

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Ontario Society for the Prevention of Cruelty to Animals and Johanna MacNaughton, Applicants

**AND:**

The Toronto Humane Society, Alan Johnson, Alvin Tweten, Robert Hambley, Brenda Hind, Bud Walters, Carol Lupovich, Delores Qasim, Joan Milne, Laurie Overton, Pamela Inglis, Patricia McIlhone, Sandi Hudson, Stephen Dooley, Tim Trow, Valerie Jones, and Public Guardian and Trustee, Respondents

**BEFORE:** D. M. Brown J.

**COUNSEL:** W. McDowell and R. Breedon, for the Applicant

H. Rubin and P. Capone, for the THS Respondents, except Tim Trow

**HEARD:** April 13, 2010.

**REASONS FOR DECISION**

**I. THS motion to vary the April 1, 2010 settlement approval order**

[1] The Toronto Humane Society moves to vary my order of April 1, 2010 (the “Settlement Order”), approving the settlement of this application reached amongst the applicants, the Ontario Society for the Prevention of Cruelty against Animals (“OSPCA”) and Dr. Johanna MacNaughton, the THS respondents, and the Public Guardian and Trustee: *OSPCA v. Toronto Humane Society*, 2010 ONSC 1953 (CanLII). Paragraph 15 of the Minutes of Settlement which formed part of the Settlement Order required the THS to surrender to the OSPCA any animals remaining at its 11 River Street facility last Sunday, April 11, 2010. The THS requests that I vary the Settlement Order so that a pit bull named “Bandit” can remain in its possession.

[2] Last Friday THS counsel wrote to me advising that the parties had agreed to an order varying paragraphs 13(b) and 15 of the Settlement Order so that “Bandit” would not be surrendered to the OSPCA, but would “remain at 11 River Street after April 12, 2010 in the control and responsibility of THS.” I informed counsel that I had some questions about the order sought and requested that they participate in a conference call this past Monday. During that call

I determined that the variation request was best heard in open court, and the hearing took place yesterday. At the hearing the OSPCA opposed the variation order sought by the THS.

[3] During the hearing I granted the OSPCA leave to examine Mr. Garth Jerome, the Executive Director of the THS. After his evidence I invoked the court's inherent jurisdiction to require Mr. Robert Hambley, a director and the President of the THS, to come to court to testify, which he did.

## **II. "Bandit"**

### **A. The 2004 order to destroy "Bandit"**

[4] Bandit is a male pit bull.

[5] On August 24, 2003, Bandit attacked and bit a young child, causing significant injuries requiring numerous stitches.

[6] Bandit somehow came into the possession and ownership of the THS.

[7] In 2004 the Animal Services branch of the Toronto Public Health Department of the City of Toronto initiated a proceeding against the THS under the *Dog Owner's Liability Act*.

[8] On October 15, 2004, Justice of the Peace Deacon ordered that:

- (i) Bandit was to be destroyed by lethal injection after November 15, 2004;
- (ii) Bandit was to remain in the custody of the THS pending implementation of the order, but "under leash and muzzle control at all times when outside its cage"; and,
- (iii) "In the event the [THS] elects to voluntarily destroy the Dog in a humane manner prior to November 15, 2004, a report by a certified Veterinarian of the destruction of Bandit shall be immediately served upon the office of the Director of Toronto Animal Services."

I assume November 15, 2004, was the date for the expiry of any appeal from the Destruction Order.

[9] On November 10, 2004, THS appealed the Destruction Order.

[10] THS then sought a stay of Section 1 of the Destruction Order – i.e. the section requiring the destruction of Bandit. THS made that motion before the Ontario Court of Justice on November 23, 2004. Cavion J. granted a stay in the following terms:

Part 1 of the Order of Justice of the Peace, Patrick Deacon, dated October 15, 2004 to destroy the dog known as Bandit through lethal injection prior to November 15, 2004 be stayed pending the disposition of the appeal of the said Order.

[11] That was five and one-half years ago and the appeal still has not been heard. Mr. Capone, who is counsel for the THS on that appeal, advised that it took two years to obtain the transcripts. Beyond that, the only explanation I was offered for the delay in scheduling the appeal was that the matter had gotten lost in the system. During the hearing THS counsel stated that Mr. Capone would contact Toronto Animal Services to see what could be done to move the appeal along.

[12] I do not accept that explanation as an adequate one. An appellant has an obligation to pursue an appeal with reasonable diligence. The THS did just that last June when faced with compliance orders issued by the OSPCA for four cats. It appealed those orders and a tribunal heard a four-day appeal last fall, within a matter of months after the THS had launched its appeal: *OSPCA v. Toronto Humane Society*, 2010 ONSC 608 (CanLII), paras. 14 to 16. Evidently, the THS can move an appeal along quickly when it suits its own purposes. I can only conclude that the reason the THS did not move along its appeal of the Destruction Order was because the THS Board of Directors was quite content to allow the stay to continue in force and to let Bandit remain at the THS.

[13] From the submissions of counsel at the hearing, and from the evidence of Mr. Jerome, it emerged that the THS did not keep Bandit under leash and muzzle control when outside its cage, but allowed the dog some freedom of movement within the THS facility, especially in the office of its then president, Mr. Tim Trow. That was a flagrant breach of section 2 of the Destruction Order. Further, Mr. Jerome testified that since admission to the THS “Bandit” has bitten three people!

[14] For a charitable organization, such as the THS, to appeal a court destruction order, sit on its hands for years after obtaining a stay, continue to harbor an animal which then proceeds to bite three more people and, to top it off, fails to control the dog on THS premises in the manner mandated by a court order, is nothing less than scandalous.

#### **B. The present issue concerning “Bandit”**

[15] I find equally troubling the continued attitude of those currently in control of the THS – its Board of Directors – to “Bandit”.

[16] Two weeks ago the parties came before me for approval of a settlement. It was represented that the THS had turned over a new leaf. I approved the settlement. In paragraph 18 of my reasons I emphasized “the need for continued vigilance and diligence by the THS, its Board, staff and members, in reforming their animal care practices.” I continued:

[T]he THS owes fiduciary duties to the public who support it, and it must operate within a defined regulatory regime. Meeting those obligations must always remain the focus of the decision-makers at the THS.

[17] Section 15 of my order, which implemented the Minutes of Settlement, was crystal clear:

If on April 11, 2010, there are any remaining animals at 11 River Street, THS shall surrender such animals to the OSPCA...On or before April 12, 2010, there will be no animals at 11 River Street...

[18] Mr. Jerome testified that in recent weeks he had consulted widely with veterinarians about “Bandit”. The unanimous expert view was that “Bandit” posed a moderate to severe risk for aggression. Mr. Jerome also stated that those whom he consulted were of the view that “Bandit” should be put down. Mr. Jerome was led to believe that a court order prevented the destruction of “Bandit”, so no steps were taken to euthanize the dog.

[19] Having heard that evidence, I required Mr. Hambly to attend the hearing to give evidence because I could not understand why, when the THS’ own expert staff was recommending putting down “Bandit”, no steps had been taken to do so. I was not at all impressed by Mr. Hambly’s evidence. A Board of Directors must be able to provide clear explanations and justifications for a corporation’s state of affairs and decisions. Mr. Hambly, on behalf of the THS Board, could not do so. His evidence left the reason for the current situation about “Bandit” quite unclear.

[20] The Board of Directors of the THS is responsible for the direction and control of the affairs of that charitable corporation. The THS agreed to a settlement which I approved on April 1. In agreeing to the settlement the Board committed to turning over any animals left at 11 River Street on April 11, 2010. The Board has failed to do so; it has not complied with the Settlement Order. Instead, the THS has moved to maintain possession of “Bandit”.

[21] The so-called “obstacle” put forward by the THS as presenting such a difficulty to dealing with “Bandit” is no obstacle at all. A few moments reflection on the Destruction Order would have made that apparent. First, section 3 of the Destruction Order was never stayed – it was always open to the THS voluntarily to put down “Bandit”. But, more importantly, the only reason a stay of section 1 of the Destruction Order – the section requiring Bandit’s euthanization – remains in place is because apparently the THS wants it to remain in place. Why do I say that? Because it was the THS which asked the court back in 2004 to put the stay in place. The reason for the stay was not to prevent the THS from destroying “Bandit”; the reason was that the THS wanted to stop the City of Toronto from destroying “Bandit”. It has always been within the complete power and control of the THS Board to destroy “Bandit”, or to turn “Bandit” over to some other organization for destruction.

[22] Why the current Board of Directors of the THS did not take those steps once the THS had agreed to the settlement is beyond my comprehension. Why a member of the Board could not give me a straight-forward answer about why the THS had not dealt with a problem whose solution lies fully within the control of that organization baffles me.

[23] The Board of Directors of the THS has dropped the ball big-time on the issue of what to do with Bandit. The Board’s confused position on “Bandit” is not a good start to implementing a settlement which was supposed to put a new face on the THS. Those who run the THS – the Board – have to get their act together. Much time, effort, and expense has been spent over the past two months by all involved in this application. After all that, for the THS to come before

the court asking to keep “Bandit”, or seeking “directions” for a problem which is not a problem because its solution lies in the hands of the THS Board, signals to me that the Board perhaps has not yet recognized its obligations to the public and under the defined animal care regulatory regime, and that I was premature in giving the Board credit for having done so in paragraph 19 of my April 1 Reasons.

[24] Let me be blunt, since the more nuanced language of my April 1 Reasons seems to have been lost on the THS Board. If the Board of the THS truly intends to turn over a new leaf, then do so. Stop playing games. I am satisfied that the THS Executive Director, Mr. Jerome, is trying to implement a professional animal care program at the THS. It is time for the THS Board of Directors to start acting professionally in its governance of that organization. To send lawyers to court to seek a variance of the Settlement Order when the Board could easily have solved the problem in a minute is not a responsible way to run a charitable organization. If the settlement agreement is to stand any chance of success, and if the THS Board truly intends to leave its recent past behind, then the Board of Directors has to pull up its socks quickly and start doing some real governance work.

### **III. Conclusion**

[25] I dismiss the motion by the THS to vary the Settlement Order to permit it to keep “Bandit”. No operational conflict exists between my order and the orders of the courts below, including the stay. Two clear options are open to the Board of the THS - either put down “Bandit”, as section 3 of the Destruction Order permits, or immediately file a notice of abandonment of the appeal of the Destruction Order and turn “Bandit” over to the OSPCA who can then deal with the dog. Whichever option the THS decides to choose, it must be implemented by 5 p.m. tomorrow, Thursday, April 15, 2010. If I learn that “Bandit” remains in the possession or control of the THS after that deadline, I will reconvene a further hearing on my own motion pursuant to the court’s broad jurisdiction to supervise charities.

[26] I make no order as to the costs of the motion.

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D. M. Brown J.

**Date:** April 14, 2010