

Citation: *Gillespie v. Cuthbert*, 2016 YKSM 8

Date: 20161103  
Docket: 16-S0041  
Registry: Whitehorse

**SMALL CLAIMS COURT OF YUKON**  
Before His Honour Judge Chisholm

EMERALD GILLESPIE

Plaintiff

v.

SHELLEY CUTHBERT<sup>1</sup> operating as ANY DOMESTICATED ANIMAL RESCUE AND  
BOARDING KENNELS

Defendant

**RULING ON *EX PARTE* APPLICATION**

[1] This is an application brought by the Plaintiff, Ms. Gillespie, for an order that Ms. Cuthbert be discovered. This application was brought without notice and the order was granted on October 21, 2016 without a hearing. Given the exceptional nature of such an application in a small claims court context, I have chosen to issue written reasons for granting it.

[2] The procedural history of this matter provides background necessary for understanding this order.

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<sup>1</sup> Ms. Cuthbert has indicated that her name is misspelled in the pleadings. I have corrected it in the body of these reasons.

[3] At the heart of this dispute is a Claim filed by Ms. Gillespie on September 2, 2016, seeking the return of a dog that had been boarding with Ms. Cuthbert in an attempt to resolve some behavioural issues. Ultimately, Ms. Gillespie determined that the dog would have a better home with a couple in Tagish, but when she tried to retrieve the dog from Ms. Cuthbert's kennel, Ms. Cuthbert took the position that Ms. Gillespie had surrendered the dog into her care. This is essentially the position taken in Ms. Cuthbert's Reply filed September 12, 2016, in which she also states that she became the *de facto* owner of the dog under the Yukon *Dog Act*, R.S.Y. 2002, c. 59 once he started residing on her property.

[4] On September 22, 2016, the court registry contacted Ms. Gillespie and Ms. Cuthbert in order to set up a pre-trial conference. Three dates were provided: October 13, November 3 or December 1. The Defendant advised, without providing any reasons, that she was not available until December.

[5] On September 23, 2016, the Plaintiff filed an application to request orders (i) setting the pre-trial for the November 3 date and (ii) placing the dog in the care of a third party pending resolution of the claim. That application was set for hearing on October 12. Ms. Cuthbert called the court registry just after 3 p.m. on September 23 (the day Ms. Gillespie says she served Ms. Cuthbert) and left a message advising that she was not available on October 12. Ms. Cuthbert did not respond to a subsequent voicemail message from the court registry requesting that she contact the registry in this regard. Again, Ms. Cuthbert provided no reason regarding her stated lack of availability.

[6] On September 30, 2016, Ms. Cuthbert filed an affidavit, although she did not serve the Plaintiff with this document. In it, she alleged that, on September 23, Ms. Gillespie attended on or near her property causing property damage and injury to dogs. Ms. Cuthbert advised in her affidavit that she had commenced peace bond proceedings against Ms. Gillespie. She also deposed that the dog had been removed from her property and that “[t]he new owner will determine if he will be adoptable to general public/special adoption or euthanized due to behaviors”. As indicated, my understanding is that Ms. Gillespie was at the property on September 23 to serve Ms. Cuthbert with notice of the October 12 application that she had filed on that date.

[7] On October 12, 2016, Ms. Gillespie’s application proceeded before me. Mr. Graham Lang appeared as counsel for Ms. Gillespie. Although aware of the hearing, Ms. Cuthbert did not appear nor did she make an application to adjourn. Based on the material already before the court and the submissions of counsel, I waived the pre-trial conference, set this matter down for trial on November 21, 2016 and ordered that the dog be removed from Ms. Cuthbert’s property and housed in the Mae Bachur Animal Shelter until the conclusion of these proceedings.

[8] Ms. Cuthbert filed an affidavit in court on October 17. In it, she indicated that she had been contacted by the animal shelter and reiterated that the dog was no longer in her care. It appears from an email attached to the affidavit that the dog in fact may no longer be in the territory. This general state of affairs is confirmed in the affidavit of Rachel Shipperbottom filed on October 18. Ms. Shipperbottom is an employee of the Mae Bachur shelter and she deposed that, while at Ms. Cuthbert’s property with the

RCMP on October 13 in an attempt to retrieve the dog pursuant to my order, she was told that he had been sent to Alberta.

[9] All of which brings me to this application for an order to discover Ms. Cuthbert without notice and without a hearing, which was filed on October 19. I granted the order on October 21, with the terms that discovery take place on November 7 at 9:00 a.m. and that service of the order be effected by mail.

[10] While the *Small Claims Court Regulations*, OIC 1995/152, as amended by OIC 2011/04, permit discovery, they constrain its use to circumstances where “the court is satisfied that special circumstances of the case make it necessary in the interests of justice” (s. 36(2)). I am satisfied this is such a case.

[11] From the circumstances outlined above, an inference can reasonably be drawn that Ms. Cuthbert moved the dog from her property after being served with notice of Ms. Gillespie’s application to place the dog with a third party. Her conduct in this regard is obstructive. The reference in her September 30 affidavit to the possible euthanizing of the dog is alarming in and of itself, and is even more so given the fact that Ms. Gillespie’s claim is being vigorously pursued in court.

[12] I am satisfied from the evidence before me that Ms. Cuthbert will not readily disclose the location of the dog, despite a court order requiring that he be placed in the Mae Bachur animal shelter. To the extent that compelling Ms. Cuthbert’s attendance for discovery before trial could reveal the dog’s whereabouts, granting this application is in the interests of justice.

[13] The more unusual aspect of the order I granted on October 21, however, is that it was made without notice to Ms. Cuthbert and on the basis of filed affidavit evidence and written submissions, without a hearing.

[14] Section 37 of the *Regulations* says the following with respect to applications:

37(1) Unless another provision of these regulations allows an application to be made without a hearing or the court so orders, an application for an order will require a hearing and may be made by filing

(a) a notice of application (Form 8); and

(b) an affidavit (Form 9) setting out evidence to support the application.

(2) Unless the court orders otherwise, a copy of the notice of application and affidavit shall be served by the party filing the application on every party who has filed a pleading, at least seven days before the hearing date, and proof of service shall be filed in accordance with section 24.

(3) Unless the court orders otherwise, if all parties consent to an application or another provision of these regulations allows the application to be made without a hearing, an application for an order without a hearing may be made by filing

(a) a requisition for order (Form 10);

(b) an affidavit (Form 9) setting out evidence to support the application; and

(c) a draft order (Form 11).

[15] It is apparent from this section that applications must be made with a hearing unless there is explicit provision within the *Regulations* for an application without hearing (s. 37(1)), an order of the court (s. 37(1)) or consent of all the parties (s. 37(3)). Similarly, it is apparent that a copy of the notice of application shall be served on all parties who have filed a pleading unless the court orders otherwise (s. 37(2)). There is

no explicit provision in the *Regulations* that would allow an application for discovery to proceed without a hearing.

[16] Neither the *Small Claims Court Act* nor the *Regulations* set out the circumstances in which a without notice or without hearing application should be granted by the court in accordance with ss. 37(1) and (2). In accordance with s. 1(2) of the *Act*, reference can be made to the Supreme Court Rules:

(2) Where matters are not provided for in these regulations, the practice may be determined with reference to the Supreme Court Rules, and at any stage in a proceeding, the court may make any order (Form 16) that is just.

[17] Rule 50(14) of the Supreme Court Rules says that the court can make an order without notice where “the nature of the application or the circumstances render service ... impracticable or unnecessary, or in the case of urgency”.

[18] Our Supreme Court has emphasized that orders without notice are extraordinary and should be made sparingly: see e.g. *K.P.L. v. R.W.E.*, 2015 YKSC 62; *Fine Gold Resources Ltd. v. 46205 Yukon Inc.*, 2016 YKSC 21. Where a without-notice order is requested, there is a broad and onerous obligation on counsel to ensure that full and frank disclosure is made of all material facts and matters (*Fine Gold*).

[19] The cautious approach articulated by the Yukon Supreme Court is the one that I would adopt in the small claims court context. It is imperative, especially given the number of self-represented litigants that come before this court, that the court’s proceedings be transparent and provide every opportunity for parties to respond to matters. Where, however, the record clearly indicates that one party is attempting to

thwart the unfolding of a full and fair process, and where, as here, there are circumstances of urgency, it is appropriate to exercise the court's jurisdiction to issue an order without notice. I find that Ms. Cuthbert's statements about the dog being sent out of the jurisdiction for possible euthanasia create a situation that requires swift action.

[20] The nature of the order sought also persuades me that it is appropriate to make it on a without-notice basis. An order for the discovery of Ms. Cuthbert will not have a significant impact on anyone's rights or well-being as would, for example, an order for the interim custody of a child or an order for the seizure of property or the freezing of assets.

[21] As well, I am satisfied that the material filed by Ms. Gillespie, when coupled with the affidavit material contained in the court file, provides a sufficient evidentiary basis to make this order without a hearing. The affidavit evidence I am relying on comes from affidavits filed by both the Plaintiff and the Defendant and is largely consistent in terms of the location and status of the dog.

[22] As is the case with an order without notice, as a general rule the power of the Small Claims Court to issue an order without a hearing under s. 37(1) of the *Regulations* should be exercised with restraint. Having considered the circumstances of this case and the nature of the order sought, I find this is not a situation where an appearance by Ms. Gillespie or her counsel is necessary to satisfy me that the order being sought is just. In my view, given the nature of the order being sought and the evidentiary record, there is no compelling argument against Ms. Cuthbert's discovery that could be advanced in the circumstances.

[23] Finally, Ms. Gillespie sought that my order be served on Ms. Cuthbert by mail and that the calculated time for deemed service be reduced. Under s. 23 of the *Regulations*, where a document is served by mail, “service ... shall be deemed to have been effected on the tenth day following the date of mailing”. Ms. Gillespie’s draft order contemplated that service would instead be deemed effected on the fifth day following the date of mailing.

[24] While I do have jurisdiction under s. 72(2) of the *Regulations* to lengthen or shorten any prescribed time, I declined to do so in these circumstances. As the date set for the discovery of Ms. Cuthbert is November 7, I am not convinced it is necessary to shorten the time for deemed service. By my calculations, ten days from October 21 as determined under s. 72(1) of the *Regulations* is October 31. If service is deemed effective on October 31, then there are still seven days before the date set for Ms. Cuthbert’s discovery. Given the fact that Ms. Cuthbert’s address for delivery is a post office box and that she lives in a rural area, I am reluctant to shorten the deemed service date.

[25] Secondly, although there does not seem to be a notice requirement for a discovery examination in the *Regulations*, the notice time for an application is seven days (s. 37(2)), which provides a useful reference point. Seven days is also the notice required for an appointment to examine for discovery under Supreme Court Rule 27(15). I consider seven days’ notice to be sufficient for Ms. Cuthbert and of examinations for discovery generally and have no concern about the application of the regular timing provisions in the *Regulations* applying here.



[26] In the very unusual circumstances of this matter, I have found that time is of the essence and that an order for discovery, without notice to Ms. Cuthbert and without hearing, is appropriate. I should add that I am troubled by the fact that neither Ms. Cuthbert nor her agent attended the October 12 application, despite having been served with notice. If Ms. Cuthbert does not attend the November 7 discovery date, the Court will consider options available to it under the legislation to respond to the non-attendance.

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CHISHOLM, T.C.J.