

# Court of King's Bench of Alberta

**Citation: Calgary (City) v Bagaric, 2022 ABKB 635**

**Date:** 20220921  
**Docket:** 2201 07974  
**Registry:** Calgary

Between:

**City of Calgary**

Applicant  
(Cross-Respondents)

- and -

**Denis Bagaric and Tayln Calkins**

Respondents  
(Cross-Applicants)

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**Reasons for Decision  
of the  
Honourable Justice Colin C.J. Feasby**

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## **Introduction**

[1] On June 5, 2022, three dogs attacked and killed an elderly woman in the Capitol Hill neighbourhood in Calgary. The City of Calgary commenced a proceeding by Originating Application seeking to have dogs declared dangerous and humanely euthanized pursuant to the *Dangerous Dogs Act*, RSA 2000, c D-3 (“*DDA*”).

[2] The owners of the dogs, Denis Bagaric and Tayln Calkins (the “Respondents”), seek by way of a cross-application to have the Originating Application struck on the basis that the Court

of King's Bench has no original jurisdiction to hear matters arising under the *DDA*. The Respondents' cross-application was heard at the end of the list during urgent chambers.

### **Procedural Background**

[3] On July 7, 2022, counsel for the City provided counsel for the Respondents a draft letter to Associate Chief Justice Rooke. Counsel for the Respondents provided comments on the letter. The finalized letter was sent to Associate Chief Justice Rooke on July 22, 2022. The letter reads, in part, as follows:

Both the Applicant and Respondents are concerned that scheduling this matter on the regular timeline for a two-day special will result in significant prejudice to all parties. Further, there is a public interest in the matter being heard expeditiously given the June 5, 2022, incident was both tragic and high-profile in the media. Finally, the parties are also concerned that, without an expedited hearing to at least September 2022, the extend[ed] time in the Calgary Animal Services Centre will result in undue harm to the dogs, and considerable costs to the Dog Owners.

[4] This proceeding was commenced by Originating Application on July 13, 2022.

[5] On July 27, 2022, the Civil Coordinator advised the parties that the Court had made time available for the application to be heard on September 27 and 28, 2022. The Civil Coordinator further advised the parties that a Procedural Order must be prepared for ACJ Rooke's signature.

[6] Counsel for the Respondents drafted the Procedural Order to which the City consented. The Procedural Order was signed by ACJ Rooke on August 15, 2022. The relevant filing deadlines in the Procedural Order are:

- (a) September 13, 2022 – Applicants to file all briefs and materials
- (b) September 13, 2022 – Transcripts and undertakings from cross-examinations on affidavits to be filed.
- (c) September 20, 2022 – Respondents to file all briefs and materials.

[7] On September 13, 2022, the City filed eight affidavits, including an expert affidavit which appends three expert reports, and its written brief and authorities.

[8] The same day that the City filed its materials, counsel for the Respondents wrote to counsel for the City to advise that the Court of King's Bench did not have jurisdiction to hear the matter.

### **Attornment**

[9] The City contends that the Respondents have attorned to the jurisdiction of the Court of King's Bench. The Respondents rely on *Obcorp Holdings Inc v Mammoet Canada Western Ltd*, 2019 ABQB 960 where at para 20 Applications Judge Summers wrote, "[t]he underlying rationale for having the legal principle of attornment is 'fairness.' Once a defendant has committed to defending in a jurisdiction, it is not fair that the defendant may change its mind and seek another jurisdiction."

[10] The concept of attornment arises most often in contests between different territorial jurisdictions and between courts and alternative dispute resolution processes such as arbitration.

The parties provided no cases where the concept of attornment was applied in the context of whether a matter was properly in a superior court or a statutory court.

[11] Fairness and judicial economy favour a finding of attornment in the present case if such a conclusion is open to the Court. The Respondents participated in an urgent request to the Court for an expedited hearing. Counsel for the Respondents then drafted and endorsed a consent Procedural Order. The objection to jurisdiction was made concurrently with the City delivering its application materials. The hearing is scheduled to commence next week. The Respondents' jurisdictional objection may require the City to recommence proceedings in the Provincial Court. This is certain to result in delay and perhaps significant delay.

[12] Attornment is not just a question of fairness and judicial economy. The Court of Appeal held in *Transalta Utilities Corporation v Young Estate*, 1997 ABCA 349 at para 43 that "consent or attornment of the parties cannot confer jurisdiction on a court that it does not have." This, of course, must be the law. Otherwise, litigants could bypass the Provincial Court for the Court of King's Bench by agreement and frustrate the purpose of the *Provincial Court Act*, RSA 2000, c P-31 ("PCA"). The Court of Appeal also observed at para 43 that "a defendant is entitled to assert a lack of jurisdiction at any stage in the proceedings." Accordingly, the question that must be determined is whether the Court of King's Bench has jurisdiction to decide matters under the *DDA*.

### **Jurisdiction of the Court of King's Bench**

[13] The City submits that the Court of King's Bench has inherent jurisdiction to hear matters under the *DDA*. The City relies on *R v Caron*, 2011 SCC 5 at paras 24-32. At para 29 Binnie J quoted with approval from I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr Legal Probs* 23 at 23: "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways" [emphasis in original].

[14] Inherent jurisdiction is not a magical cure all that allows the Court of King's Bench to hear any and all matters without regard to statutory limits on the Court's jurisdiction. The Supreme Court of Canada in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 6 considered whether the statutory conferral of jurisdiction on the Federal Court to hear actions against the Crown removed the right of litigants to sue the Crown for damages in provincial superior courts. Binnie J, writing for the Court, held:

[42] What is required, at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: "[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court . . . requires clear and explicit statutory wording to this effect" [emphasis added and citations omitted]....: *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, 1972 CanLII 14 (SCC), [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, at para. 38. The Attorney General's argument rests too heavily on what he sees as the negative implications to be read into s. 18.

[43] The oft-repeated incantation of the common law is that “nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged”: *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88. In contrast, the jurisdiction of the Federal Court is purely statutory [emphasis added].

[15] The rationale in *TeleZone* requires the Court in the present case to review whether the *DDA* provides that the jurisdiction of the Court of King’s Bench is ousted in clear and explicit language.

[16] The *Constitution Act*, 1867 s 96 has been interpreted to limit the power of Parliament and the Provincial legislatures from eroding the jurisdiction of the superior courts: see the majority reasons of Martin and Côté JJ in *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 at para 41ff. No constitutional issue was raised by the parties in the present case and it appears unlikely that statutory allocation of jurisdiction under the *DDA* to Justices of the Peace and the Provincial Court would raise any constitutional issues.

### **The Dangerous Dogs Act**

[17] The current iteration of the *DDA* is almost unchanged from the first version enacted in 1926. The *DDA* consists of three brief sections:

#### Complaint as to bite

1 A justice may take cognizance of a complaint that a dog has bitten or attempted to bite a person and if it appears to the justice that the dog ought to be destroyed, the justice shall direct a peace officer to destroy it.

#### Complaint as to dangerous dog

2(1) A justice may take cognizance of a complaint that a dog is dangerous and not kept under proper control and if it appears to the justice that the dog is dangerous, the justice may make an order in a summary way directing the dog to be kept by the owner in a proper way or to be destroyed.

(2) A person who fails to comply with an order under this section is guilty of an offence and liable to a fine of not more than \$5 for each day during which the person fails to comply with the order.

#### Presumption of ownership

3(1) The occupier of a house or premises where a dog was kept or permitted to live or remain at the time of a complaint shall be presumed to be the owner of the dog unless the occupier proves that the occupier was not the owner of the dog at the time.

(2) When there are more occupiers than one of a house or premises let in separate apartments or lodgings, or otherwise, the occupier of that particular part of the house or premises in which a dog was kept or permitted to live or remain at the time of a complaint shall be presumed to be the owner of the dog unless the

occupier proves that the occupier was not the owner of the dog at the time [emphasis added].

## **Provincial Court/Justice of the Peace Jurisdiction**

### ***Summary Conviction Proceedings***

[18] The Respondents submit that any proceeding under the *DDA* is a summary conviction proceeding for which the exclusive original jurisdiction lies with the Provincial Court or a Justice of the Peace. The Respondents further submit that a proceeding under the *DDA* must be commenced by way of an information.

[19] If the Respondents are correct that proceedings under the *DDA* are summary conviction proceedings, then the Court of King's Bench has no jurisdiction. The role of the Court of King's Bench is limited to hearing summary conviction appeals. Justice Feldman, writing for the Court, in *R v Allen*, 2000 CanLII 16954 (ON CA) held at para 5: "The jurisdiction of the superior court is to try indictable offences only, not summary conviction offences."

[20] There is only one reported case under the *DDA*, *R v Harmsworth*, 2012 ABPC 346. *Harmsworth* was heard before a Justice of the Peace in Didsbury. The reasons indicate at para 1 that the application (no mention of an information) was brought by an individual RCMP officer though the case is styled in the name of the Crown. This, together with the apparently common practice of bringing civil applications pursuant to the *DDA* in the Court of King's Bench discussed below, indicates that there is confusion at the Bar as to the correct way to proceed under the *DDA*.

[21] Proceedings under *DDA* sections 1 and 2(1) are not summary conviction proceedings according to the *Provincial Offences Procedures Act*, RSA 2000, c P-34 ("*POPA*"). *POPA* s 2(1) provides that it "applies to every case in which a person commits or is suspected of having committed an offence under an enactment for which that person may be liable to imprisonment, fine, penalty, or other punishment." The destruction of a dangerous dog pursuant to *DDA* s 1 and s 2(1) is not imprisonment, a fine, or a penalty. The only question is whether the destruction of a dangerous dog is "other punishment." The Supreme Court in *Canada (Attorney General) v Whaling*, 2014 SCC 20 at para 52 explained that when considering whether something is a "punishment" under s 11(h) of the *Charter* the Court must ask "whether a discrete sanction ... has characteristics of a criminal sanction, and thus constitutes 'punishment.'" The *Whaling* approach to determining what is punishment is equally applicable in the context of *POPA*. The destruction of a dangerous dog under the *DDA* does not have the characteristics of a criminal sanction against the owner; rather, it is a public safety measure.

[22] *DDA* s 2(2), by contrast, creates a summary conviction offence for non-compliance with an order granted pursuant to s 2(1). This aligns with *POPA* s 2(2) which provides that "[w]here a contravention under an enactment is enforced under this Act, the contravention is deemed to be an offence under that enactment and for the purposes of this Act." There is no allegation of non-compliance with the *DDA* in the present case.

[23] For much of the *DDA*'s history, municipalities were given the power to enforce the *DDA*: see, for example, *An Act Respecting Cities*, SA 1951 c 9, s 276(d). Under the contemporary *Municipal Government Act*, RSA 2000, c M-26, this has been replaced by a general bylaw making power with respect to wild and domestic animals (s 7(h)).

[24] There appears to be a continuing practice of municipalities enforcing the *DDA* via civil proceedings in the Court of King's Bench. Counsel for the City provided me with orders or pleadings from five different *DDA* actions commenced by the City of Edmonton in the last eight years.

[25] *DDA* proceedings are properly understood to be civil matters, but that does not resolve the question of jurisdiction.

### ***Wordings of the Dangerous Dogs Act***

[26] The *DDA* may not appear to a casual reader or, I suspect, even many lawyers in Alberta to designate the jurisdiction of the Provincial Court of Alberta in clear and explicit statutory language. The *DDA* directs proceedings take place before a "justice." Readers may be forgiven for assuming that a statutory reference to a "justice" includes a Justice of the Court of King's Bench, but as a matter of statutory interpretation it does not.

[27] The *DDA*'s use of the term "justice" is a clear and explicit designation of the Provincial Court or a Justice of the Peace. The *Interpretation Act*, RSA 2000, c I-8 at s 28(1)(y) provides that in an enactment "justice" means a justice within the meaning of *POPA*. In turn, *POPA* s 1(g) states that "justice" means a justice of the peace or a judge of the Court. "Court" is defined in *POPA* s 1(c) to mean the Provincial Court. This ousts the jurisdiction of the Court of King's Bench.

[28] The City's application must be heard by a Judge of the Provincial Court, not a Justice of the Peace because the *Justice of the Peace Regulation*, Alta Reg 6/1999 s 3(2) provides that a "justice of the peace may not be assigned to hear, try or determine ... any complaint or information that involves the death of any person."

### **Conclusion**

[29] The Originating Application is stayed on the basis that the Court of King's Bench does not have jurisdiction to hear *DDA* applications as a court of first instance.

[30] The result of this application, though required by the law, is unfortunate. The City made an understandable mistake based on the historical practice of municipalities bringing *DDA* applications in the Court of King's Bench. The Respondents acceded to the City's chosen path and imposed on the goodwill of the administration of the Court to expedite the matter only to raise a jurisdictional objection late in the process.

[31] The Respondents seek costs of this application. The timing of the Respondents' objection to the jurisdiction of this Court indicates to me that the objection was made for strategic reasons. Accordingly, I decline to award the Respondents the costs of this application despite their success.

[32] Rather than requiring that the matter start afresh, I have stayed the matter to allow the parties to work together to transfer the matter to Provincial Court pursuant to *PCA* s 57. If the matter is not transferred by consent to the Provincial Court and the City is required to commence a new proceeding, I retain jurisdiction to make an award in respect of thrown away costs.

Heard on the 20<sup>th</sup> day of September, 2022.

**Dated** at the City of Calgary, Alberta this 21<sup>st</sup> day of September, 2022.

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**Colin C.J. Feasby**  
**J.C.Q.B.A.**

**Appearances:**

Lajvir Benipal and Bassam Saifeddine, City of Calgary  
for the Applicant (Cross-Respondent)

Brendan M. Miller, Foster LLP  
for the Respondents (Cross-Applicants)