Court of Queen's Bench of Alberta

Citation: Reece v. Edmonton (City), 2010 ABQB 538

Date: 20100820
Docket: 1003 01655
Registry: Edmonton

Between:

Tove Reece, Zoocheck Canada Incorporated and People for the Ethical Treatment of Animals, Inc.

Respondents (Applicants)

- and -

The City of Edmonton

Applicant (Respondent)

Corrected judgment: A corrigendum was issued on October 21, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on August 24, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
Associate Chief Justice
John D. Rooke

I. Introduction

[1] This Decision relates to "Lucy", the 34 year old Asian elephant resident at the Edmonton Valley Zoo. While the litigation before the Court makes allegations about the health and care of Lucy, this Decision does not address those allegations. Rather, it addresses the health of the legal system to properly consider such allegations.

II. Background

[2] Tove Reece, Zoocheck Canada Incorporated and People for the Ethical Treatment of Animals, Inc. (the Applicants) filed an Originating Notice seeking a declaration that the City of Edmonton (the City), is in violation of s. 2 of the *Animal Protection Act*, R.S.A. 2000, c. A-41 (the Act), in relation to Lucy. Specifically they allege that the City keeps Lucy in an environment and in a state of health that breaches provincial law.

[3] The City, relying on Rules 6, 129(1)(a) and (d), and 410 of the *Alberta Rules of Court*, Alta. Reg. 390/1968, seeks to strike the Originating Notice.

III. Issues

[4] The City seeks to strike the Originating Notice on numerous grounds, including the following:

a. None of the Applicants have standing to seek the declaration;
b. The application is an abuse of the process of the Court, because it seeks to circumvent the comprehensive regulatory regimes set out in the Act, the *Animal Protection Regulation,* Alta. Reg. 203/2005 (the Regs), the *Wildlife Act*, R.S.A. 2000, c. W-10 (*Wildlife Act*) and *Wildlife Regulation*, Alta. Reg. 143/97 (*Wildlife Regs*.), including the *Government of Alberta Standards for Zoos in Alberta* (Zoo Standards), (collectively, the Legislation), "thereby usurping the role of the Attorney General and depriving the City of numerous procedural protections to which it would otherwise be entitled"; and
c. Proceedings by way of an originating notice are not permitted by Rules 6 or 410, and are not appropriate because:
    i. there is nothing in the Act permitting a party to seek a declaration by way of originating notice;
    ii. the action raises serious questions of fact and law and real disputed proceedings are likely; and
    iii. material facts are in dispute which will require *viva voce* evidence.

[5] 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. Simply put, the City argues that, if there is concern about Lucy's well being, the appropriate - indeed the only proper - legal procedure is to proceed under the Legislation. The Applicants argue that the City has not met the requirements of the Act, and those administering it will not invoke it to assist Lucy, and therefore a declaration is necessary.

IV. Summary of Conclusions

[6] I find that the Applicants's Originating Notice is an abuse of process because no private individual can bring an action to enforce the criminal law and therefore the proper way to proceed is through the Legislation. There is a possible caveat: if the public officers charged with responsibility under the Legislation do not meet that duty, the jurisdiction of the Court might be invoked to seek relief through a judicial review application for mandamus or an application for mandatory injunctive relief.

[7] Alternatively, had I not found an abuse of process, I would have found, based on the City's arguments, that if the Court's jurisdiction is to be invoked to seek a declaration in these circumstances, it must be done by way of statement of claim, not originating notice. However, such an alternative decision is not necessarily fatal to the Applicants who might apply to seek relief from a finding of such an irregularity under Rule 560.

[8] In light of my first finding, I further find that I do not need to address the issue of standing in any detail, or the resulting issues under Rule 129(1)(a), although there are some interrelationships with other issues. As the City notes, the question of abuse of process has often been characterized as a standing issue (see for example: ***Greenpeace Canada v. MacMillan Bloedel Ltd.,*** [1994] 10 W.W.R. 705, 93 C.C.C. (3d) 289, 96 B.C.L.R. (2d) 201 (BCCA), aff'd [1996] 2 S.C.R. 1048.

[9] I can, however, make some provisional findings and observations:

a. If required to make findings on standing, I would have found that the Applicants did not have any private interest standing because their private rights were not interfered with, nor did they suffer any damage peculiar to themselves. Since this case relates to the alleged infringement of a public right, this application attempts to "usurp the role of the Attorney General and to sue to enforce public laws". See for example*:* ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607, referencing ***Boyce v. Paddington***, [1903] 1 Ch. 109; and ***Kitimat (District) v. Alcan Inc.***, 2006 BCCA 75, 265 D.L.R. (4th) 462 (B.C.C.A.), at para 59.

b. The Applicants rely upon the rate payer cases (for example ***Paterson v. Bowes,*** [1853] O.J. No. 255; and ***MacIlreith v. Hart Estate,*** [1908] 39 S.C.R. 657) as exceptions to the general rule in ***Boyce*** and ***Finlay***. I find that these decisions are not helpful, because:

   i. none of the applicants here are Edmonton rate payers;
   ii. the situation here is not about monetary loss to citizens such that they "sustained a pecuniary interest" in the matter and accordingly the Applicants have not demonstrated "special damage"; and
   iii. in any event, the claim here is not analogous to rate payers.

c. While one or more of the Applicants may qualify for a "public interest" standing on a discretionary basis in the broad sense (a serious issue, and a genuine interest, in the matter raised) to challenge "the limits of administrative authority", such standing is generally granted in the context of challenging legislation (see: ***Finlay***; and ***Canadian Council of Churches v. Canada (Minister of Employment and Immigration)***, [1992] 1 S.C.R. 236; ***Canada (Minister of Justice) v. Borowski,*** [1981] 2 S.C.R. 575). 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 Applicants.

d. Additionally, as the City argued, the declaration sought by the Applicants does not challenge the limits of administrative authority, but instead seeks to enforce a comprehensive regulatory regime without the consent of the Attorney General of Alberta, an area to which public interest standing does not extend: ***Carruthers v. Langley*** (1985), 69 B.C.L.R. 24, 23 D.L.R. (4th) 623 (BCCA)**;** and ***Society for the Preservation of the Englishman River Estuary v. Nanaimo (Regional District)*** (1999), 28 C.E.L.R. (N.S.) 253, 86 A.C.W.S. (3d) 261 (B.C.S.C. - Macaulay J.).

V. Analysis

A. Standard

[10] The standard for striking pleadings, including an originating notice, pursuant to Rule 129(1) is that it is "plain and obvious" or "beyond doubt": see, for example, ***Hunt v. Carey Canada Inc***., [1990] 2 S.C.R. 959, at para. 33; and ***Allen v. Alberta***, 2001 ABCA 171, at para. 13, rev'd but aff'd on that issue [2003] 1 S.C.R. 128 , at para. 11.

B. Abuse of Process

[11] The City alleges that the Originating Notice is an abuse of process under Rule 129(1)(d) because there is another reasonable and effective manner to bring the issue before the Court. The City argues that the Act creates an offence and the proper procedure for enforcing this provision is a criminal prosecution. Further, the City argues that the Applicants, by attempting to circumvent that procedure, are abusing the process of this Court and denying the City the procedural protections associated with such a prosecution.

1. Animal Protection Legislation

[12] The City argued that the Act provides a means by which allegations of a violation of s. 2 can be brought before the Court. Section 12 makes it an offence to contravene the Act and declares that a person in violation is liable to a fine of not more than $20,000. The Act is

enforced by empowering Peace Officers to enter property and relieve any animal under distress (ss.3 and 4). Peace Officers can also enter places where animals are exhibited to investigate an animal that may be in distress (s. 10).

[13] The City further argued that under the *Wildlife Act* a permit is required for controlled animals, which include elephants (s. 55), and that wildlife officers can inspect permit premises (s. 72). Any contravention of the Act is an offence (s. 86). Pursuant to section 141.1 of the *Wildlife Regulation,* zoos must comply with the Zoo Standards.

[14] The City noted that an offence under either the Act or the *Wildlife Act* regime would be prosecuted in accordance with the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34 which incorporates the procedure of the *Criminal Code*, R.S.C. 1985, c. C-46.

[15] The City thus concludes:

> A criminal prosecution is another reasonable and effective manner for the matter to come before the court and this process is better adapted to the offence alleged by the Applicants. The Appellants (*sic)* have a further alternative remedy in applying to the Minister to cancel the City's zoo permit under section 19 of the *Wildlife Act*.

[16] I agree with the City's conclusions, but would add some further comments.

[17] The Act has a number of relevant provisions. Section 1(2) provides:

> 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.

[18] It is clear from s.1(2) that, to the extent that the Applicants complain that Lucy is an "animal ... in distress" for one of these complaints, the Act applies to her.

[19] Section 2 of the Act prohibits such distress, provided that it does not relate to "activity carried on in accordance with the regulations or in accordance with reasonable and generally accepted practice of animal care, management, husbandry...". Section 2.1 reinforces a positive duty in relation to prevention of distress to animals.

[20] Section 3 of the Act, and following sections, mandates a peace officer to take action to relieve any animal distress.

[21] Section 14(2) provides that if a person believes on reasonable and probable grounds that an animal is in distress and reports the distress to a peace officer, "no action lies against that person for reporting unless that person reports maliciously or without reasonable or probable grounds for the belief."

[22] While no one took the Court through the specific applicable provisions of the Legislation in detail, one can obtain some guidance from the *Wildlife Regs*, which reference "controlled animals" in Schedule 5, which includes Asian or Indian Elephants. Section 46 relates to persons entitled to hold a collection licence to include those who hold a zoo permit. Section 69 deals with import permits. Section 76 has comprehensive provisions relating to zoo permits, and, referencing the Zoo Standards issued September 30, 2005, the applicable provisions of which form part of the *Wildlife Regs*., authorizes the issuance of such a permit to those that Zoo Standards and all other laws apply. Section 78 requires a written zoo plan. Section 79 sets out the authorizations contained in a zoo permit.

[23] A closer look as the Zoo Standards issued September 30, 2005 indicates a number of interesting things, the following of which merely touch the surface, for illustrative purposes:

a. the Zoo Standards were prepared by a consultant retained by divisions of the Departments of Agriculture and Sustainable Resource Development and reviewed by the Alberta Society for the Prevention of Cruelty to Animals, the Wildlife Committee of the Alberta Veterinary Medical Association and the Canadian Association of Zoos and Aquariums;

b. the purpose of the Zoo Standards is "to ensure that facilities requiring an Alberta Zoo Permit meet acceptable standards that provide: a suitable environment for the animal collections...";

c. the Department of Agriculture administers the Act and its obligations, whereas the Department of Sustainable Resource Development administers the *Wildlife Act* and *Wildlife Regs*., and "Agencies with authority under the [Act] are responsible for enforcement of Animal Care Standards";

d. Section III deals with "Standards Related to the [Act]", the purpose of which "is to ensure the needs of all the animals in the zoo facility are being met with regard to "... shelter, space and health care";

e. under Section III, a zoo must be either "an accredited zoo" or submit an "Animal Care Protocol" for each species, which must "describe in detail the provision of adequate ... health care program, adequate shelter ...", the latter including "a description with scale drawings of each separate exhibit including enclosures, housing ...", and then there are detailed provisions of the "standards for animal care [that] must be met" (Animal Exhibit Standards);

f. the Animal Exhibit Standards provide that "[a]ll animals must be maintained in numbers sufficient to meet their social and behavioural needs"; "[e]xhibit enclosures must be of sufficient size to provide for the physical well being of the animal"; "[a]ll 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 movements"; "[a]nimals must be protected from injurious heat and cold ..."; the American Zoo and Aquarium Association "Minimum Husbandry Guidelines for Mammals" for each species apply; there must be a veterinarian for each zoo who develops a "health management plan" with annual or more frequent inspections; a whole section, "D. Animal Behaviour Husbandry Standards", relates to the "development of animal enrichment that improves the well being of the animals", that consists of a range of measures that "attempt to provide a more stimulating environment for the animals"; and

g. under Section "IV. Appendices" and "B. Appendix 2. Zoo Permit Cancellation", it specifically provides that "*[i]n addition to charges being laid under the governing legislation*, there may be circumstances where the Zoo Permit will be cancelled and the zoo collection ordered removed", based on complaints and investigations of officials, where, specifically, '[a]n enforcement officer with authority under the [Act] will be the authority to investigate complaints related to animal care", where "[e]nforcement actions under the Wildlife Act or [Act} may consist of warnings, prosecutions and *court orders*...." [Emphasis added].

[24] These provisions are touched on here to demonstrate that the Legislation provides a comprehensive legislative and regulatory scheme for the care of controlled animals in a zoo, such as Lucy.

[25] Thus, in answer to the claim of the Applicants that "there is no other party other than themselves who are better placed to bring the issue of the lawfulness of the City's actions to Court", it is the officials under the Legislation who have the duty to take steps or lay charges under that Legislation when required. In this regard, the City makes reference to Peace Officers employed by the Edmonton Humane Society for that purpose. Indeed, officials under the Legislation have a statutory duty to do so, if they believe there to be a breach. In the result, so that the point is not lost, I find that the Legislation in this case provides an effective mechanism to bring the *issu*e of the alleged breaches before the Court.

[26] In addition to the provisions under the Legislation, I infer from s. 14(2) of the Act that a private citizen can, on reasonable and probable grounds, report their belief that an animal is in distress to a peace officer, who must investigate under the Act.

[27] It is unclear, however, whether a private charge may also be laid under a provincial statute (including the Legislation) for prosecution, with the prosecution being conducted by or with the consent of the Attorney General. Section 504 of the Criminal Code provides for private prosecution of indictable offences (the Criminal Code also provides for the possibility of private prosecutions for other specific offences). Under s. 3 of the *Provincial Offences Procedure Act*,

all provisions of the Criminal Code apply except to the extent they are inconsistent with the *Provincial Offences Procedure Act* and its regulations. Section 22 of the *Provincial Offences Procedure Act* provides that instead of the procedure in the Criminal Code for laying an information, Parts 2 and 3 of the *Provincial Offences Procedure* Act may be followed. Parts 2 and 3 provide for summons violation tickets and offence notice violation tickets, respectively. Under Part 2, a complainant who believes on reasonable and probable grounds that an offence has been committed, may swear a complaint before a commissioner for oaths (s. 25). Part 2 offences are defined in the Regulations - Schedule 1. The Act is not within Schedule 1. Under Part 3, a violation ticket must include a certificate of offence which must be completed and signed by a peace officer (s. 31). Thus, in the absence of submissions by the parties, the question of whether a private prosecution is possible in these circumstances remains an open question.

[28] The Applicants argue further that if charges were to proceed under the legislation they would go to Provincial Court, and that it has no jurisdiction to grant a declaration. However, to prove breach of the Legislation, a conviction is more powerful than a declaration. While there may be no other way to obtain a declaration, there is another way to have the courts rule on the *issue* of whether there is a breach of the Legislation.

2. Enforcement of Criminal Laws

[29] Absent interference with private rights, an interference I don't find here, the general rule, as articulated in the City's brief, and with which I agree, is that no private individual can bring an action to enforce the criminal law, whether by way of declaration, injunction or damages: ***Greenpeace Canada****, supra*. While focussing more on standing than the issues of reasonable provisions, see also: ***Carruthers v. Langley*** (1985), 69 B.C.L.R. 24, 23 D.L.R. (4th) 623 (B.C.C.A.); and ***Society for the Preservation of the English River Estuary v. Nanaimo (Regional District)*** (1999), 28 C.E.L.R. (N.S.) 253, 86 A.C.W.S. (3d) 261 (B.C.S.C. - Macaulay J.).

[30] In ***Greenpeace***, the Supreme Court ([1996] 2 S.C.R. 1048) directed its attention to "whether a person who asserts no private right has standing to advance the public interest without first obtaining the consent of the Attorney General" (at para. 20), referencing two decisions: ***Robinson v. Adams*** (1924), 56 O.L.R. 217 (C.A.) and ***Gouriet v. Union of Post Office Wkrs****.,* [1978] A.C. 435, [1977] 3 W.L.R. 300, [1977] 3 All E.R. 70 (H.L.).

[31] As pointed out in the City's brief, in ***Robinson***, the Ontario Court of Appeal held at para. 32:

> The equitable jurisdiction of a civil court cannot properly be invoked to suppress crime ... unless a right to property is affected, the civil courts should not attempt to interfere and forbid by their injunction that which has already been forbidden by Parliament itself.

[32] In ***Gouriet,*** the House of Lords held that there was no standing to seek an injunction without the consent of the Attorney General, stating, per Lord Wilberforce at p. 12: "where Parliament has

provided for trial of offences ... it may seem wrong that the courts, applying a civil standard of proof, should in effect convict a subject without the prescribed trial."

[33] The Applicants argue that they are not seeking an injunction and that injunction principles in the cases relied upon by the City are not applicable. The City replies, relying on ***Finlay,*** at para. 37, that the law is the same as to injunctions and declarations. I agree with the City, although it is more accurate to say so in the context of standing. In ***Finlay,*** the Court noted (at para. 37):

> The general rule respecting standing to seek a declaration or an injunction, to which I have referred above, has generally been regarded as essentially the same for the two forms of relief. Cf. ***Cromwell***, op. cit., pp. 157-58. I can see no sound reason why the exceptional recognition of public interest standing, as a matter of judicial discretion, which is being affirmed in these reasons should not apply to injunctive as well as declaratory relief.

[34] As alluded to, however, the Court did draw a distinction between the issues of standing and the issue of the availability of the particular relief, noting (also at para 37):

> It is essential to distinguish, I think, between standing, or the right to seek particular relief, and the entitlement to such relief...Whether a plaintiff should be granted either declaratory relief or injunctive relief in a particular case is a matter of judicial discretion to be exercised according to criteria and considerations which are somewhat different for the two forms of relief. In the exercise of that discretion in the present case consideration would have to be given to the role of injunction as a public law remedy, including the question whether it will lie against Ministers of the Crown.

[35] Other cases are of interest to the subject; I rely on the brief of the City summarized below.

[36] In ***Manitoba Naturalists Society Inc. v. Ducks Unlimited Canada*** (1991), 79 Man. R. (2d) 15, 86 D.L.R. (4th) 709 (QB - Morse J.), the applicant sought a declaration that the defendant was in contravention of a provision of the *Migratory Birds Convention Act*, R.S.C. 1985, c. M-7, which created an offence and carried a penalty pursuant to that Act. In addition, the applicant sought an injunction prohibiting further construction of the building alleged to be in contravention. Morse J. of the Manitoba Court of Queen's Bench struck out the application for reasons of standing as well as abuse of process. At the fifth last paragraph, he held that courts are reluctant to grant injunctive relief where a statute creates an offence and provides a penalty for two reasons: (1) the penalty for civil contempt may be higher than the maximum penalty set out by the legislature; and (2) the civil standard of proof is applied to offences and protections such as the right to silence are denied.

[37] In ***Rabbitt v. Craigmont Mines Ltd.*** (1963), 42 W.W.R. 157 (B.C.S.C. - Brown J.), the applicant sought a declaration that the respondent was in contravention of a provision of the *Metalliferous Mines Regulation Act*, RSBC, 1960, ch. 242, which created an offence and carried a penalty pursuant to that Act. The originating notice was struck (para. 12) as "an interpretation and a

declaration by a civil court are not appropriate when penal consequences may be involved. and when the Act provides a mechanism for enforcement".

[38] In ***Ed DeWolfe Trucking Ltd. et al. v. Shore Disposal Ltd.*** (1976), 16 N.S.R.(2d) 538 (NSSCAD), the applicant sought a declaratory judgment that the respondent was acting contrary to certain provisions of the *Motor Carrier Act*, R.S.N.S. 1967, c. 190, s. 6, which created offences and carried penalties pursuant to that Act. The majority of the Nova Scotia Court of Appeal held (at para. 19) that a court should not grant a declaration to enforce a penal offence as the court "should not usually interfere by declaration where the matter in issue is placed within the exclusive jurisdiction of another tribunal". The Court went on to hold (at para. 24):

> ...that...**where the plaintiffs are virtually private prosecutors [the Court] should not grant a declaration that the defendant has committed an offence**. Such a declaration is gratuitous and almost impertinent advice to the summary conviction court... and may also be **in effect an injunction** disregard of which may visit upon the defendant penalties harsher far then the legislature ordained.
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> (Emphasis added)

[39] Also in ***Ed DeWolfe***, the Court noted, at para. 25, "[b]asic freedoms may be grossly infringed by a person thus being convicted in civil proceedings without the protection of the criminal laws of burden of proof and evidence, including the ban against self-incrimination".

[40] In ***Mid West Television Ltd. v S.E.D. Systems Inc. et al.*** (1981), 9 Sask.R. 199, [1981] 3 W.W.R. 560 (Q.B.- Noble, J.), the applicant sought an injunction on the basis that the respondent was acting contrary to provisions of both the *Broadcasting Act*, R.S.C. 1970, c. B-11, and the *Radio Act*, R.S.C. 1970, c. R-1, which created offences and carried penalties pursuant to those Acts. Noble J. dismissed the application on the grounds that irreparable harm was not established, and noted at para. 18:

> ... the remedy is to institute or to ask the proper authorities to institute criminal proceedings against one or more of the defendants. I agree with the defendants that this court should not use injunctive relief in aid of, or as a substitute for, the criminal law particularly when, as many of the cases suggest, there is no right of property being infringed.

[41] In ***Assn. of Manitoba Land Surveyors v. Manitoba Telephone System*** (1993), 84 Man.R. (2d) 213, 100 D.L.R. (4th) 420 (Q.B. - Kroft J.), the applicant sought a declaration that certain individuals were in contravention of provisions of the *Land Surveyors Act*. R.S.M. 1987, c. L60, which created an offence and carried penalties pursuant to that Act. Kroft J. was clear that the applicants could not obtain the injunction for the offence alleged, stating (at 425):

> The capacity of a private individual or entity to enforce public or criminal law through a civil action and to obtain a private remedy has been addressed repeatedly in motions, trials and appeals in England and across Canada for more than a century...These judgments arose from a

> variety of circumstances. The decisions are, though, notable for their consistency. For the most part they support the defendants' submissions.

[42] Based on these authorities, I agree with the City when it argues that the Applicants' declaration seeks a statement of the Court that the City is acting contrary to section 2 of the Act, which creates an offence and imposes penalties. A declaration is not appropriate, as the Applicants are attempting to act as private prosecutors, which is an abuse of the criminal process of the courts.

[43] Additionally, the standard of proof to which the Crown is held in a criminal prosecution is proof beyond a reasonable doubt, whereas in a civil remedy, such as the declaration sought, only proof on a balance of probabilities is required. It is wrong for the courts to "convict" without the prescribed trial, and it is an abuse of the Court's process to, in effect, try the City on a greatly lowered standard of proof. There are decisions that reach a contrary conclusion on this point, but they are distinguishable. In ***Parkland (County) v. Barakat Industries Ltd.***, 2004 ABQB 822, 370 A.R. 1 (Park J.) there was a specific provision in the subject legislation which specifically allowed for such relief; and in ***Canada (Canadian Radio-Television Commission v. Teleprompter Cable Communications Corp***. [1972] F.C.J. 1265 (C.A.) and ***Acadian Cable TV Ltd. v. Canadian Radio-Television and Telecommunications Commission*****,** [1972] F.C.J. No. 112 (T.D. - Kerr J.), the declaration was not in face of an allegation of unlawfulness, but rather, a declaration of compliance.

[44] Further, seeking a declaration deprives the City of the right to disclosure outlined in ***R. v. Stinchcombe***, [1991] 3 S.C.R. 326, where Sopinka J. said (at para. 12): "the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution".

[45] If charged with an offence, rather than defending the declaration, the City *may* also be entitled to the protections set out in section 11 of the *Charter of Rights and Freedoms* in *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, it being an abuse of process to proceed in a manner that denies the other party its constitutional rights.

[46] In the result, I find, to use the words of the Applicants' own brief (para. 70), that their application for a declaration is "a colourable attempt ... to enforce the criminal law privately". Accordingly, I agree with the City that the declaration is an abuse of the Court's process, and therefore, it is struck pursuant to Rule 129(1)(d) of the *Alberta Rules of Court*.

C. Originating Notice of Motion Not the Right Procedure

[47] In the alternative, had I found that the action should not be struck as an abuse of the Court's process, I would have held that the action was not properly commenced by an originating notice, but rather that it should have been commenced by way of statement of claim. There are a number of reasons for this conclusion.

[48] The Applicants's Originating Notice does not comply with the *Alberta Rules of Court*: the presumption is a Statement of Claim - Rule 6(1); there is no provision in the Act to commence a proceeding such as this by originating notice; and the declaration does not meet any of the criterial in Rule 410.

[49] Of particular issue, I find that Rule 410(e) is not available to the Applicants because, even before the issue of judicial discretion arises, at least some, if not all, of the "technical requirements" of the rule are not met. See paras. 38 - 39 of ***Thomlinson v. Alberta (Child Services),*** 2003 ABQB 308**,** 335 A.R. 85 (Brooker J.), although the Court there continued the matter as a statement of claim under Rule 560 (discussed below) rather than striking it out. These requirements include the following:

a. Facts in issue: Unlike cases of interpretation of a statute or agreement, and other cases where it is clear there are no facts in issue, I find that here, clearly, there will be facts in issue should the matter proceed. For example, the Applicants filed expert evidence that relied on evidence by the City's expert. The Respondent has demonstrated that *viva voce* evidence will be required, unlike ***Edmonton Telephones Corp. v. Stephenson*** (1994), 24 Alta. L.R. (3d) 96, 160 A.R. 352 (Q.B. - Ritter J.) (aff'd 162 A.R. 139(CA)) (at paras. 34-35).

b. Discovery would assist the fact finding process;

c. Evidence admitted at trial would likely affect the outcome;

d. There is no written instrument or legislation to be interpreted; and

e. The presence of a "proper contradictor", with a true interest, who opposes the declaration.

[50] Rule 129 may be available to strike an originating notice that does not conform with Rule 410: ***Thomlinson*** at paras. 36 - 38. However, as Brooker J. in ***Thomlinson*** noted, although an originating notice could be struck under Rule 129 for not complying with the technical requirements of Rule 410(e), the curative provisions of Rule 560 were applicable (at paras. 73-75):

> As above, the scope of Rule 410(e) does not provide for the relief sought beyond the declaratory relief. Further, the Originating Notice does not comply with the technical requirements or even those requirements expressly set out in Rule 410(e) itself. That being the case, this Court is unable to grant the relief sought in the Originating Notice and it could therefore be struck under Rule 129.
>
> ...
>
> [Rule 560] is a curative Rule that provides the court with the discretion to continue a matter as an alternative to having it struck. In the present case, as I have found that the Originating Notice may be struck under Rule 129, I could stop here. However, if the court possesses the

> jurisdiction to allow the relief requested under some other provision or principle, the matter should in my view, be continued as a statement of claim as was done, for example, in ***Mannville Canada Inc. v. Montreal Trust Co. of Canada*** (1993), 142 A.R. 37 (Q.B.-Wachowich A.C.J.); and ***Energy Probe v. Canada (A.G.)*** (1989), 35 C.P.C. (2d) 201 (Ont.C.A.), leave to appeal to S.C.C. refused (1989), 102 N.R. 399 n. (S.C.C.)

[51] In a similar decision, Topolniski J. in ***Alliance Pipeline Ltd. v. Seibert***, 2003 ABQB 872, 342 A.R. 343, concluded that the Originating Notice was appropriate, but even if it was not, it could be cured by Rule 560.

[52] There are a number of cases where originating notices under Rule 410(e) were struck, but in my view, there were good reasons why those applications could not be converted to a statement of claim under R. 560, unlike the claims in ***Thomlinson*** and ***Alliance*** (see below). In ***Alberta Union of Provincial Employees v. Alberta***, 2001 ABCA 309, the appeal was dismissed both because the application was out of time and because it did not meet the requirements of 410(e) because it was advisory and theoretical. In ***Governors of the University of Alberta v. Nowrouzian*****,** 2005 ABQB 454, 381 A.R. 156 (Belzil J.), although some of the rationale for dismissing the application arose from the fact that there were facts in dispute and therefore under Rule 560 might have been converted to a statement of claim, the primary ground was that the court had no jurisdiction since the agreement in question arose in the course of employment and the Applicant's employment was governed by the collective agreement.

[53] Rule 560 provides that "an action improperly begun by... originating notice... may be treated as an irregularity and the action may be continued upon such terms as the court may impose." See also ***834658 Alberta Ltd. (c.o.b. Mira Timber Frame) v. 763319 Alberta Ltd. (c.o.b. Ironwood Contracting Ltd.)***, 2008 ABCA 371, 440 A.R. 290; ***G.A.E. v. Alberta (Director for Child Youth and Family Enhancement)***, 2008 ABCA 199, 167 A.C.W.S. (3d) 916; ***McConnell v. Aviva Insurance Co. of Canada Ltd.***, 2006 ABQB 80, 393 A.R. 180 (Ross J.)(at paras. 11 and 12); and ***Calgary Roman Catholic Separate School District No. 1 v. O'Malley***, 2007 ABQB 574, 426 A.R. 275 (P.M. Clark J.) (at para. 61).

[54] See also Rule 561: "No pleading or other proceedings shall be defeated on the ground of an alleged defect of form." In light of these rules, I find that a Rule 129 application would not be successful here solely on the grounds that the action was begun using the wrong procedure, as the Rule 410(e) application by originating notice could be converted to a statement of claim. However, what ever the process, the bottom line remains that such a proceeding must continue, if allowed, by statement of claim, not originating notice.

[55] I also note in passing, unnecessary for my decision, that, even where the Originating Notice meets the requirements of Rule 410, the Court's discretion may be invoked to declare a originating notice is not the appropriate manner in which to proceed, where a Statement of Claim would permit

preparation of a defence: ***Bumpers Inn Ltd. v. Husky Oil Operations Ltd.,*** 2007 ABQB 724, 162 A.C.W.S. (3d) 896 (Hawco J.) at paras. 21 and 29.

VI. Conclusion

[56] Even without determining standing of the Applicants in detail, I find that the declaration sought by the Applicants is an abuse of the process of this Court. The Originating Notice is struck pursuant to Rule 129(1)(d) of the *Alberta Rules of Court*. Alternatively, if I had found that the action should not have been struck under Rule 129, the Originating Notice does not comply with the requirements of the *Alberta Rules of Court,* and, absent a request for relief under Rule 560, should also be struck out for that reason.

[57] The City is entitled to its costs as may be agreed or taxed.

Heard on the 4th day of May, 2010.
Dated at the City of Edmonton, Alberta this 20th day of August, 2010.

John D. Rooke
A.C.J.C.Q.B.A.

Appearances:

Steven Phipps and S. McAnsh - The City of Edmonton
for the Applicant (Respondent)

Clayton Ruby and Y. Cheng - Ruby & Shiller
for the Respondents (Applicants)

Corrigendum of the Reasons for Decision
of
The Associate Chief Justice
John D. Rooke

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1. Rule 129(a) in Paragraph No. 8 was corrected to read Rule 129(1)(a):

> [8] In light of my first finding, I further find that I do not need to address the issue of standing in any detail, or the resulting issues under Rule 129(1)(a), although there are some interrelationships with other issues. As the City notes, the question of abuse of process has often been characterized as a standing issue (see for example: ***Greenpeace Canada v. MacMillan Bloedel Ltd.,*** [1994] 10 W.W.R. 705, 93 C.C.C. (3d) 289, 96 B.C.L.R. (2d) 201 (BCCA), aff'd [1996] 2 S.C.R. 1048.

Corrigendum of the Reasons for Decision
of
The Associate Chief Justice
John D. Rooke

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1. Rule 401 in Paragraph No. 3 was changed to 410 and Paragraph No. 3 now reads as follows:

   [3] The City, relying on Rules 6, 129(1)(a) and (d), and 410 of the *Alberta Rules of Court*, Alta. Reg. 390/1968, seeks to strike the Originating Notice.

2. Counsel for the Plaintiff, S. McAnsh's name was misspelt and it has now been corrected.