

April 22, 2003

Mr. Marcel Beaudry, Chairman
National Capital Commission
202-40 Elgin Street
Ottawa, Ontario, K1P 1C7

RE: NCC ANIMAL REGULATIONS / YOUR LETTER OF APRIL 2, 2003

Dear Mr. Beaudry,

Thank you for your letter of April 2, 2003. On page 4, it stated: “The NCC must consider and balance the opinions and needs of all users of its lands...”

The issue is not “balance” nor “opinions” nor “needs”, real or imaginary, nor the highly dubious efficacy of NCC public consultations; it is whether the Animal Regulations conform to or exceed the legislative authority of the National Capital Act and of the Statutory Instruments Act.

In my view, there are essentially two questions:

1. Are the regulations lawful? and
2. Is there “evidence” of a need for regulations?

(The Oxford New English Dictionary defines evidence as: “the available body of facts or information indicating whether a belief or proposition is true or valid.”)

Because its quality bears on the applicability of subsection 3.(2)(c) of the Statutory Instruments Act, the analysis of the NCC’s “evidence” will come first.

EVIDENCE REQUIREMENT

The Regulatory Process Management Standards (RPMS) of the Government of Canada, (see page 9, 27 Nov 02 brief) require that:

*Regulatory authorities proposing new regulatory requirements or regulatory changes must have **evidence** that a problem has arisen, that government intervention is required and that new regulatory requirements are necessary. [Emphasis added]*

Your letter has confirmed, no doubt unintentionally, that the Commission proposed the enactment of the Animal Regulations without good evidence.

On page 3 appears the following: “There was no number given for warnings in 1998.” This was the single criticism you made of the table found on page 5 of the November 27, 2002 brief. (It assembled and analyzed the few statistics the Commission published on the

matter.) Please see: “Appendix ‘A’ - Statistics – Dog Incidences (sic) 1994 to 1998” Delcan report (page 57) released by the NCC. It stated: “Note: 1998 Ontario Urban Lands **includes** 230 warnings issued on the Rideau Canal” (my emphasis). Thus your criticism is incorrect.

HEARSAY

... fear of ... animals ... not controlled by their keepers. The NCC does not view these concerns as irrational, especially as there have been incidents on NCC property where domestic animals that are not properly controlled by their keepers have caused injury to persons. (Your letter, page 3)

The last sentence might have carried weight if the NCC’s consultation documents or the RIAS (or even your letter) had included verified numbers, dates and details of injuries. Without disclosure of proper documentation, this claim is hearsay, and thus incapable of fair assessment.

LOGICAL CONCLUSION Therefore, because of the Commission’s dependence on hearsay and because you found no fault with the above table, it is logical to conclude that you now accept its findings, as set-out in the November 27, 2002 Brief, namely:

1. Based on the five years 1994 - 1998, the average number of dog-related incidents per urban parkland was, *annually*, 1.7 and 3.6 in Ontario and Québec, respectively.
2. The highest one-year average of incidents was 2.4 and 7.2, respectively. The data, on which the latter figure depends, seems very suspect. The total number of Quebec complaints in 1997 is 1350% of the 1996 total!
3. With respect to Gatineau Park and the Greenbelt, the relatively low numbers there indicate an equally weak case.
4. In light of this information, it is clear that the NCC has advanced a case without merit. The Governor-in-Council has unnecessarily enacted punitive regulation.

UNLAWFUL REGULATIONS

Your letter on page stated:

.... the operative words ... are trespass unduly. Given that the animal regulations are consistent with municipal by-laws ... it cannot be said that the regulation trespass unduly on existing rights and freedoms. [Emphasis added]

The Governor-in-Council, under the National Capital Act, regulates only lands within the NCC’s responsibility, and, for that purpose, may enact regulations in accordance with that Act. Municipal corporations, created and acting under the Municipal Act of Ontario, or under its equivalent in Quebec, may make bylaws in accordance with their jurisdiction and powers under their respective Acts. The NCC cannot regulate on the basis of “if the local municipal governments are doing something, we can do it too.” Rather, regulations under the National Capital Act must conform to subsection 20. (1) and to the Statutory Instruments Act.

The latter states that every regulation must not trespass unduly on **existing** rights and freedoms (my emphasis). The Oxford dictionary defines undue as “unwarranted or inappropriate because excessive or disproportionate.” Therefore, to “trespass” in any way requires demonstrable and cogent reasons.

Your letter all but ignored the other term, **freedoms**. Do you think that the *de facto* freedom of walking one’s dog off-leash in a park for a minimum of 25 years or more, and almost a century in Patterson Park, is dismissible without proven and substantial cause?

Again on page 2, your letter stated:

The Governor in Council is empowered, by section 20 of the National Capital Act, to make regulations for the protection of ... property, ... for preserving order or preventing accidents. Every section in the animal regulations falls within one or another of these powers.

The final sentence in this quotation from your letter lacks credibility. For example, as noted on page 7 of the November 2002 brief, the Animal Regulations require dogs, with the exception of the Queen Elizabeth and Colonel By “corridors”, to be kept three metres away from “the shoreline of a body of water of a permanent nature.” Several NCC parklands have either the Rideau or Ottawa Rivers as boundaries. These rivers are **not** NCC property. Subsection 20.1 of the National Capital Act confines the jurisdiction of the regulations to “any property of the Commission.” Thus, how can subsection 20.(1) authorize a regulation to keep dogs from swimming in, say, the Ottawa adjacent to the Ottawa River parkway?

Even if the lake or river or pond, is solely within NCC lands, where is the evidence of disorder, damage to property or accidents? The NCC and its predecessors enjoy a long history. The accumulated records should demonstrate, easily, if one of the prerequisite conditions actually exists for the enactment of the Animal Regulations. If they do, they seem a well-kept secret.

SAFETY: A DOUBLE STANDARD? Another example arises from the requirement that dogs be on leash in Patterson and other urban parks, 24 hours a day, 52 weeks a year. How does protecting property or preserving order sanction this rule? Difficult to imagine. That leaves accident prevention. How many accidents, attributable to an unleashed dog, have taken place - a day, a week, a month or a year? Is the record, if any, significantly different in Hillside and Pine Hill parks in Rockcliffe and in Stanley Park in New Edinburgh, where there is an exemption to the on-leash rule? Or, is the answer, as noted above, that all “incidents” per park remain at a trivial level, year-in and year-out? Thus, the on-leash regulation does **trespass unduly**, because there is no proven need to curtail the long-standing freedom of dog walkers in Patterson and other parks.

The RIAS stated: “Most of the Commission's open spaces in this part of the city contain recreational pathways and, therefore, permitting domestic animals to be off leash in these locations would compromise public safety.”

On most portions of the pathways such as along the Ottawa Parkway or the Rideau Canal, there's lots of room on grassy or open areas. The NCC apparently makes no effort to discourage bicycles racing along mixed-use pathways nor, according to a 30 Oct 2002 Email to me, any special effort to stay informed of bicycle (or other?) accidents on these

pathways. By the way, a mixed bicycle / pedestrian path bisects the off-leash NCC park at Stanley Avenue without apparent problems.

On page 2, your letter contained the following: "No member of the public has an acquired right to bring a domestic animal, leashed or unleashed, on NCC property. Persons are invited by the NCC to its property..."

Do not members of the public without dogs have a right of entry onto NCC property? If so, do not members of the public have an implicit license to enter onto NCC property? If so, then has it not become a term of the license for at least 25 to nearly 100 years that members of the public can enter with their dogs onto various NCC parklands? Thus the regulations do make a material change in the terms of the licence.

The letter's reference to the NCC's invitation to the public to "use its property" reeks of arrogance and pomposity. Canadian residents and visitors hardly need an invitation to enter onto NCC property. NCC property belongs to the Crown and applicable regulations must be lawful and necessary.

MATTERS MUNICIPAL On page 2, your letter stated the following:

The rules contained in the by-laws of the municipalities in the National Capital Region had always been incorporated by reference into the regulations. ... Of the ten former municipalities that made up the new City of Ottawa:

- *1 prohibited dogs in all parks and 3 prohibited dogs in most parks;*
- *3 required dogs in parks to be leashed and 2 required dogs in parks to be leashed or "under control";*
- *1 (Ottawa) permitted dogs off leash in some parks, dogs on leash in some parks and prohibited dogs in other parks."*

"Under control" refers to off-leash. Thus two more municipalities permitted this practice, provided, as in Ottawa (the most populous) that the dogs were responsive to the owner or walker and doing no harm. (It's remarkable that the NCC finds the example of municipal by-laws so selectively persuasive – in this instance. If these animal control by-laws were so praiseworthy as to be worthy of the NCC's adoption, why did it develop its own animal regulations at considerable cost in cash, time and continuing public aggravation?)

Ottawa successfully implemented and has continued a time allocation approach on a neighbourhood basis that works well and virtually without enforcement. The RIAS rejected this approach:

It would be impractical for the Commission to enforce different time periods in different parks, given the extent of the Commission's green spaces. As well, such an approach would add complexity to the system at a time when the Commission is seeking simplicity and consistency in the rules that apply to its lands.

In short, the NCC admitted that it lacked the administrative competence and flexibility of the City of Ottawa, which also operates a great many parks. In addition, the wish for simplistic bureaucratic rules trumped popular, long-standing park uses.

DRAMATIC CHANGE IN USAGE On page 2, your letter stated:

Given this information, the fact that the NCC requires domestic animals to be on leash in most green-spaces does not represent a dramatic change in usage. [Emphasis added]

But yes, this does represent a dramatic change in usage at the neighbourhood or specific park level, e.g., where people live. The NCC's centralizing, bureaucratic approach to park administration fails to comprehend and respect that the kind, location and customary usage of a specific park are far more important to local users and visitors than an administrator's unnecessary quest for universal rules and conformity. People do not look at the total of NCC parks they might visit but rather the one in their neighbourhood to which they and visitors to the National Capital can walk on a daily basis.

Take the example of Patterson Creek Park, formerly the eastern section of Central Park before the middle and western sections became City Of Ottawa property in the baseball stadium land swap. Until the NCC, with the blind cooperation of the Governor-in-Council, came-up with the on-leash and remove the poop from the park regulations, dog owners and their families in this neighbourhood had customarily enjoyed the freedom to let their dogs off leash and put bagged poop into the garbage cans throughout Central Park. When I say customarily, people in the neighbourhood can attest to 25 years of this freedom, at least. Given that the Park dates back to 1907, customarily most probably means almost a century of this freedom.

Many people in our area have usually gone to Patterson Park in the morning or in the evening with their dogs. They have enjoyed their neighbourly chats, playing with their dogs off-leash or letting them romp together. The Animal Regulations have now made prosecutable these happy, harmless, and healthy activities in Patterson Park. In our neighbourhood and in others like it with NCC parks established generations ago, the animal regulations do constitute dramatic change.

STOOP & SCOOP. (Your letter, pg 3): “. droppings left by inconsiderate dog owners ”

Droppings left by inconsiderate dog owners is a problem, one many of us try to correct by removing such droppings. Nevertheless, that problem gives no authority to impose punitive regulations beyond the scope of the National Capital Act and the Statutory Administration Act. In addition, that negative approach serves only to punish the innocent and to discourage their helpful, clean-up behaviour.

We have found in Patterson Park, and it is true in others as well, that the “regulars” pick-up poop, spot for each other and tactfully police the careless or preoccupied. By the way, dog owners, who keep their dog on leash, are occasionally careless about ‘stoop and scoop’. The on-leash requirement doesn't ameliorate this particular problem.

MISLEADING RIAS AND BIAS See page 1, your letter: “In the RIAS, the NCC fully and carefully set-out the problem ... the extensive consultations and the changes made to the proposal as a result of public input.”

This fails to refute the analysis and information on pages 2 and 3 of the 27 Nov 02 brief. The RIAS is all but devoid of hard evidence or analysis, as also noted above. Rather it relies on rhetoric such as:

At the same time, conflicts between domestic animals and their owners and other users of Commission property were mounting, due to the increase in numbers of domestic animals in the NCR. As well, more and more people were bringing their domestic animals onto Commission property because many of the municipalities in the NCR were making their by-laws more restrictive, especially the by-laws governing parks.

Note the lack of basic statistics; the use of hyperbole “more and more people”; and silly, pedantic terminology, e.g., domestic animals, when dogs are the subject.

As for the “changes made ... as a result of public input”, the initial proposal was outrageous, and various groups protested vigorously, as did the 1000 or so people who turned out on a miserable November evening to the one and only “open house” in Ontario (RA Centre).

See page 1:

Far from misleading the Special Committee of Council the RIAS was a far more thorough document than would be expected for a regulation of this size and significance.

Does the thoroughness of an RIAS depend on the submitting department’s or agency’s assessment of the regulation’s “size and significance”?

See pages 3 and 4:

... no anti-pet bias exists at the NCC ...The NCC provides five sites where domestic animals may be exercised off leash, and a further 1,116.7 hectares ... where domestic animals are permitted on leash.”

This numbers game reflects, as pointed out earlier, the NCC’s preoccupation with centralized, uniform controls regardless of a specific park’s traditional uses in its neighbourhood. Moreover, permitting a dog in a park, provided it remains on leash, fails to inspire feelings of gratitude. The “whistler and his dog” might as well stay on the sidewalk as enter the park.

As for the “anti-pet bias” issue, the NCC’s 2001 Public Consultation Report speaks for itself. The November 2002 brief quoted it on pages 15 and 16 and the critical comments stand.

SPECIAL TREATMENT? The regulations exempted from the on-leash requirement Pine Hill and Hillsdale Parks in Rockcliffe and Stanley Avenue Park in New Edinburgh. In the absence of a convincing rationale to impose the restriction in Patterson Park, people concluded that this preferential treatment resulted from strong area lobbies. The following sentences in the RIAS lends credibility to that view:

It was also suggested by members of the public that LeBreton Flats and the Rockcliffe/New Edinburgh areas be considered as potential sites for off-leash areas. ...

As for the Rockcliffe/New Edinburgh area, the Commission will permit domestic animals off leash at three sites: Hillsdale Road, Pine Hill and Stanley Avenue Park.

People have also noted that the NCC's Vice Chairman lives in Rockcliffe. Thus, the consensus is that persistent local lobbying by prominent citizens and the influence of the Vice Chairman, counted far more than sensible objective criteria, which appear non-existent, in the Commission's decision to include or exempt parks.

CONCLUSIONS AND SUGGESTION

In view of (a) the foregoing; (b) the delays imposed by both the Department of Justice and the Privy Council Office on Access to Information requests on this file; and of (c) a senior official's previous refusal of a request (informal) to release key documents on the grounds of "solicitor-client privilege", confidence in the validity of the regulations seems to be weakening.

Your conservation officers will tell you that enforcement in Patterson and, I understand, other NCC parks and along various pathways, remains problematic; non-compliance is chronic.

The results of the Animal Regulations are costly coercion of citizens, many of them active in community affairs, contempt for the regulations, and a court challenge.

If the NCC continues to enforce the animal regulations and the fact that these regulations exceed the legislative limits comes out in Court, as surely it will, what will that do to the reputations of your Minister and of various senior officials, including your own?

Consequently, I suggest that you suspend enforcement, order an unbiased scrutiny of each regulation for its lawfulness and proven necessity, and release the results publicly for comment.

Yours sincerely,

cc: Mr. Michael Wernick, Associate Deputy Minister
Department of Canadian Heritage
Mr. George Redling, Assistant Secretary to Cabinet
Privy Council Office