DANGEROUS DOGS

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DANGEROUS DOGS

I. INTRODUCTION

It has been the writer's experience that there has been a marked increase in the number of dog related incidents over the past few years. As with most municipal bylaw enforcement, much of this can be attributed to higher density in urban areas where proximity between neighbours leads inevitably to more contact, and more conflict. But the number of incidents involving aggressive dogs can also be attributed to an increasing dog population, the popularity of the so called "bully" breeds of dogs and irresponsible owners who are disinterested in or incapable of controlling the animals they own.

II. POWERS OF THE ANIMAL CONTROL OFFICER UNDER THE *COMMUNITY CHARTER*

Section 49 of the *Community Charter* authorizes an animal control officer ("ACO") to seize and make application to destroy a dangerous dog, as defined

A dangerous dog is:

(a) A dog that has killed or seriously injured a person;

(b) A dog that has killed or seriously injured a domestic animal, while in a public place or while on private property, other than property owned or occupied by the person responsible for the dog or

(c) A dog that an animal control officer has reasonable grounds to believe is likely to kill or seriously injure a person

While it seems at first blush that a local government council or regional district board[1] must specifically appoint an ACO to carry out the authority set out in the section, subsection 49(1) also designates peace officers as ACOs. As we know, a Bylaw Enforcement Officer ("BLEO") is a peace officer as long as the BLEO is acting in the course of his or her duties.[2] If a BLEO is already empowered to enforce the animal control bylaw, logically his duties should include the powers provided by Section 49. To be on the safe side, however, a specific appointment should be made.

[1] In this paper the tern 'local government" means both municipalities and regional districts
[2] *R v. Jones* [1975] 5 W.W.R. 7

III. SEIZURE

After an incident involving a dangerous dog, the ACO must determine whether it is prudent to seize the dog. In a number of cases the owner, aware of the potential for an application to have the dog destroyed, has removed the dog from the municipality. In some situations the seizure is carried out as soon as possible because of the potential for further incidents, and so seizure is in the interest of public safety.

Most seizures are done under the authority of a warrant issued pursuant to subsection 49(5) of the *Charter*. Seizure with a warrant is rarely controversial because it is judicially authorized. The procedure to obtain a warrant is relatively straightforward and similar to obtaining a search warrant under the *Offence Act* or an entry warrant under Section 275 of the *Community Charter*. Notice to the owner of the dog is not required and, in fact, would be counterproductive for obvious reasons.

For local governments in the lower mainland, applications are usually made at the Justice Centre in Burnaby. The application is made by information, sworn before a JJP at the Justice Centre. The information must set out the location where the dog is to be seized, evidence with respect to ownership and the events which establish the informant's reasonable grounds to believe that the dog in question is a dangerous dog as defined. The informant is usually, but not necessarily, the ACO. An example of such an information is attached as Schedule "A" to this paper.[3]

Local governments outside of the lower mainland have two choices. They may make the application at their local registry. If the registry is familiar with the process this should run smoothly, but if the registry has never entertained such an application there could be difficulties. The ACO should contact the registry beforehand to determine when a JJP is sitting.[4] It may be wise to schedule an appointment.

The second option for local governments outside of the lower mainland is to make the application at the Justice Centre, using an informant in the lower mainland.[5] As noted above, the informant need not be the ACO. Hearsay evidence is admissible on such an application. As long as the informant can establish that there are reasonable grounds to believe that the dog is a dangerous dog the warrant should issue.

The information should not only ask for authority to enter a premises to seize the dog, it should also ask that police be allowed to accompany the ACO to ensure the ACO's safety. This should

[3] Templates for the documents referred to in this paper are available from Young Anderson.

[4] A warrant can also be issued by a provincial court judge.

[5] Subsection 49(6) provides authority to obtain a telewarrant, but is contingent on the passage of regulations "respecting the authority and procedure for warrants" under subsection 49(7). No regulations have been made.

also be reflected in the warrant which is signed by the JJP. An example of such a warrant is set out as Schedule "B" to this paper.

While we have said that the procedure to obtain a warrant is relatively straightforward, success cannot be guaranteed, especially where the application is made in a registry where the process is not common. An application may be refused on one or more attempts. The information and warrant may have to be revised. Patience and persistence may be required.

In certain circumstances a dog may be seized without a warrant. Subsection 49(8) authorizes an ACO to "*enter and search any place, except a place that is occupied as a private dwelling, and seize a dog, if the officer believes on reasonable grounds*" that the dog is a dangerous dog, the dog presents an imminent danger to the public, and the purpose of seizing the dog cannot reasonably be accomplished if the officer is required to obtain a warrant.

Recently a pit bull terrier was seized by an RCMP officer in White Rock immediately following an attack on a small poodle cross dog.[6] The poodle cross dog was killed in the incident. The pit bull was at large in a public place. Clearly the pit bull terrier was a dangerous dog, but less clear is whether the dog, which appeared to be people friendly, presented an imminent danger to the public or whether the purpose of seizing the dog could not have been reasonably accomplished if the ACO was required to obtain a warrant. It is almost always advisable to obtain a warrant.

IV. THE DESTRUCTION APPLICATION

The destruction application must be brought within 21 days of the date that the dog was seized. There is no prescribed form for the application nor are there any procedural directions for the application itself. An example of one version of such an application is attached as Schedule C to this paper. It has been assumed that oral evidence is used at the hearing, although there is no reason to believe that affidavit evidence would not be admissible. The ACO presents evidence first and then the owner of the dog replies

In leading evidence the ACO must be aware of what has to be established. The first two categories of dangerous dog are fairly clear. The ACO is required to prove that the dog has killed or seriously injured a person or domestic animal. Some interpretation is required when determining whether an injury is serious or not serious. Judicial decisions have found that, both with humans and animals, the threshold is actually very low[7]. The injury need not be life threatening.

While a judicial determination with respect to the first two categories of dangerous dogs may be made objectively with evidence from the injured person or the owner of the injured dog, with the

[6] *The Animal Control Officer for the City of White Rock*, Court File No. 185291-1, Surrey Registry (decision pending)
[7] R. v. Whittle, 2005 BCPC 0215; Corporation of the City of New Westminster v. Ash, 2006 BCPC 0635.

assistance of medical or veterinarian records, the third category, based on the ACO's belief that the dog is likely to kill or seriously injure a person, is more subjective. All that must be established, however, is reasonable grounds for that belief.

It has been argued that the third definition of dangerous dog should receive a wide and liberal interpretation because section 49 is clearly public safety legislation.[8] Therefore, while it has been said that the determination of this question can include consideration of the owner's care of and ability to control the dog, it has also been argued that the words "if given the opportunity" should be written into the provision to give it full effect.[9]

Just what constitutes "reasonable grounds to believe"? In cases where aggressive dog behaviour has not led to serious injury or death, but the ACO believes that the threat is there, there are a number of factors to consider. As Associate Chief Judge Burdett noted in *R. v. Kucera*:

> *The applicant must prove therefore, on the balance of probabilities that the animal control officer, Kimberly Lord, has reasonable and probable grounds to believe that the dog Marchal is likely to kill or seriously injure a person. It is a prospective test. In my view, it should also involve a consideration of the dog's past behaviour, current state, and an examination of the owner's care of the dog and ability to control it."*[10]

Note as well that the standard of proof is the civil standard, not the criminal standard. This standard was based on a comparison with s. 810 of the Criminal Code as stated by Mr. Justice Carrothers of the B.C. Court of Appeal in *R. v. Dempster* in reference to section 8 of *the Livestock Protection Act*:

> *By analogy, the Crown submits that s. 8(1) is in many ways similar to s. 810 of the Criminal Code which provides that a person who has reasonable grounds for fearing that another person will cause personal injury to him or her or to a close relative or property may lay an Information before a justice. If the justice then finds at a hearing that there are reasonable grounds for such fear, the justice may place the defendant on a peace bond. Again, as here, this is not a criminal conviction and sentence but a sanction in the form of forfeiture of the dog. Like s. 8(1) of the Act, s. 810 of the Criminal Code does not involve the laying of a criminal charge but rather involves proceedings to prevent future harm (Regina v*

[8] *Ash* (supra); Section 8, *Interpretation Act*, RSBC 1996, c. 238.
[9] The City of Prince George v. MacLeod, 2004 BCPC 0008
[10] 2001 BCPC 0360.

> *Allen (1985), 18 C.C.C. (3d) 155, Ont. C.A.). The Crown also submits that the rule limiting the admissibility of similar fact evidence in criminal trials has no application to a hearing under s.810 of the Criminal Code. Under s.8(1) of the Act, the Court is called upon to consider not only whether a dog has in the past killed or injured but also, and more importantly, whether the dog is likely to do so in the future. The terms of s.8(1) of the Act are disjunctive and the Court can make an order if it is satisfied, on a balance of probabilities, rather than beyond reasonable doubt either that a dog has killed or injured or that the dog is likely to kill or injure. I concur with these submissions of the Crown."*[11]

A word should be said about identification. Just as it is necessary to identify the accused in a bylaw prosecution, it will be necessary to identify the dog which is the subject of a destruction application. Since the dog will not be in the courtroom, this is done by presenting photographs to the victims of the attack during the examination in chief. As part of preparation, the victims should be presented with the photographs during the initial interviews to determine whether identification can be made

V. ASSESSMENTS AND EXPERT EVIDENCE

In cases where the animal in question has not killed or seriously injured, it is common practice to obtain an assessment of the dog. The assessment can then be used in expert testimony. Expert testimony is of great use to the court, but only if the expert is clearly objective in his testimony. An expert is not an advocate for either side. Consider, for example, the comments of the Honourable Judge Brooks in *West Vancouver and Mohammed*[12] referring to the testimony of Gary Gibson of Custom Canine, many times qualified as an expert in proceedings involving dangerous dogs:

> *... the most significant evidence is the evidence of Mr. Gibson, and here is why I thought Mr. Gibson's evidence was so important Mr. Gibson is a person who has worked with dogs for nearly a quarter of a century He is a person who anybody would agree knows dogs, understands dogs. You can see that by his manner when he testified.*
>
> *When he testified he did not have an axe to grind. He did not say all dogs are bad dogs He did not say all pit bulls are bad dogs*

[11] (1995) B.C.J. 2264 In Kucera similar fact evidence with respect to the owner's past conduct with another dog was taken into account in making the decision to order destruction of the animal

[12] November 9th, 2009, File No. 53207-1, North Vancouver Registry, Provincial Court of British Columbia

> *He did not do or say any of those things that suggested that he came into this court with any kinds if bias against anybody or any dog, and in fact he took an approach to dogs, and to understanding dogs, that is very important one and a very open-minded one.*

Experts first have to be qualified before the evidence can be taken as expert testimony. This can be a somewhat tedious process if the other side contests the qualifications of the proposed expert. Even when the expert is qualified, the evidence will be of little use if it is apparent that the testimony is tinged with bias

VI. CONDITIONAL ORDERS

Subsection 49(10) provides that:

> *In addition to any other authority, if an animal control officer has reasonable grounds to believe that a dog is a dangerous dog, the officer may apply to the Provincial Court for an order that the dog be destroyed in the manner specified in the order*

It is now established law that, where it is appropriate, and based on expert testimony with respect to a proposed alternative, conditional orders can be made to spare a dangerous dog from destruction. In *Capital Regional District v Kuo*[13] the Supreme Court addressed a long standing controversy over the authority of a Provincial Court judge to make such an order as an alternative to destruction. In that case the Provincial Court judge ordered the destruction of the dog owned by the Respondent, but stayed the order to permit the dog to be adopted by a new owner in another municipality for a trial period. The order was based on the evidence of a veterinarian that the new owner had the ability to control the animal in question. Such conditional orders have also been made in the *Whittle* and *Nagra* [14] decisions.

In his decision, Mr. Justice Johnson said:

> *Section 49 is silent as to the orders that a judge might grant on a finding that an animal control officer believed a dog to be dangerous, and that belief was reasonably based. The silence might be taken to mean the judge has a wide discretion to fashion an order that met the evidence led, or it might be taken to mean that the judge has no discretion at all, as is argued here.*

[13] 2006 BCSC 1282.

[14] January 22, 2010, File No. 30984-1, Vancouver Registry, Provincial Court of British Columbia

> *Elsewhere in the Community Charter the powers of the court are specified. For example, in s. 111 an application is authorized to this court where the qualifications of a person to hold office is questioned. Subsection 6 sets out three declarations open to this court on such an application. Similarly, s. 129 sets out the order open to this court on an application to determine the quorum of a municipal council in cases where a councillor is disqualified by conflict of interest. This court is specifically granted the power to make its order "...subject to any conditions and directions the court considers appropriate." s. 129 (6). I would have thought it unnecessary to state that this court has the latter power.*
>
> *I read the Community Charter as giving wide discretion to the judge to deal with the facts revealed by the evidence on an application under s. 49(10). I say that because, where the statute elsewhere gives this court jurisdiction to make certain decisions, it sets out with some precision limits within which this court might act. By contrast, s. 49 (10) permits an animal control officer to apply to the Provincial Court for a destruction order, but, as I have said earlier, states no limits on what the Provincial Court judge hearing the matter might order.*

The decision in *Kuo* was appealed by the Capital Regional District, but by that time the dog had been voluntarily destroyed by the new owner. The Court of Appeal dismissed the appeal as being moot.

VII. OTHER OPTIONS

In some circumstances a destruction application may not yet be warranted, but the ACO believes that some action is required to address public safety and motivate compliance with the animal control bylaw's provisions requiring aggressive dogs to be muzzled, contained and controlled. At the lower end of the scale a bylaw offence notice or municipal ticket information may be enough to bring about compliance. Where the situation is more serious, and a prohibition or mandatory order is required, a long from information may be brought, coupled with an application pursuant to Section 263.1 of the *Community Charter*. Section 263.1 gives a Provincial Court judge authority to grant mandatory orders requiring compliance with a municipal bylaw if a conviction is obtained. The orders can last for up to a year. Just such an order was granted in *R. v. Harris*[15] where it was proven that the accused dogs had participated in three attacks, one in Nanaimo and two in Surrey, in which one dog was killed and two dogs and a person received injuries. In addition to imposing $6,500.00 in fines on the accused, the court

[15] August 26th, 2009, No. 168882-1, Surrey Registry

required the accused to comply with the Surrey Dog Responsibility Bylaw with respect to licensing and controlling his dogs.

An animal control bylaw may also be enforced by way of an application to the Supreme Court pursuant to Section 274 of the *Community Charter*. A Supreme Court application may be preferable for a number of reasons:

1. The civil standard applies. The ACO only need establish, on a balance of probabilities, that the bylaw has been breached.

2. The evidence is presented by affidavit. No court attendance is required except by counsel.

3. Precedent establishes that there is very little discretion in the hearings judge to refuse the ACO's request for an order. If the ACO proves a breach, the order should follow.[16]

4. The ACO should be awarded legal costs in a successful application

A word might be said at this point about the interrelationship between Section 49 and the animal control bylaw. Recent versions of animal control bylaws have often contained references to the *Charter* provision, or have used the term "dangerous dog" in one section or more, dealing with licensing, impoundment or requirements such as insurance. Some bylaws have even substituted "dangerous" for the old terms "vicious" or "aggressive". This can lead to confusion, because, while there is some overlap between Section 49 dangerous dogs and aggressive dogs that may be subject to the relevant provisions of an animal control bylaw, the criteria in an animal control bylaw is usually much wider and includes dogs that merely have a tendency or disposition to be aggressive or a dog which has aggressively pursued a person or another domestic animal. It's best to avoid the use of the term "dangerous dog" in an animal control bylaw unless it is clearly in reference to a dog that meets the Section 49 definition and the cross reference is intentional.

VIII. CONCLUSION

Section 49 of the *Community Charter* makes it clear that the provision is intended to be enforced by an ACO. While proceedings in the Supreme Court under section 274 of the *Community Charter*, for example, require attendance by counsel, there is no reason why an experienced ACO cannot take the section 49 process to competition, from seizure to destruction order, without the direct assistance of counsel It has been done at least once, to the writer's

[16] *Langley Township v. Wood* (1999, 2 M.P.L.R. (3d) 35, at Pages 38 and 39; *Osoyoos v. Nelmes* 2009 BCSC 704, 60 M.P.L.R. (4th) 251, [2009] B.C.J. No. 1053, (S.C.), (Cited to QL).

knowledge. The process does require patience, determination, careful planning, attention to detail and a careful study of the relevant caselaw.

NOTES

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