THE APPOINTMENT AND POWERS OF A BYLAW ENFORCEMENT OFFICER

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I. APPOINTMENT OF BYLAW ENFORCEMENT OFFICERS

On more than one occasion we've been asked about the validity of a specific individual's appointment as a bylaw enforcement officer. The individual may advise that they were given an employment letter, uniform, vehicle and a list of bylaws that they were expected to enforce and now ask if that is enough. We simplify of course, but you get the idea.

The position of bylaw enforcement officer must be established formally, in one of two ways. The first, rarely used, is by way of Section 36 of the *Police Act*, RSBC 1996, Chapter 367. In that case the officer is appointed by the municipal police board or, if no such entity exists, by the municipal council. If appointed in this manner the officer is accountable to the chief constable or the officer in charge of the local detachment, not the local government council or regional district board. Their duties are specified in the appointment and they swear an oath as provided for in the Solemn Oath Affirmation Regulation under the *Police Act*.

The more common practice is to establish the position itself under the local government or regional district's enabling legislation, now section 146 of the *Community Charter*, SBC 2003, Chapter 26 and 196 of the *Local Government Act*, RSBC 1996, Chapter 323 respectively, which authorize the establishment of officer positions and the assignment of "powers, duties and functions" to those positions.

That legislation may be quite comprehensive, including the establishment of all officer positions for the local government, or, more commonly, it may be specific to the position of bylaw enforcement officer itself.

These positions must be established by a bylaw, so the creation of the position itself cannot be delegated. The appointment of the individual officer to the position can be delegated and is much less formal. An employment letter is sufficient.

Mention should also be made of the separate authority under Section 264 to designate bylaw officers for the purposes of issuing municipal ticket informations.

II. POWERS OF BYLAW ENFORCEMENT OFFICERS

A. Are bylaw enforcement officers "peace officers"?

It is now well established that properly appointed bylaw enforcement officers acting in the course of their duties are peace officers as that term is defined in section 2 of the *Criminal Code of Canada*. The issue was considered in *R. v. Jones,* [1] a 1975 decision of the Yukon Territory

[1] [1975] 5 W.W.R.97.

Magistrates court.[2] In *Jones*, the City of Whitehorse sought to charge two men under what was then paragraph. 118(a) of the Criminal Code for obstruction of a peace officer engaged in the execution of his duty. The men had removed their two malamute dogs from the animal control officer's truck after he had impounded the dogs when they were found at large in a trailer park contrary to the City's dog bylaw.

After finding that the dogs were lawfully impounded and that the animal control officer was acting in the course of his duties, the court considered whether the animal control officer was a peace officer. The only possible category of those set out in the paragraph 118(a) of the Code that could apply was "*other person employed for the preservation and maintenance of the public peace*". Referring to a 1923 decision of the Saskatchewan Court of Appeal where the question arose in the context of an officer appointed under the *Temperance Act* of that province, the court noted that the term "public peace" extended beyond specific crimes to "*an all embracing atmosphere*". In other words, the term "public peace" received a wide and liberal interpretation[3].

The court also noted that although the animal control officer was employed to enforce legislation within provincial competence the Criminal Code was still applicable.[4]

The court also found that it was immaterial that the animal control officer was not a bylaw enforcement officer. The court concluded that the animal control officer was a peace officer and the two men were convicted.

In *obiter* the court noted that the City's dog bylaw provided that "*no person shall hinder, or molest the animal control officer in the performance of any duty*" and commented that there was some doubt that the provision was one that the City had power to enact, the federal government having "occupied the field". This comment would put in question similar provisions in local government or regional district bylaws, and possibly Section 153 of the *Community Charter*. Constitutional law has evolved however, and these sections are most likely enforceable.

B. Do bylaw enforcement officers have the power to arrest and detain offenders?

Many of us will be familiar with the unreported decision in *R. v. Turko*. In that case an altercation took place between four bylaw enforcement officers from the Capital Regional District and a patron of Big Bad John's in Victoria's Strathcona Hotel. The officers were attempting to issue a ticket under the Capital Regional District's Clean Air Bylaw to the patron who was found smoking in the establishment. The altercation developed when the individual

[2] See also *Regina v. Moore* (1983), 5 W.W.R. 176 (Man. C.C.)
[3] *Rex v. Magee*, 17 Sask. L.R. 501, [1923] 3 W.W.R. 55, 40 C.C.C. 10. The court found that the act was *ultra vires* as it was criminal legislation, and thus was invalid.
[4] *Regina v. Beaman*, 48 M.P.R. 239, [1963] 2 C.C.C. 97 where, in the course of deciding that the powers of a provincial game warden did not include the powers of arrest, concluded that willfully obstructing a game warden in the execution of his duties under the *Game Act* of New Brunswick was committing the indictable offence of willfully obstructing a peace officer.

refused to provide identification and, when detained for that purpose, assaulted one of the bylaw enforcement officers.

It was conceded by the accused that if the officers were acting in the course of their duties they had the power to detain, but he argued that the two detentions that had taken place, the first before the assault while trying to obtain identification and the second after the assault, were arbitrary and contrary to Section 9 of the Charter of Rights and Freedoms. The court found, after considering *Moore* and *Regina v. Rutt*[5] that the bylaw enforcement officers were peace officers acting in the course of their duties and that the officers had the authority to detain the accused for the purposes of obtaining identification and to arrest the accused for an offence under the Criminal Code. The court concluded that the detentions were not arbitrary and the accused was found guilty of both obstruction and assault.[6]

C. Do bylaw enforcement officers have the ability to use reasonable force when affecting an arrest?

In the unreported decision of *Woodward v. Capital Regional District*, the Honourable Judge J.M. Hubbard considered whether measures taken during the arrest of the owner of a vicious dog who had assaulted bylaw enforcement officers during an attempt to serve a ticket were "grossly excessive" as alleged in the Claimant's Small Claims Court action.

Judge Hubbard referred to Section 525 of the Criminal Code, which provides that a peace officer acting in the course of his duties, if he acts on reasonable grounds, is "justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose".

The court found that the evidence of the Claimant with respect to the force used by the bylaw enforcement officers was inconsistent with the injuries sustained and the allegations were exaggerated. Judge Hubbard found that the bylaw enforcement officers were justified in using the force they did and the claim was dismissed.

D. Do bylaw enforcement officers have the power to demand identification?

Turko tells us that a Bylaw Enforcement Officer, acting in the course of his or her duties has the power to demand identification. This is an important issue because, should a matter go to trial, it will be necessary to prove the identity of the accused before a conviction can be obtained. A matter can take many months and possibly over a year to go to trial, making visual identification in court difficult, impossible or potentially unreliable.

[5] (1981), 59 C.C.C. 93d) 250.

[6] See *R. v. Mulder*, where the defendant was accused of assaulting a transit officer who, while checking identification, mistakenly concluded that he was the subject of two arrest warrants and attempted to detain the man. The defendant was acquitted when the court determined that the detention was unrelated to the officer's statutory functions and was therefore unlawful.

Leaving aside the argument that the accused, having appeared before the court, had attorned to the court's jurisdiction, the safest method of establishing identity is by way of photo identification such as a passport or driver's licence.[7]

E. What powers do bylaw enforcement officers have to enter and inspect property?

Bylaw enforcement officers have the authority to enter into and inspect private property. This authority is now found in section 16 of the *Community Charter* which applies to regional districts by virtue of section 314.1 of the *Local Government Act*. For regional districts reference must also be made to section 268 of the *Local Government Act.* Section 16 of the *Community Charter*, with which most of us are now familiar, comprehensively codifies the powers of municipalities to enter and inspect private property.

Since the right to enter and inspect is now set out in the *Community Charter*, no provision is required in a bylaw. Section 16 automatically covers employees and officers, but others, such as contractors, require council authorization. Inspections without consent are permitted, but entry into a private dwelling requires consent or 24 hours notice in writing.

Unless there is an emergency, entry must be at reasonable times and in a reasonable manner, and reasonable steps must be taken to notify the person who owns or occupies the property prior to entry.

Section 268 of the *Local Government Act* still plays a key role in authorizing regional districts to conduct bylaw investigations and it is important to note the limitations that are involved: Unlike municipalities, the power to enter must be delegated in a bylaw and the person intending to enter must be specifically appointed to do so.

The authority to enter is important because entry onto private property without authority would constitute a trespass.

Section 8 of the Canadian Charter of Rights and Freedoms provides that "*everyone has the right to be secure against unreasonable search or seizure*". In *R. v. Bichel*,[8] it was argued that a search under former Section 310 of the *Local Government Act*, now Section 16 of the *Community Charter*, constituted an "unreasonable search" contrary to Section 8 of the Charter of Rights and Freedoms if no warrant is obtained prior to the search. In that case, a property owner in the District of North Vancouver was charged under the zoning bylaw with the offence of preventing or obstructing entry by a building inspector. At trial, the owner was acquitted, but the Court of Appeal reversed the decision and imposed a conviction.

The Court of Appeal held that no warrant was required for administrative searches such as those carried out under what is now section 16 because there is no stigma attached to such a search and the subject matter is not serious enough to require that a judge authorize the search. However,

[7] *R. v. Schryvers*, [1963] 2 C.C.C. 286.
[8] 1986), 4 B.C.L.R. (2d) 132 (C.A.*).*

the court stated that a householder who is subjected to a search is entitled to demand identification from the inspector; require that the inspector give a valid reason for the inspection; and refuse entry if the time of the inspection is inconvenient, as the search may only take place during "reasonable hours".

Bichel has been followed in *Jackson v. Penticton (City)*,[9] *R. v. Kostecki*[10] and, most recently, *Arkinstall v. City of Surrey*.[11]

Most of us are aware of what transpired in *Arkinstall*. The decision has been appealed and the appeal is to be heard by the Court of Appeal soon. In the appeal, Mr. Arkinstall seeks to overturn *Bichel* and argue that the Charter of Rights and Freedoms applies to entry powers to enforce municipal regulations.

As it now stands, entry and inspection, even into a private dwelling, may be conducted without a warrant, provided the requirements set out in *Bichel* and section 16 are met. Applying Section 525 of the Criminal Code and the *Woodward* decision, the bylaw enforcement officer may use reasonable force to carry out the inspection. The more prudent approach, however, is to obtain an entry warrant pursuant to section 275 of the *Community Charter* (and section 847 of the *Local Government Act*). Similar to search warrants, but intended for regulatory (non-criminal) municipal inspections, entry warrants can be obtained without the assistance of counsel.

[9] 2004 BCSC 711
[10] 2008 BCSC 551
[11] 2008 BCSC 1419