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Dogs Getting Their Day:
Alberta Court of Appeal Rejects End-runs Around Animal Cruelty Laws

By: Erin Sheley

Case Commented On: *Regina v Sanaee*, 2016 ABCA 289 (CanLII)

The year 2016 has been bleak for animals in Canada. In September, Montreal passed a new city bylaw banning the adoption of new pitbulls and pitbull mixes, and imposing stringent licensing and muzzling requirements on currently-owned dogs under threat of euthanasia. (See City of Montreal Regulation 16-060). And Parliament just voted down proposed amendments in Bill C-246, the *Modernizing Animal Protections Act,* which would have made modest changes to federal legislation such as banning the importation of shark fins removed from living sharks and products made from dog or cat fur. But on September 28, 2016 the Alberta Court of Appeal provided some good news for animal welfare supporters.

In *R v Sanaee*, 2016 ABCA 289 (CanLII), the Court of Appeal considered the appeal of a dog trainer convicted of two counts of causing unnecessary pain, suffering or injury to an animal, contrary to section 445.1(1)(a) of the *Criminal Code*, RSC 1985, c C-46. The facts developed at trial showed that, on two occasions, Mr. Sanaee had used an electric cattle prod to discipline dogs in his care. On one occasion he had used it in the dog's home, as part of training to curb food aggression (at para 3). After being stunned by the prod the dog "yelped and ran into the bathroom, where he stayed for 10 minutes with his tail between his legs" (at para 4). On the second occasion Mr. Sanaee was leading a community dog walk during which, according to the testimony of multiple witnesses, he used the cattle prod on a pitbull who had not been displaying any signs of violence (at para 5). In that case the dog "yelped or cringed and appeared to be in a lot of pain each time the cattle prod was used on it" (at para 5).

At trial the Crown led expert testimony from a veterinarian who gave the opinion that a cattle prod is excessively painful for use on dogs as it is made for adult cattle who are much larger and have thicker skin (at para 6). In addition, an animal behavioral consultant testified that a cattle prod is not considered an appropriate tool for dog training (at para 6). Mr. Sanaee did not present expert opinion evidence of his own. Instead he testified that he had not in fact used a cattle prod on either occasion, and that on the first occasion he had not even brought one to the dog's residence (at para 7).

After the trial judge rejected Mr. Sanaee's evidence and sentenced him to six months on each count, to be served concurrently, he appealed on two grounds (at para 10):

1. That the trial judge erred by relying on expert opinion evidence outside the scope of the witness's expertise and;
2. That the trial judge erred by not considering whether the appellant acted without a colour of right.

As to the first point, Mr. Sanaee argued that to show the element of "unnecessary" pain under section 445 the Crown would have needed to establish through expert testimony that the cattle prod in question "was capable of delivering a shock of 'X amperage and that the expert ought to have been able to establish that dogs feel pain at X amperage'" (at para 14). The trial judge had stated in her reasons that she was not required to rely on expert testimony to convict Mr. Sanaee in the first place. The Court of Appeal agreed. The Court rejected Mr. Sanaee's argument on the grounds that multiple lay witnesses testified to the physical manifestations of pain exhibited by both dogs (at para 15).

It has been established since *R v Graat*, [1982] 2 SCR 819,1982 CanLII 33 that lay witnesses are competent to testify to opinions based on "compendious" facts such as bodily plight or emotional state. (*Graat* at p 835). In that case, a police officer testified to the accused's intoxication based on his physical observations. As Justice Dickson then observed: "I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived." (at p 837). *Graat* has come to stand for the principle that lay witnesses may, rather than simply providing a laundry list of purely physical observations, synthesize those observations into an opinion about basic emotional and physical states.

In applying the *Graat* rule to *Sanaee*, the Court of Appeal implicitly rejected a very old myth about animal suffering: namely, that animals cannot feel pain in the way that human beings can. Seventeenth-century philosopher René Descartes posited that animals lack consciousness, and that assumption gave rise to a centuries-long justification for ignoring their suffering in clinical and other settings. Until very recently, scientists who asserted that animals *do* feel pain like humans, based on their analogous physical responses, were told they had the burden of affirmatively proving it. See Bernard Rollin, *The Unheeded Cry: Animal Consciousness, Animal Pain, and Science* (New York: Oxford University Press, 1989) at p 117-118. As science journalist Stephen Budiansky argued as recently as 1998, "sentience is not sentience, and pain isn't even pain…Our ability to have thoughts about our experiences turns emotions into something far greater and sometimes far worse than mere pain…Consciousness is a wonderful gift and a wonderful curse that…is not in the realm of the sentient experiences of other creatures." (Budiansky, *If a Lion Could Talk: Animal Intelligence and the Evolution of Consciousness* (New York: Free Press, 1998) at p 193-194)

In more recent years there appears to be greater scientific support for the proposition that animals do in fact feel pain in the same manner that humans do – a fact that would seem obvious to any pet owner who has ever inadvertently stepped on their companion's tail. While it may therefore also seem obvious that a human witness should be able to accurately report the manifestations of physical suffering in an animal, this assumption has been so controversial throughout much of the modern history of science that any judicial recognition of the fact is deeply significant. In rejecting Mr. Sanaee's argument on this head, the Court of Appeal also rejected a Cartesian binary that has justified a great deal of cruelty to animals.

Mr. Sanaee raised his second issue for the first time on appeal (at para 17). He claimed he acted with colour of right under section 429(2) of the *Criminal Code*, which provides a defence to offences under sections 430-466 of the *Code* where the accused can show "that he acted with legal justification or excuse and colour of right." (at para 17). The defence of colour of right generally arises in cases involving property offences – where the accused had a mistaken but genuine belief in legal permission to make use of another person's property. Here Mr. Sanaee

tried to argue that his use of the cattle prod was within the scope of permission granted by the owners of the dogs he was working with.

The Court quickly dispatched with that theory on the grounds that the appellant had failed to raise it at trial (at para 18). Indeed Mr. Sanaee had testified, not that he was given permission to use the prod, but that he had not in fact used the prod at all (at para 17). As a result, the Court held that the defence of colour of right had no air of reality, as there was no evidence on the record upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true (at para 21, citing *R v Cinous*, 2002 SCC 29 (CanLII), [2002] 2 SCR 29 at para 49).

While this procedural defect resolved Mr. Sanaee's second claim as a matter of law, the Court, in *obiter,* made an even more significant statement about its substantive merits:

> Belief by the appellant that he was entitled, in law, to inflict unnecessary pain in some circumstances does not create a "colour of right" to do so. This is a mistake of law. Further, even if a dog owner consented to or acquiesced in the use of a cattle prod, an owner cannot lawfully consent to the infliction of unnecessary pain (at para 23).

Had Mr. Sanaee raised the defence at trial, he would have had a plausible argument based on statutory interpretation. Section 429 creates the colour of right defence for the fairly small number of offences in Part XI of the *Code*. He could have therefore argued that Parliament explicitly intended for it to apply to each of them. But the Court rejected that reading, stating, essentially, that one cannot be said to believe in colour of right to do something inherently illegal. The belief that one has been granted such a right is therefore a mistake of law, and not a defence at all. In further stating that even actual consent by the owner would not provide a defence the court recognizes that the animal cruelty offence created by Section 445 confers protection on animals beyond their intrinsic property value to their owners. Rather, the animal itself is the beneficiary of the protection.

In just a few words of *obiter*, then, the Court touches on the massive controversy at the heart of animal protection legislation: can animals have rights? To avoid answering the rights question, legislators and commentators generally conceive of animal welfare laws as protecting the public morality, in the same way as vice offences. We don't need to ask the uncomfortable question if we recognize a public moral interest in prohibiting unnecessary cruelty in our society. Yet the Court does not mention the public interest at all. It simply notes that an owner cannot waive their pet's freedom from unnecessary pain secured by section 445 of the *Code*. Is this implicit recognition of a "right"? Perhaps not in the way we understand rights as immutable human freedoms secured by constitutional documents. But in the weaker sense of a legislatively conferred benefit flowing to a specific party, it certainly sounds like it.

In *Sanaee*, therefore, in only four short pages of reasons, the Alberta Court of Appeal drew some fairly significant conclusions about the legal and moral status of animals in Alberta. Those who seek to use the existing laws to better protect our animal companions have a significant new precedent on their side. Whether this case will prove generative remains to be seen, but it is a bright spot at an otherwise low point for animal protection.

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