TRIBUNALS ONTARIO **TRIBUNAUX DÉCISIONNELS ONTARIO**

Animal Care Review Board **Commission d'étude des soins aux animaux**

2023 ONACRB 48 (CanLII)

Citation: *Henry v. Chief Animal Welfare Inspector*, 2023 ONACRB 48

Date: 07/26/2023
File Numbers: 14948/ACRB

Appeal under s. 38 of the *Provincial Animal Welfare Services Act, 2019*, R.S.O. 2019, c. 13.

Between:

Peter Henry

Appellant

and

Chief Animal Welfare Inspector

Respondent

DECISION AND ORDER

Order Made By:	**Susan Clarke, Vice-Chair**
For the Appellant:	Peter Henry, Self-represented
For the Respondent:	Shane Sukerman, Counsel Regional Supervisor Ryan Sparks, Animal Welfare Services
Observers:	Ziba Heydarian, ACRB Member Delena Broomer, ACRB Connie Mallory, Regional Supervisor, Animal Welfare Services
Court Reporter:	Barbara Pollard
Heard by Videoconference:	July 12, 2023

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OVERVIEW

[1] Peter Henry, the Appellant, is the owner or custodian[1] of four adult dogs and one puppy (the "dogs") located at his residence in Chatham, Ontario.

[2] On May 31, 2023, Inspector Brynne Howell of Animal Welfare Services ("AWS") entered the Appellant's residence under a warrant,[2] and removed the dogs pursuant to s. 31 of the *Provincial Animal Welfare Services Act, 2019, S.O. 2019*, c. 13 (the "*PAWS Act*"). Following the removal, Inspector Howell issued a Notice of Removal ("NOR") on May 31, 2023 to the Appellant.

[3] On June 4, 2023, Inspector Howell personally served a Notice of Decision to Keep an Animal in the Chief Animal Welfare Inspector's Care ("DTK"), signed by Regional Supervisor Ryan Sparks, the Chief Animal Welfare Inspector's Delegate (the "CAWI").

[4] The Appellant appealed the NOR to the Animal Care Review Board (the "Board") on June 5, 2023. The Appellant requested the return of the dogs; however, he did not appeal the DTK.

[5] The parties participated in a case conference on June 9, 2023, at which time a hearing was scheduled for the period between June 20 and 22, 2023.

[6] On June 12, 2023, Inspector Howell issued a Report to A Justice,[3] advising that she had seized[4] "five canines; four (4) intact female American Bulldog type dogs, and one (1) intact male American Bulldog type dog". Justice. D. Isaac of the Municipality of Chatham-Kent signed an Order of Detention on July 13, 2023, giving Inspector Howell the authority to detain the dogs until August 31, 2023.

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[1] From Inspector Howell's testimony at the hearing, the ownership of each dog has not been determined. Registration papers were not submitted as evidence at the hearing.
[2] Name used by Inspector Howell; the warrant was issued pursuant to s. 28(2) of the *PAWS Act*, on May 30, 2023.
[3] Pursuant to s. 159 of the *Provincial Offences Act*, submitted on June 12, 2023.
[4] Pursuant to s. 44(1) of the *PAWS Act*.

[7] The hearing proceeded before the Board on July 12, 2023 regarding the NOR only, and the appellant's request for the return of the dogs.

PRELIMINARY ISSUE

Motion to Dismiss

[8] On June 14, 2023 the Respondent, the Chief Animal Welfare Inspector, filed a Notice of Motion to dismiss the Appellant's appeal of the NOR on the basis that the appeal was moot, as the animals had been seized after the NOR was filed pursuant to s. 44 of the *PAWS Act* and the Board therefore had no remedy available to it regarding the appeal.

[9] The Board dismissed the Respondent's motion in a decision released on June 29, 2023. While the Appellant made no submissions, the Board determined that the *PAWS Act* created the potential for parallel proceedings. It was noted that s. 44(7) contemplated the potential return of the animals. The appeal was determined on this basis not to be moot; if the appeal had been dismissed, then the Appellant would have lost the right to have his dogs returned even if the s. 44 proceedings determined that the dogs could be returned. The Board determined that the appeal of the s.31 removal order was still a live issue, and the appeal could proceed.

[10] The Board ordered the appeal of the NOR to proceed. New dates were provided for the exchange of disclosure between the parties, and for the submission of document briefs to the Board.

Disclosure

[11] On July 11, 2023, the Board contacted the parties asking for confirmation of attendance at the hearing scheduled to proceed on July 12, 2023 as the Appellant had not filed a document brief. The Respondent advised that it had not received disclosure from the Appellant.

[12] The Appellant responded, stating the following:

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> "I already said that the evidence they submitted is good for me they have edited/cropped videos and lies from my neighbours. The witnesses they are calling are good for me as well because they didn't do a proper investigation and are trying to make it seem like I am a monster when I am not. So I am ready to give you a full explanation and I don't have to lie or twist anything I have nothing to hide."

[13] At the start of the hearing, the Respondent advised that they had not received disclosure, a witness list, or the appellant's anticipated testimony as ordered in the Case Conference Report and Order (CCRO). I ruled that due to his failure to comply with the CCRO, the Appellant would not be able to testify, explaining that to allow it would contravene the rules of procedural fairness. The Appellant was advised that he could cross-examine the Respondent's witnesses and make closing arguments.

ISSUES IN DISPUTE

[14] The issues to be decided are:

1. **Removal of the dogs pursuant to s. 31(1) of the *PAWS Act***

   Were the five dogs in distress at the time of their removal on May 31, 2023? If so, was it necessary for AWS to remove the dogs to alleviate their distress?

2. **Can the dogs be returned to the Appellant pursuant to s. 38(9)?**

   Was the removal of the dogs warranted? Was the removal done in accordance with the law?

RESULT

[15] Based on the evidence before me, I find that:

1. The dogs were in distress at the time of their removal on May 31, 2023, and it was necessary for the Respondent to remove them to alleviate their distress.

2. The removal of the dogs was warranted. As the dogs were removed in accordance with clause 31(1)(a) of the *PAWS Act* and therefore lawfully removed, the dogs should not be returned to the owner.

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ANALYSIS

[16] In addition to the oral testimony received from Inspector Howell and AWS consultant veterinarian Dr. J. Bruce Robertson, I also reviewed the documentary evidence, including Dr. Robertson's report and 14 videos of the Appellant with the dogs, and the Notice of Appeal filed by the Appellant.

[17] I qualified Dr. Robertson as a participant expert whose specific education and training in veterinary medicine were sufficient expertise supporting his opinion evidence on whether the dogs were in distress when he watched the videos.

ISSUE 1*:* **Were the five dogs in distress leading up to their removal on May 31, 2023? If so, was removal necessary to alleviate the dogs' distress?**

[18] For the following reasons, I find that the evidence supports a finding that the dogs were in distress at the time they were removed, because they were physically abused and subject to psychological hardship. Inspector Howell removed the dogs in accordance with clause 31(1)(a) of the *PAWS Act*, where a veterinarian advised the Inspector in writing that alleviating the dogs' distress necessitated their removal.

[19] Section 1 of the *PAWS Act* defines distress as the state of being:

1. In need of proper care, water, food or shelter;

2. Injured, sick, in pain or suffering; or

3. Abused or subject to undue physical or psychological hardship, privation or neglect.

[20] Inspector Howell testified that:

1. On May 23, 2023, AWS received a complaint about animal abuse from the Appellant's neighbour;

2. Inspector Howell spoke with the complainant on May 24, 2023, and requested he email to her the three videos he had of the Appellant and his dogs in his backyard;

3. On May 25, 2023, the complainant emailed eight additional videos from the evenings of May 23 and 24, 2023 to Inspector Howell;

4. Inspector Howell forwarded all the videos to AWS consultant veterinarian Dr. Robertson. On the evening of May 25, 2023, Dr. Robertson responded saying there were clear signs of physical and psychological distress on the videos, and he was willing to sign a Veterinarian's Certificate[5] recommending the dogs be removed from the Appellant's care to alleviate their distress. On May 30, 2023, Inspector Howell received Dr. Robertson's completed AWS Veterinarian's Certificate form;

5. On May 26, 2023, the complainant emailed three additional videos from the evening of May 25 and the early morning of May 26 to Inspector Howell;

6. The complainant gave Inspector Howell the Appellant's landlord's contact information. Inspector Howell subsequently contacted the landlord and got the name of the Appellant;

7. Inspector Howell was able to confirm the identity of the Appellant, by searching social media platforms for photographs of the Appellant that matched the complainant's description of him.

[21] Inspector Howell showed the 13 videos (noting that videos 2 and 7 were duplicates) and described them, noting in particular:

1. The Appellant was striking a dog in almost every video, once in front of a young child;

2. The Appellant was either hitting a dog with his open hand, a closed fist, and on two occasions with a flashlight. On several occasions, he appeared to strike a dog numerous times, and on one occasion 13 times;

[5] Certificate of a Veterinarian Advising the Removal or Euthanasia of Animal(s); AWS standard form, completed with UCN 16522477 on May 30, 2023, and signed by Dr. Robertson.

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3. The behaviour of the dogs, including cowering low to the ground, and running from the Appellant, were indicative of fearful responses to him.

[22] Inspector Howell testified there were clear signs of physical abuse when the Appellant hit the dogs, and psychological distress indicated by the dogs cowering under the Appellant's hand, and fleeing from him. She testified that she removed the dogs because physical abuse and psychological hardship are defined under the *PAWS Act* as distress.

[23] Inspector Howell testified to verbal information the complainant later gave her, which I have not included in my assessment. The information is hearsay, and unsubstantiated. While s. 15 of the *Statutory Powers and Procedure Act*[6] allows the Board to accept hearsay, I did not find this evidence persuasive. When the complainant was advised to call the police because he believed the Appellant was in the midst of an extreme incident of abusing the dogs inside his home, the complainant said it had ended and did not call them. Inspector Howell provided no evidence that such an incident had taken place, either witnessed when she later entered the Appellant's home or from a veterinarian's examination of the dogs.

[24] Inspector Howell also testified that:

1. On May 31, 2023, she met with Senior Investigator Dougherty and Regional Supervisor Sparks, three additional AWS Inspectors (to assist with removal of the dogs) and two Chatham-Kent police officers (to assist with the warrant);
2. She met the Appellant at his residence and showed him two videos, and received his confirmation that it was him;
3. He led her to the basement where she observed two adult dogs and a puppy in crates. The other two dogs were running loose in the house;
4. The Appellant justified his treatment of the dogs as training;

[25] During cross-examination, the Appellant raised several issues with regards to Inspector' Howell's testimony:

[6] R.S.O. 1990, ch. S.22

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1. The video clips were very short, and did not provide the context of why he was hitting the dogs;

2. Inspector Howell couldn't evaluate the force used from a video. Her response was that his arm was raised, and she watched the dog's response (cowering, fleeing);

3. He questioned why of 14 videos, only one was taken in daylight. All other videos were taken at night, where it was not clear what was happening. He questioned why none of the videos were date or time stamped. He indicated that if these were taken with a motion-sensitive camera, the context would have been seen, but was cut off instead.

[26] Dr. Robertson testified that:

1. He gave Inspector Howell his verbal opinion that the dogs were in distress and should be removed when he first viewed the videos, and then provided the Veterinarian's Certificate about five days later when asked for it;

2. He produced his Veterinarian Report on June 14, 2023 when the case went to a hearing;

3. He reviewed 11 videos, although his Report only describes 10 videos as two were duplicates.

[27] Dr. Robertson reviewed the videos, and described his observations and opinions as follows:

1. He could hear the blows on the videos; at least once, the dog was sitting still when it was struck;

2. The dogs, often as a group, indicated distance-increasing behaviour, which indicates a reluctance to engage, fear, or previous negative experiences;

3. The dogs indicated submissive posture after blows (head down); the dogs appear hyper-vigilant;

4. Often people strike dogs because they exhibit unwanted behaviour. He doesn't support this as it is physical punishment and is often not proportionate to what the dog did. The correction results in a negative outcome. In the dog's mind, it is being punished for sitting still;

5. When the Appellant struck a dog as he was telling him not to do something, there was evidence of physical force being used as a correction, which is contraindicative and therefore abusive;

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6. Two videos show a dog being hit with a flashlight, with some force. This rises to the level of assault, with no indication of cause. The force is amplified when using a “weapon,” and could cause injuries.

7. A video shows a dog being struck 13 times over 11 seconds; this was horrific and very abusive, both physically and psychologically.

8. In the second daylight video, a young child was nearby. The Appellant struck a dog in view of the child. This could lead to “redirected aggression” where a dog might bite a subordinate like a child. This was also concerning because the child might repeat the behaviour themselves.

[28] Dr. Robertson provided his conclusions as follows:

1. The videos show a pattern of behaviour by the Appellant;

2. The dogs’ mannerisms and responses indicate psychological concerns; when struck for no particular reason, they anticipate further abuse and are hypervigilant;

3. The only way to alleviate distress caused by repeated physical and psychological abuse was removal.

[29] On cross-examination, Dr. Robertson responded as follows:

1. Dr. Robertson acknowledged that it was dark, but said from the height and arc of the Appellant’s hand and where the dog was, and the sound of the hit, he was certain that he was striking the dog. He testified that striking an object beside the dog might not be physically harmful, but would be psychologically abusive because it was threatening.

2. Dr. Robertson said the dog sitting down was an indication of submissive behaviour, because the dog didn’t look at the Appellant. Other indications include a dog making itself seem smaller, and exposing the belly. Other indications of fear are increasing distance.

3. Dr. Robertson testified that he doesn’t condone hitting as physical training but conceded that if an animal is caught in the midst of a behaviour and it is a single time correction, particularly if the dog is harming a person or another dog, it might be appropriate. He stated that he saw no sign of any dog exhibiting unwanted behaviour like this. He also stated that hitting a dog over the head with a flashlight is not appropriate.

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4. In response to how Dr. Robertson could make his conclusions when he hadn't seen the full video showing what the Appellant was reacting to, he testified that as long as he saw what happened half a second before the strike it is enough. Any more of a lapse of time and the dog wouldn't know why they were hit. He added that the Appellant was observed chasing a dog down and then striking it after it stopped. He stated the dog believes it was punished for stopping.

5. In response to information that the Appellant was chasing a dog because it had something in its mouth, Dr. Robertson testified that well trained dogs will drop an object and be rewarded, adding that chasing them is not effective.

[30] Dr. Robertson continued to respond to the Appellant's questions, acknowledging that he couldn't always see exactly what happened and that he sometimes made inferences based on when he saw something directly, and other times based on the dogs' responses. He testified that there is no place for physical abuse in the guise of training, and that it has to be proportionate and humane.

[31] I accept the evidence of Inspector Howell and Dr. Robertson that the dogs were in distress because of physical and psychological abuse. I further accept Dr. Robertson's opinion evidence that the Appellant's actions were not justified as a correction for any behaviour the dogs might have exhibited, and were not appropriate training methods. While the video clips were short, and mostly at night, and not every action could be clearly seen, there were sufficient instances where it was clear that the Appellant routinely struck the dogs.

[32] I am satisfied that the dogs were removed to relieve their distress, pursuant to clause 31(1)(a) of the *PAWS Act.* Dr. Robertson provided Inspector Howell a signed Veterinarian's Certificate advising that alleviating the dog's distress necessitated their removal. Inspector Howell removed the dogs, and provided a NOR to the Appellant pursuant to s. 31(5).

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ISSUE 2: Can the dogs be returned to the Appellant pursuant to s. 38(9)? Return of the Dogs and the Appeal

[33] In his appeal of the removal of the dogs, the Appellant stated that he wanted his dogs returned, stating that the dogs were not in distress when they were removed, all their needs were met, and they were in great condition, and then justifying his training methods.

[34] For the purposes of this appeal, which was based on the removal of the dogs, my powers are limited to considering the return of the animals based on whether removal of the dogs was warranted and in accordance with the law. After consideration of Inspector Howell's and Dr. Robertson's evidence I find that the removal was warranted, and in accordance with clause 31(1)(a) of the *PAWS Act*. I find that the dogs should not be returned to the owner for these reasons.

The Decision to Keep in Care (DTK) and Application for Revocation of Determination

[35] The Board notes that an Appellant can appeal a DTK under s. 38(1), and may make an application under s. 38(4) to have animals returned if the conditions that caused the animals to be kept in the CAWI's care have ceased to exist. In this case however, the Appellant did not appeal the DTK, or make an application for the return of the dogs. As such I have no powers to make such an Order.

[36] Despite the fact that the Appellant made no such appeal or application, the Respondent provided considerable evidence regarding its DTK after removal, which was based on sub-clause 31(6)(b)(i) of the *PAWS Act*:

> "The Chief Animal Welfare Inspector has reasonable grounds to believe that the animal may be placed in distress if returned to its owner or custodian."

[37] Dr. Robertson testified that without treatment and therapy for the dogs, it is likely they would experience distress if returned to the Appellant even if there is no further aggression from him. Dr. Robertson recommended gradual re-acclimation

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with positive supervised encounters, before the dogs are returned to the Appellant. He recommended AWS conduct follow-ups for a time to ensure the dogs are not experiencing distress.

[38] In response to cross-examination, Dr. Robertson testified:

1. If a dog was previously in a stressful situation, it would be watchful. A person would be well advised to then minimize situations that would evoke fearful responses.

2. The only way he would be comfortable with returning the dogs is for different training methods to be used, and follow up inspections conducted.

3. There were multiple occasions where the Appellant was abusive. Even if he tries not to do this ever again, the dogs might still believe that interactions might lead to abuse, and their initial response will anticipate abuse. Acclimation might diminish fearfulness over time, or never. Ongoing monitoring and assessments would be necessary.

4. If the dogs were returned to a family member instead of the Appellant, the dogs might make a minor connection if the family member was with him when he abused them, but the level of distress might be less.

5. He might recommend a certified behaviourist to evaluate the dogs, and provide a treatment plan.

[39] While the Appellant was not permitted to testify, his questioning was on occasion argumentative, attempting to justify his training method. On other occasions he appeared interested to learn from Dr. Robertson what would be required to have his dogs returned to him. This was supported by his Notice of Appeal. However, at no time was there any indication that he had made efforts to become knowledgeable in other more acceptable training methods which would not cause distress for the dogs.

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[40] In closing arguments, the Appellant indicated that he was open to exploring other training methods, and open to having the dogs returned to a family member. He pointed out that the *PAWS Act* says that if conditions cease to exist the dogs could be returned to the owner, stating that he didn't know how to demonstrate this, other than to record and monitor them 24/7.

[41] I did not find that the Appellant fully appreciated that his form of training, using physical force, created distress. While he indicated a willingness to explore other training methods, and to have the dogs monitored, he did not give any indication that he had taken steps to do so. The Appellant didn't file any supporting evidence, and the Respondent didn't reveal anything on cross-examination that could support his arguments. It was incumbent on the Appellant to prove to the Tribunal that he could provide an environment free from distress, in order for the dogs to be returned to him.

[42] Having viewed the videos, I am particularly concerned that aside from occasions where the Appellant struck the dogs a single time, there were other occasions where he struck a dog repeatedly or with a flashlight, which go beyond training.

[43] Dr. Robertson's evidence was compelling, that the dogs should not be returned to the Appellant, based on his opinion evidence that the Appellant's training methods are abusive and cause physical and psychological distress, and that the dogs might still suffer psychological distress if returned to the Appellant's care even if different training methods were used.

[44] In conclusion, I do not have the power to make an Order regarding the DTK and returning the animals pursuant to s.38(4) as the Appellant did not file an application, nor provide any evidence that the conditions causing distress have ceased to exist. However, if I am wrong, and the parties were both given to understand that an application had been made under s.38(4) for the return of the animals, I find that the dogs should not be returned to the owner for the reason that the Appellant has provided no evidence to indicate that the conditions causing distress have ceased.

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CONCLUSION AND ORDER

[45] For the reasons above, I find that:

1. The dogs were in distress at the time they were removed, and it was necessary to remove them from the Appellant's residence to relieve their distress;

2. The removal was done in accordance with the law.

[46] The dogs should not be returned to the owner. The appeal for the return of the dogs is dismissed.

Released: July 26, 2023

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Susan Clarke, Vice-Chair

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