2(1) of the *Animal Protection Act*. This argument, and other arguments based on alleged breaches of the *Animal Protection Regulations*, would require the court to find the Zoo had committed offences under animal protection legislation, even though no proceedings have been commenced against the Zoo under that legislation by the responsible authorities. As was the case in the *Reece CA* decision, there is no reason to suspect that the peace officers charged with enforcing the *Animal Protection Act* would fail to prosecute the City if they found an animal to be in distress. Moreover, it is questionable whether the Minister, in exercising his discretion to renew a zoo permit, could find a breach of animal protection legislation in the absence of proceedings or a finding by the responsible authorities. At best, the application for judicial review is premature.

[36] To some extent, the proposed judicial review application raises similar concerns to those previously identified by the majority of this Court in the 2010/2011 Proceedings: that indirect proceedings to enforce penal statutes, "other than by charging the party allegedly responsible with the applicable offence", are generally found to be an abuse of process: *Reece CA* at para 20. This is so due to the differing burdens of proof in civil and penal regulatory proceedings, and because the presumption of innocence and other procedural and *Charter* protections are undermined in a declaratory action: *Reese CA* at para 29. Such proceedings can also undermine the jurisdiction of the criminal courts and the authority of the Attorney General, who would have the option of taking over the prosecution or staying proceedings if a complainant swore an information that the City was in breach of the *Animal Protection Act*: *Reece CA* at paras 30–31.

[37] In assessing the first factor, the chambers judge found that there was not a serious justiciable issue in the context of the proposed judicial review application.

b) A Genuine Interest

[38] The second factor to be considered on an application for public interest standing is whether the applicant has a real stake or genuine interest in the outcome. The chambers judge found that the question was not "whether the appellants have a real stake or genuine interest in Lucy's well-being, it is whether they have a real stake or genuine interest in the decision of the Minister to renew the Zoo permit": 2017 Application at para 12. He found that that they did not. "In their Originating Application, the Applicants have stated that their goal is to have Lucy moved to another facility, in a warmer climate with greater space and other Asian Elephants. Their interest in the zoo permit itself is purely collateral to their stated goal, which is a relocation of Lucy": *ibid.*

[39] The chambers judge relied on *Alberta Liquor Store Assn v Alberta (Gaming & Liquor Commission)*, 2006 ABQB 904, 406 AR 104, where Slatter J (as he then was) observed that an applicant who seeks to use judicial review to achieve an objective that is not part of the regulatory regime has no direct interest in the challenged administrative act. An applicant who is using the process for collateral purposes in this way should not be granted standing. The chambers judge concluded that this was the appellants' position in this case; their challenge of the Zoo permit was for the collateral purpose of securing a change in Lucy's situation.

c) Is the proposed action a reasonable and effective way to bring the matter before the court?

[40] The third factor is whether the proposed action is a reasonable and effective way to bring the matter before the court. The chambers judge concluded that "there is a more appropriate mechanism – specifically, a complaint under the *Animal Protection Act* - available to the Applicants, and therefore a more reasonable and effective way to bring the issue of Lucy's well-being before the Court": 2017 Application at para 17. This is consistent with what the majority of this Court recognized in the 2010/2011 Proceedings: *Reece CA* at paras 34–35:

> 34 There are other more appropriate remedies available to the appellants. The Court was advised that after the decision of the chambers judge a further complaint was filed with the Edmonton Humane Society. A further investigation was conducted, following which it was decided not to lay any charges under the Animal Protection Act, although the Society indicated that its investigation "will remain open in order to follow up".
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> 35 The appellants argue that there is no other effective alternative way to bring this issue before the courts. Stating the issue in that way presupposes that this is a suitable issue for the courts. Whether the City is discharging its operational duties in the care of Lucy is a hotly contested issue. It is not appropriate to expect the courts to take over the animal husbandry of the animals at the City zoo through the ability to issue declarations on points of law. As mentioned, there are other public officials who have that responsibility, and other appropriate legal procedures to possibly engage if they fail to discharge their duties. Further, it is not the role of the superior courts to

> review every operational decision made by government, and the courts do not have the resources needed to deal with the volume of applications that could be generated if the procedure chosen by the appellants was endorsed. The role of the superior courts is limited to reviewing the legality of executive action, and does not extend to examining the policy choices made by the executive branch. There are established procedures for judicial review, which have many built in controls that reflect the constitutional relationship between the executive branch and the judicial branch. As the Court stated in Consolidated Maybrun Mines at para. 25, "... the rule of law does not imply that the procedures for achieving [executive review] can be disregarded, nor does it necessarily empower an individual to apply to whatever forum he or she wishes in order to enforce compliance with it."

[41] One of the considerations in relation to the third factor of the test for public interest standing is whether there are parties who are more directly affected or responsible who have not initiated proceedings: *Downtown Eastside* at para 51:

> The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.

[42] There are public authorities within Alberta who are responsible for animal welfare and who have elected not to commence proceedings in relation to Lucy. There is no reason to assume they are not enforcing the law. The following observation from *Reece CA* at para 33 remains apt:

> The appellants argue that if the courts will not engage the issues in their originating notice, then a level of executive action will be unsupervised by the superior courts. It is not, however, apparent on this record that any executive action has been properly identified and engaged: *Cassells v. University of Victoria* at para. 77. There is no suggestion on this record that the Attorney General has failed in his duty to enforce the law. Offences under the *Act* are routinely prosecuted in the province. There is no reason to assume that the Attorney General would countenance illegal acts by the City: see, for example, the prosecution in *R. v. Edmonton (City)*, 2006 ABPC 56, 20 C.E.L.R. (3d) 1. Even if the Attorney General were to assume control of any private prosecution, and were then to stay those proceedings, it is not self-evident that would be in any way improper. There is no indication on this record that the rule of law would be jeopardized by the courts declining to take jurisdiction in this case. The parties primarily responsible for animal welfare (the Edmonton Humane Society, the Attorney General, and the Department of Sustainable Resource Development) are independent of the respondent City, and there is no indication on this record that their ability to enforce the law has been compromised.

2. *Was the chambers judge's denial of public interest standing reasonable?*

[43] The decision to grant or deny public interest standing is a discretionary decision that is afforded considerable deference by an appellate court. It may only be interfered with on appeal where the judge below acted on a wrong principle or failed to give sufficient weight to all relevant considerations: *Miner* at para 21.

[44] The chambers judge correctly identified and expressly addressed each of the factors to be considered when exercising his discretion to determine whether public interest standing should be granted to the appellants. The Supreme Court in *Downtown Eastside* made clear that the factors are not to be approached as a series of requirements, but flexibly in the exercise of discretion. While the chambers judge addressed each of the factors in turn, when his reasons are read as a whole, I am satisfied that he considered the three factors in combination, with the required flexibility, and his decision is entitled to deference: *Campisi v Ontario (Attorney General)*, 2018 ONCA 869 at paras 6–7.

[45] The appellants have not demonstrated that the chambers judge acted on wrong principle, failed to give sufficient weight to all relevant considerations,or that his overall assessment was not reasonable.

[46] The appeal from the denial of public interest standing is dismissed.

B. Collateral Attack and Abuse of Process

[47] The chambers judge held that the rule against collateral attack "prevents a party from using '...an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route'": para 18, citing *British Columbia (Worker's Compensation Board) v Figliola*, 2011 SCC 52 at para 28, [2011] 3 SCR 422. He applied this test and determined that the appellants' application for judicial review was a collateral attack on the 2010/2011 Proceedings.

[48] I agree with the conclusion reached by my colleague O'Ferrall JA that the chambers judge erred in finding that the appellants' application for public interest standing was a collateral attack on the 2010/2011 Proceedings. Those proceedings sought a declaration that the City was in breach of section 2 of the *Animal Protection Act*. While the City is a party to the current application, the appellants are now seeking public interest standing to bring an application for judicial review directed at the Minister's renewal of the Zoo's permit pursuant to s 76 of the *Wildlife Act Regulation*. The current application is directed at a different party and involves a different legal test than was before the court in the 2010/2011 Proceedings. While the applications raise some similar issues (regarding the use of civil proceedings to have a court determine that a regulation is being breached or an offence committed where no enforcement proceedings have been commenced) and both were motivated by a genuine concern about Lucy's welfare, that does not make the second application a collateral attack on the first.

[49] This aspect of the chambers judge's decision is set aside.

C. Procedural Issues and Costs

[50] The chambers judge denied the appellants' application to permit the 2017 Application to be amended because they were not seeking leave to amend their pleadings in any specific fashion. While the chambers judge did provide some suggestions as to how the appellants might consider proceeding, it is not the responsibility of the court in an adversarial system to advise parties how to conduct their litigation. He made no reviewable error in this regard.

[51] The respondents did not oppose the appellants' use of the new affidavit evidence on the standing application. Having concluded that the appellants lacked standing, it was unnecessary for the chambers judge to determine what evidence should be considered had the judicial review application proceeded.

[52] Orders as to costs are discretionary and entitled to deference on appeal, absent misdirection by the chambers judge on the applicable law or a palpable and overriding error. In this case, the chambers judge awarded enhanced costs of the application under column 4 of the *Rules of Court* based upon his finding that the application was a collateral attack on the 2010/2011 Proceedings. As that finding was a reviewable error, his enhanced costs award is set aside and replaced with the usual award under column 1 of Schedule C of the *Rules of Court*.

VII. Result

[53] The appeal is dismissed. The enhanced costs award below is set aside and replaced with the usual award under column 1 of Schedule C of the *Rules of Court*.

Appeal heard on March 8, 2018

Reasons filed at Edmonton, Alberta
this 24th day of May, 2019

REGISTRAR FILED MAY 24 2019 Court of Appeal of Alberta

Strekaf J.A.

I concur:

Wakeling J.A.

Dissenting Reasons for Judgment Reserved of the Honourable Mr. Justice O'Ferrall

I. Introduction

[54] This appeal raises the important question of when, if ever, citizens or advocacy groups should be granted public interest standing to seek judicial review of a governmental decision that, arguably, contravenes animal welfare laws. A shift in attitudes regarding the acceptable treatment of animals has led Alberta to legislate positive duties of care towards animals. However, this protection will remain ineffective so long as citizens are unable to challenge alleged unlawful treatment of animals by government. Efforts by citizens or advocacy groups to uphold those laws ought not to be silenced through the denial of standing. If animals are to be protected in any meaningful way, they, or their advocates, must be accorded some form of legal standing.

[55] Denying the appellants' public interest standing suggests the government's control over animals in its care is immune from review and organizations attempting to protect those animals' interests are without recourse. This cannot be the case. The executive branch of government should not be immune from scrutiny merely because human interests are unaffected. Courts cannot stand by when animal protection laws are ignored. Upholding the rule of law against the executive is the dominant rationale for granting public interest standing.

[56] Granting standing in this case is consistent with decades-old jurisprudence which accorded standing to environmental advocacy groups to advocate on behalf of the environment (See e.g., *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR, 88 DLR (4th) 1 and *Canadian Wildlife Federation Inc v Canada (Minister of the Environment)*, 26 FTR 245, [1989] 4 WWR 526 (TD)). Standing is nominally granted to appropriate advocacy groups, but it is the interests for which the groups advocate that are really being given standing. The basis upon which this standing is given in wildlife cases is that laws protecting wildlife, from bees to boreal caribou, require enforcement; but experience has shown that those responsible for enforcing wildlife laws sometimes fail to do so. In such cases an organizations such as the applicant in these proceedings is given standing to apply for declarations that the law is not being obeyed (if it is not) and for remedies if the courts are in a position to grant remedies. The health of our ecosystem has been recognized as requiring representation for years. The need for representation and advocacy on behalf of animals in our custodial care is just as great.

[57] This is an appeal of the chambers judge's decision to dismiss the appellants' application for public interest standing to seek judicial review of the Minister of the Environment and Parks' decision to issue a zoo permit or zoo permit renewal to the Edmonton Valley Zoo under section 13(1) of the *Wildlife Act*, RSA 2000, c W10 (*Zoocheck Canada Inc v Alberta (Agriculture and Forestry)*, 2017 ABQB 764, [*Chambers Decision*]). The application was not only dismissed on the basis that the appellants failed to meet the requirements of public interest standing, but the chambers judge also found that the application itself was an abuse of process because seeking public interest standing was a collateral attack on previous decisions (i.e., *Reece v Edmonton (City)*, 2010 ABQB

538, 498 AR 43 [*Reece, QB*], aff'd 2011 ABCA 238, 513 AR 199 [*Reece, CA*], collectively referred to as "2010/2011 Proceedings") (*Chambers Decision* at para 18). This cannot be.

II. Standard of Review

[58] A chambers judge's finding of abuse of process is a discretionary finding based on specific facts; therefore, a review calls for deference, absent palpable and overriding error (*Enron Canada Corp v Husky Oil Operations Limited*, 2007 ABCA 27 at para 13, 401 AR 291).

[59] The application of the test for public interest standing to these facts is a question of mixed fact and law (*Housen v Nikolaisen*, 2002 SCC 33 at para 26, [2002] 2 SCR 235 [*Housen*]). The error alleged is one of application. Such questions are "subject to the standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law" (*Housen* at para 37). Palpable errors are those that are "clear to the mind or plain to see" (*Housen* at para 5, citing Judy Pearsall, ed, *New Oxford Dictionary of English* (Oxford: Clarendon Press, 1998)).

III. Analysis

[60] The chambers judge erred both in finding the appellants' application for public interest standing was a collateral attack on the 2010/2011 Proceedings and in denying their application for public interest standing.

[61] The 2010/2011 Proceedings concerned the appellants' attempt to enforce penal legislation through civil proceedings. It too was characterized as an abuse of process. But regardless, these proceedings did not address the substantive issued raised by the appellants concerning Lucy's health and treatment. Therefore, the chambers judge erred in finding the appellants' application for standing was an improper attempt to raise issues that had already been finally determined. They had not been determined at all.

[62] The chambers judge erred in his application of the test for public interest standing by failing to account for the scope of public interest standing. He failed to apply the test with an eye to the underlying purposes of public interest standing, leading him to incorrectly find that the appellants did not meet any of the elements of the test.

A. Collateral Attack

[63] The chambers judge found the appellants' application for standing and judicial review to be a collateral attack on his previous decision in *Reece, QB* and therefore an abuse of process (*Chambers Decision* at para 18). He found their application to be, in essence, another attempt to use an improper mechanism to achieve the collateral purpose (*Chambers Decision* at para 18). In *Reece, QB* the appellants' application for a declaration that the City was in violation of the *Animal Protection Act*, RSA 2000, c A-41 was summarily dismissed as another attempt to enforce penal legislation through civil proceedings and was therefore an abuse of process. In *Reece, CA*, this Court did not consider the substantive claims regarding Lucy's mistreatment. Nor did it decide the appellants' public interest standing. Instead, this Court expressly stated it was unnecessary to consider whether the

appellants' were entitled to standing and thus any comments on standing were *obiter dicta* (*Reece, CA* at para 37). In the appealed decision in these proceedings, the chambers judge, despite the narrow finding in *Reece, QB*, found the judicial review application to be a collateral attack on that previous ruling.

[64] I am of the view that the appellants' application for standing and judicial review is not a collateral attack on the 2010/2011 Proceedings.

[65] The essence of a collateral attack is an attempt to achieve indirectly what an authoritative body has already clearly decided (*British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 28, [2011] 3 SCR 422). It is a court action which raises grounds or issues already determined, or which is intended to circumvent the effect of a court or tribunal order (*Lee v Canada (Attorney General)*, 2018 ABQB 40 at para 251, 403 CRR (2d) 194).

[66] In *Reece, QB*, the claim was dismissed on the basis that the appellants chose to proceed through an improper route. The claim that Lucy's treatment was in violation of animal protection legislation was not found to be without merit as the substance of the matter was not decided. Nor was the appellants' application for public interest standing ruled on. Instead, the Court only passed judgement on the way in which the appellants chose to bring their claim to court. Therefore, to raise the same question—that has not been decided—through another, arguably more appropriate procedure is not an attempt to circumvent a final determination of an issue. The appellants are simply pursuing the Court's suggestion in *Reece, CA* that there may be a more appropriate procedure to bring their claim. In fact, review of the zoo permit was one of the very strategies suggested by the City in *Reece, CA* as the preferable means through which to bring these concerns.

[67] The appellants are now using an alternative procedure they were expressly encouraged to pursue and are being dismissed on the basis of their previous unsuccessful attempt. By this logic, any further attempt by the appellants to seek judicial consideration of the treatment of Lucy would be characterized as a collateral attack on a decision that did not address the merits of the appellants' claim that Lucy is being mistreated. This cannot be the case as the claim is serious, currently undecided, and, in my view, deserving of careful consideration by the judiciary. The denial of the application is not only unfair, but inconsistent with the harm the law against collateral attacks aims to avoid.

[68] Therefore, the 2010/2011 Proceedings do not preclude the appellants' subsequent application for standing and judicial review.

B. Public Interest Standing

[69] Courts must take a purposive approach to granting public interest standing. The public interest standing test is meant to protect against the traditional concerns that motivate limitations on the granting of standing. As articulated by Justice Cromwell in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [*Downtown Eastside*], the factors comprising the test "should not be treated as hard and fast requirements or free-standing, independently operating tests...[r]ather they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes" (*Downtown Eastside* at

para 20). This means the court must give due consideration to the purpose of public interest standing, which is to ensure governments are held accountable for their actions and to prevent the immunization of executive acts from any scrutiny. This of course requires the court to use its discretion, where appropriate, to permit more litigants to enter the courtroom (*Delta v Lukacs*, 2018 SCC 2 at para 18, [2018] 1 SCR 6.

[70] The question of whether the appellants should be granted public interest standing requires consideration of the three-part test set out in *Downtown Eastside*. The Supreme Court of Canada in *Downtown Eastside* articulated the following three questions, or factors, to consider before exercising discretion to grant public interest standing: (1) is there a serious justiciable issue; (2) does the plaintiff have a real stake or a genuine interest in the issue; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts" (*Downtown Eastside* at para 37).

1. Serious and Justiciable Issue

[71] To satisfy the first factor, the issue raised on appeal must be sufficiently serious to address concerns about the allocation of scarce judicial resources and sufficiently justiciable to address concerns about the proper role of courts in relation to other branches of government (*Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at 631, 33 DLR (4th) 321).

[72] The issue under appeal in this case is the judicial review of the province's decision to renew the Edmonton Valley Zoo's zoo permit. The basis of this review is the alleged illegality in the treatment of Lucy. As discussed below, this issue satisfies both requirements.

a) Serious Issue

[73] The significance of this case goes far beyond Lucy's individual circumstances and whether the Minister rightfully issued a zoo permit. As articulated by the Chief Justice in dissent in *Reece, CA*, the treatment of Lucy raises important questions about the scope of the protection accorded to animals; about who, if anyone, is entitled to access the courts on those animals' behalf; and about whether the executive branch may ever be held accountable by the public in the civil courts for non-compliance with animal welfare legislation (para 175).

[74] In *Downtown Eastside*, the Supreme Court of Canada articulated a "principle of legality" which calls for a "practical and effective way to challenge the legality of state action." This principle arises from a concern for "access to justice for disadvantaged persons in society whose legal rights are affected" (*Downtown Eastside* at para 51). The importance of this principle in the context of this issue was considered by Chief Justice Fraser in her dissenting reasons in *Reece, CA* at paragraph 171:

> 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.

[75] Animal protection legislation serves a vital and important purpose and the government cannot be immune from scrutiny if it ignores these obligations. The overarching purpose of the legislation is to protect animals—not their owners (*Reece, CA* at para 91). The legislation "is not simply for show, to assuage our collective conscience, promising much but delivering little" (*Reece, CA* at para 91). And yet, there currently is a dearth of means through which animal rights can meaningfully be heard in the judicial system. The inadequate enforcement of animal protection laws results in large part from the inability of the public to access a mechanism through which to hold the government accountable. Judges act as gatekeepers for access to justice when exercising their discretion to grant or withhold public interest standing. This raises a serious question of when the public can hold the government accountable for its treatment of animals, an issue that warrants judicial consideration not only Lucy's sake, but for the sake of all animals in our custodial care.

b) Justiciable Issue

[76] The chambers judge erred when he found no justiciable issue on the basis that the *Wildlife Act* does not function as animal protection legislation (*Chambers Decision* at para 9). A condition of receiving a zoo permit is compliance with all animal protection legislation and therefore the alleged non-compliance by the Edmonton Valley Zoo may be a basis on which to revoke a zoo permit.

[77] Alberta's animal welfare laws consist of two statues: the *Animal Protection Act* and the *Wildlife Act*. Each statute has a corresponding regulation: the *Animal Protection Regulation*, Alta Reg 203/2005 and the *Wildlife Regulation*, Alta Reg 143/1997.

[78] Zoo permits are issued pursuant to section 13(1) of the *Wildlife Act* by the Minister of Environment and Parks. Eligibility for those permits is outlined in section 76 of the *Wildlife Regulations*. The chambers judge found no justiciable issue because section 76(1) of the *Wildlife Regulations* defines "zoo standards" to include Section II and Section IVA, Appendix 1 of the Government of Alberta Standards for Zoos in Alberta (GASZA). He held that limited definition necessarily meant compliance with Section III of GASZA (the section pertaining to animal care) was not a condition of a zoo permit. He thus concluded the zoo licensing provisions were never intended to function as animal protection legislation (*Chambers Decision* at para 9). On that basis he found the appellants' application did not raise a justiciable issue.

[79] This proposed interpretation is inconsistent with a reading of section 76 of the *Wildlife Regulations* as a whole. While the defined term "zoo standards" is used in subsections 2, 3 and 4 of section 76, its use is distinctly different in subsection 4. Section 76(4) authorizes the Minister to issue zoo permits to those who "**fully meet all applicable laws *and*** all additional requirements of the zoo standards" [emphasis added]. There is no limiting language that indicates compliance is limited to zoo standards, as defined in the Regulation. To the contrary, the language explicitly requires compliance with "all applicable laws." Compliance with all applicable laws requires zoo permit holders to comply with every law that pertains to their activities as a zoo owner. This refers not only to the requirements set out in the zoo standards, but any requirements in all applicable legislation, including the *Animal Protection Act* and regulations.

[80] The presumption against tautology requires an interpretation that presumes the legislature avoids superfluous or meaningless words and does not pointlessly repeat itself (*AG (Que) v Carrières Ste-Thérèse Lté*, [1985] 1 SCR 831 at 838, 20 DLR (4th) 602). Every word in a statute is

presumed to have a specific role to play in advancing the legislative purpose and courts should avoid adopting interpretations that would render any portion of a statute meaningless or redundant (Ruth Sullivan, *Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada, 2014) at §8.23 [*Sullivan*]). The reference to both "zoo standards" and "all applicable laws" should not be read as referring to the same body of legislation. Section 76(4) should be read as mandating compliance with all applicable laws, in addition to legislated "zoo standards."

[81] This reading is consistent with the *Animal Protection Regulation*. The *Animal Protection Regulation* requires the owner of a zoo for which a zoo permit is issued to comply with all of GASZA. Section 2(3) of the *Animal Protection Regulation* states:

> A person who owns or controls a zoo for which a zoo permit is issued under the *Wildlife Act* **must** comply with the Government of Alberta Standards for Zoos in Alberta.
>
> [emphasis added]

[82] Use of the word "must" should be interpreted to mean compliance with GASZA is a necessary precondition to receiving and maintaining a zoo permit and failure to comply would presumptively disqualify a zoo from receiving a permit. The Alberta Legislature regularly employs the words "must" and "shall" when it wants to compel conduct (*Alberta (Minister of Justice and Attorney General) v Sykes*, 2011 ABCA 191 at para 31, 334 DLR (4th) 193). When "shall" and "must" are used in legislation to impose an obligation, they are always imperative; a person who "shall" or "must" do something has no discretion to decline (*Sullivan* at §4.80).

[83] Compliance with GASZA in its entirety, not just the sections referred to in the definition of "zoo standards", is relevant to this appeal because several provisions of GASZA apply to the manner in which Lucy is being housed and sheltered at Edmonton Valley Zoo. Chief Justice Fraser canvassed the ways GASZA might apply to the facts of this case at paragraphs 80-87 of her dissent in *Reece, CA*. For example, Section III B 1 of GASZA sets out the requirement that animals be housed with same species-companions and in adequate facilities:

> 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.

[84] Section III B 2 of GASZA incorporates the minimum standards set by the *American Zoo and Aquarium Association Standards* (AZA Guidelines). These standards include Standards for Elephant Management and Care that accredited zoos are required to meet. These 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.

In addition, Standard 2.2.4 provides:

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

Lucy, of course, has no same-species companions.

[85] In my view, GASZA appropriately falls under "all applicable laws" which the zoo must comply with to qualify for a zoo permit and, in this case, there is evidence that Lucy's treatment does not meet the requirements set out in GASZA. For example, it is clear from the already-noted GASZA sections and AZA Guidelines that elephants have particular social needs that directly affect their health and well-being. In this case, Lucy has been without a companion for 11 years since another elephant, Samantha, was transferred to a zoo outside Canada for breeding purposes. The appellants argue that this is but one example of the Edmonton Valley Zoo's treatment of Lucy which may disqualify it from a zoo permit.

[86] On a more principled level, the chambers judge's proposed reading of the legislation undercuts the purpose of zoo regulation and animal welfare laws generally. If the renewal of zoo permits depends only on the matters the chambers judge suggests—matters such as a $100 fee and an animal inventory—the zoo licensing process would serve no meaningful purpose. Issuance of a zoo permit would have no connection to compliance with the commitment to treat animals humanely. A zoo's treatment of animals must be the primary basis on which to assess eligibility for a permit to run that zoo. As a society, we recognize that the caging of live animals is more than an exercise of holding proprietary objects, and instead involves the stewardship of sentient beings deserving of our concern and care. Conditioning a zoo permit on ongoing compliance with the legislated ethical standards of animal care is more consistent with the purpose of this collection of legislation.

[87] The chambers judge's suggestion that zoo licensing provisions were not intended to function as animal protection legislation ignores one of the recognized functions of licensing generally. Licensing of a regulated activity is done for a number of reasons and serves several functions. One of them is to ensure compliance with conditions the regulator wishes to impose. But even when the regulator imposes no conditions, another fundamental function of licensing is to secure compliance with legislation governing the various aspects of the regulated activity. License or no license, regulated activities must be conducted in accordance with the law; but where there is a license, one of the reasons for granting it is to secure compliance with applicable legislation. In the case of a zoo, the need for a license secures compliance with applicable legislation such as the *Animal Protection Act* and the *Public Health Act*. To suggest that that licensing of zoos under the *Wildlife Act* was not intended to secure compliance with animal protection legislation is tantamount to saying that a zoo license could not be revoked for non-compliance with that legislation. That cannot be the case.

[88] For these reasons, in my opinion, the appellants' application for standing and judicial review of the decision to grant the Edmonton Valley Zoo a permit satisfies the test for a serious and justiciable issue.

2. Genuine Interest

[89] The second factor of the *Downtown Eastside* analysis requires the party seeking public interest standing to have a genuine interest in the issue raised. This factor represents an attempt to screen out busybodies in that it requires the party to have a real stake in the proceedings or be engaged with the issues raised (*Downtown Eastside* at para 43). Courts may approach the genuine interest factor as akin to intervener screening, looking for "experience and expertise" or an "understanding" relevant to resolving the issues (*Sierra Club of Canada v Canada (Minister of Finance)*, [1999] 2 FC 211 at para 52, 157 FTR 123 (TD) [*Sierra Club*]). In the context of environmental law, the Federal Court held in *MiningWatch Canada v Canada (Minister of Fisheries and Oceans)*, 2007 FC 955 at para 179, [2008] 3 FCR 84 [*MiningWatch*], that a genuine interest requires more than a *bona fide* interest or concern about environmental issues. The most important indicators of genuine interest are organizational purposes and a record of involvement with the issue or the substantive environmental subject matter (*Sierra Club*; *MiningWatch).*

[90] The appellants clearly meet these requirements. The appellants have more than an abstract concern about environmental issues. They have a genuine interest in the treatment of Lucy and the potential misconduct of the Edmonton Valley Zoo. Zoocheck is a Canadian-based international wildlife protection charity established to promote and protect the interests and well-being of wild animals, including those in our custodial care. This is an organization dedicated to helping animals. They have a long standing reputation in the field of animal welfare and have done with significant work on the subject (e.g. see *Citizens' Mining Council of Newfoundland & Labrador Inc. v Canada (Minister of the Environment)*, [1999] FCJ No 273 at para 30, 163 FTR 36). Ensuring zoos who are issued permits meet statutorily mandated standards of care falls directly within their scope of work.

[91] The chambers judge was correct that the question is not whether the appellants have a genuine interest in Lucy's well-being, but rather whether they have a genuine interest in the decision of the Minister to renew the zoo permit (*Chambers Decision* at para 12). However, to suggest that an interest in one precludes an interest in the other is a false dichotomy. It is a distinction without a difference to say the finding that the appellants' genuine interest in Lucy's well-being necessarily meant their interest in the zoo permit was collateral to their goal of having Lucy treated in accordance with generally recognized custodial standards (*Chambers Decision* at para 12).

[92] While the appellants are interested in Lucy's well-being, they are also concerned about the zoo's compliance with animal welfare legislation, or rather the lack of compliance, and the effect of such non-compliance on the revocation or renewal of the zoo's permit. The appellants have presented evidence that Lucy's living conditions are inadequate and she may be experiencing distress. That evidence is unchallenged. If this is true, then the Edmonton Valley Zoo is in direct contradiction of section 2 of the *Animal Protection Act* that mandates that no personal shall cause or permit any animal to be, or continue to be, in distress. This warrants a judicial review of their zoo permit. There does not need to be widespread neglect before a permit should be revoked; the mistreatment of even one animal breaches a zoo's legal obligations and may be enough to undermine

their right to a permit. If the appellants are correct about Lucy's conditions, those conditions, arguably, would violate the mandatory provisions for obtaining or renewing a zoo permit.

[93] In my view, the appellants have a genuine interest in the litigation which qualifies them for public interest standing.

3. Reasonable and Effective Means

[94] Justice Cromwell in *Downtown Eastside* gave examples of the types of interrelated matters that courts may consider in assessing the third factor: (1) the plaintiff's capacity, resources, and experience; (2) a sufficient factual setting; (3) a case of "public interest" that transcends the interests of those most directly affected; (4) realistic alternative means that would favour more efficient and effective use of judicial resources and present a context more suitable for adversarial determination; (5) whether the plaintiffs would bring any useful or distinctive perspective to the resolution of the issues, even if other persons have more direct interests (*Downtown Eastside* at para 51). There is a cogent argument based on the application of Justice Cromwell's proposed considerations that granting public interest standing to the appellants to seek judicial review is a reasonable and effective means of addressing the serious issues at stake.

[95] When considering a particular measure, a court should have the benefit of the contending views of the persons most directly affected. When, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant, the granting of public interest standing is not required (*Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at 252, 88 DLR (4th) 193 [*Council of Churches*]). In this case, Lucy may not be the only potentially adversely affected animal, but she is certainly one of them. However, she cannot commence legal proceedings because she is an animal. Given the beneficiaries of the legal protections found in animal welfare laws are not actors that can represent their own interests, standing must be granted to those qualified and interested organizations that are willing and able to represent animals' interests.

[96] The appellants qualify as being an appropriate advocate. The appellants bring a useful perspective to the issues as did the sex trade workers in *Downtown Eastside* (see para 51). The appellants have assembled volumes of affidavit evidence relevant to Lucy's present condition and her particular needs. As well, the appellants have the capacity to bring forth claims as they are adequately resourced, possess expertise in animal welfare, and are able to present a strong adversarial view with supporting evidence. But only if they are heard can a determination be made as to what remedy, if any, is appropriate.

[97] The issues raised transcend the interests of any individual animal allegedly subject to improper treatment. As discussed above, the judicial review would not only consider the issuance of the Edmonton Valley Zoo's zoo permit, but also engage larger questions about the scope of animal protections and the content of rights afforded to animals. Public interest standing and the judicial review process in the past has provided access to those who would give a voice to nature and to protect species and ecosystems under threat, particularly where positive duties have been imposed on either the governments or the industries who threaten them. Here we have legislation imposing positive duties on custodians of animals. The actions of these custodians must be subject to judicial review in appropriate circumstances. But in order for there to be scrutiny, there must be an advocate

for such scrutiny. Granting public interest standing to an appropriate advocate is a pre-condition to such review.

[98] The chambers judge erred in finding judicial review of the permit decision was not a reasonable and effective way to bring the issue of Lucy's welfare before the court on the basis that there was a more reasonable mechanism available, specifically a private prosecution under the *Animal Protection Act* (*Chambers Decision* at para 17). The majority also suggests there is "no reason to suspect that the peace officers charged with enforcing the *Animal Protection Act* would fail to prosecute the City if they found an animal to be in distress" (*Majority Decision* at para 35). However, there is reason to suspect this assumption. The Humane Society, which has hitherto been responsible for such prosecutions, has indicated it wishes to relinquish this responsibility to the City which would mean that the City would be responsible for enforcing its own violations.

[99] While a private prosecution under the *Animal Protection Act* is possible in theory, the policing authority, the Edmonton Humane Society, has thus far refused to charge the City with an offence. And unless there are charges or the matter is otherwise brought to the attention of the Attorney-General, there can be no exercise of prosecutorial discretion. And despite these and other proceedings which have received widespread publicity, the Attorney-General's Department has demonstrated no interest in the alleged violations. From this it may be inferred that a private prosecution would be stayed under section 579 of the *Criminal Code*, RSC 1985, c C-46 (*Reece, CA* at para 190). Thus, there is evidence to suggest that enforcement of the *Animal Protection Act* in the case of the Edmonton Zoo might not occur when required. And even if a prosecution ensues, a successful prosecution results only in a fine and perhaps an order restraining continuation of the custodial care. It does not result in generalized compliance with animal protection legislation.

[100] As Chief Justice Fraser held in *Reece, CA*: "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" (*Reece, CA* at para 191). A party should not be denied standing because theoretically there are other ways of getting the issue before the courts. The available means must provide a reasonable prospect of a meaningful solution to the issue before standing should be refused on that basis (*Friends of the Island Inc v Canada (Minister of Public Works)*, [1993] 2 FC 229 at para 81, 102 DLR (4th) 696).

[101] In short, the *Chambers Decision* does not reflect the Supreme Court of Canada's restatement of the third factor in *Downtown Eastside*, where the Court held that this factor should be interpreted in a more relaxed manner than previous jurisprudence. This branch of the test should not be approached strictly (*Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 43, [2013] 1 SCR 623. The third factor now asks whether the proposed suit provides "*a* reasonable and effective means" to bring the challenge to court. I question whether bringing an action under the *Animal Protection Act* could be said to be a reasonable mechanism through which to address concerns about Lucy's health, but if it is such a reasonable mechanism, the appellants do not have to choose what the court might deem the *most* reasonable way of addressing the matter. Given previous denial of their application under the *Animal Protection Act*, it was reasonable for the appellants to seek an alternative means to address their concerns. Judicial review provides such a reasonable and effective means.

IV. Result

[102] The appeal should be allowed. The appellants qualify for public interest standing to seek judicial review of the Minister's decision to grant or renew the Edmonton Valley Zoo's zoo permit. This case should go to trial for consideration of the important points of law that impact both the protection of animals and the public's interest in government compliance with the law.

Appeal heard on March 8, 2018

Reasons filed at Edmonton, Alberta
this 24th day of May, 2019

O'Ferrall J.A.

Appearances:

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