SUPREME COURT OF YUKON

Citation: *Angerer v. Cuthbert*, 2017 YKSC 41

Date: 20170714
S.C. No. 16-A0132
Registry: Whitehorse

BETWEEN:

STEFAN LUDWIK ANGERER
URSULA ANGERER
LEOPOLD SELINGER
EDELTRAUD SELINGER
GERRY MCGRAW
STEFAN LANDFRIED

PLAINTIFFS

AND

SHELLEY R. CUTHBERT

DEFENDANT

Before Madam Justice G. Miller

Graham. Lang — Counsel for the Plaintiffs
Shelley Cuthbert — Appearing on her own behalf

APPLICATION JUDGMENT

INTRODUCTION

[1] The Plaintiffs and Defendant own neighbouring plots of land located in the Tagish Lake area of the Yukon for which there is no zoning or local area plan governing use of the properties owned by the Plaintiffs or the Defendant.

[2] The Plaintiffs filed a Statement of Claim November 15, 2016 against the Defendant seeking:

1) a declaration that the keeping of animals on the Cuthbert parcel of land creates a nuisance which unreasonably interferes with the use and enjoyment of the Plaintiff's parcels;

2) an injunction prohibiting the keeping of any animals on the Cuthbert parcel; and the operation of a generator on the Cuthbert parcel;

3) in the alternative, a declaration that the keeping of animals and operation of a generator on the Cuthbert parcel causes a contravention of the *Noise Prevention Act* and an injunction in accordance with s. 7 of that *Act*;

4) an order that any injunction be registered against title to the Cuthbert parcel as a restrictive covenant; or

5) in the event that injunctions are not granted, damages for a) loss of value to the Plaintiff's parcels; b) loss of economic value tied to the businesses on the Plaintiffs' parcels; and c) loss of opportunity and loss of profit.

[3] A trial of this matter is scheduled to be heard September 20-22, 2017.

[4] Today two of the Plaintiffs in the suit, Leopold Selinger and Stefan Landfried, bring an Application for an interim injunction, pending the outcome of the trial,

1) limiting the number of dogs on the Cuthbert property to five; and

2) prohibiting any dogs to be outside Ms. Cuthbert's home between 10 p.m. and 7 a.m.

[5] As set out in the Supreme Court of Canada decision of *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] S.C.J. No. 17, an applicant for an injunction must demonstrate there is a serious issue to be tried; that irreparable harm will result if the injunction is not granted and that the balance of convenience lies in their favour.

[6] The Applicants rely on evidence they submit establishes the basis for their nuisance suit as a serious issue to be tried; that they will suffer irreparable harm if the injunctions are not granted and that greater harm will result to them if the injunction is not granted than would to the Respondent if it is.

[7] The Respondent submits that the evidence falls far short of establishing a basis for the nuisance suit and in particular that there is causal connection; that the Applicants have not demonstrated that they will suffer harm that cannot be compensated for in damages and that the Respondent will suffer greater harm if the injunction is granted than would the Applicants if it is not.

THE LAW

[8] Jurisdiction to grant interlocutory injunctions is set out in s. 26 of the *Judicature Act*, R.S.Y. 2002, c.128.

[9] The test for whether an injunction should be granted is set out in *RJR*, at paragraph 43:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[10] In determining whether there is a serious question to be tried, the Court offered the following guidance at paragraphs 49-51:

> 1) There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case.
>
> 2) Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.
>
> 3) An exception to the general rule that a judge should not engage in an extensive review of the merits is when the result of the interlocutory motion will in effect amount to a final determination of the action for example when the result

> of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. The Court cited Lord Diplock in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:
>
> > Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

[11] In determining the question of irreparable harm, the Court indicated at paragraphs 58-59:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples include instances where one party will be put out of business by the court's or where one party will suffer permanent market loss or irrevocable damage to its business reputation. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration.

[12] In respect of the balance of convenience the Court indicated at paragraph 62 that many interlocutory proceedings will be determined at this stage.

[13] At paragraph 63 the Court indicated that the factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case but that, at paragraph 66:

> …either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

THE EVIDENCE

[14] The evidence relied on by the Applicants is that set out in the affidavits of Leopold Selinger and Stefan Landfried sworn May 10, 2017 and the reply affidavits of Leopold Selinger and Stefan Landfried sworn June 28, 2017. Their contents may be summarized as follows:

1. Mr. Selinger resides seasonally on a property immediately adjacent to that of Ms. Cuthbert and has done so since 2001. Ms. Cuthbert purchased the neighbouring lot in 2012 and operates an animal shelter thereon, known as Any Domestic Animal Rescue. The noise from the animal shelter including the generator disturbs him and his wife at all hours. He is not able to enjoy the use of his property specifically sitting outside his home or "otherwise make use of the area of land adjacent" to Ms. Cuthbert's. Further, intermittent barking at night disturbs his sleep. Exhibited to Mr. Selinger's affidavit are what he describes as diary entries detailing numerous instances in September, October and November 2012, April-October 2013, May-October 2014, May-October 2015 and April-September 2016 of night-time barking and howling, of dogs attending his

property and three instances when he has noted that because of the direction of the wind that it stinks. In addition Mr. Selinger diarized instances of smoke from burning and "car noise". Also exhibited to Mr. Selinger's affidavit is a flash drive of video footage taken by the Plaintiffs Angerer in October and November 2016 and by himself in May 2017.

2. These videos for the most part depict the dogs coming to the fence of Ms. Cuthbert's property and barking at the videographer.

3. In his reply affidavit Mr. Selinger confirms that he has never spoken directly to Ms. Cuthbert in relation to the noise and odour issues but has made numerous complaints to police, the Local Advisory Council and his MLA. He indicates that he is unable to make any use of his property near Ms. Cuthbert's fence as that attracts barking from the dogs. He indicates that while he and his wife previously enjoyed gardening, walking the property and sitting outside they no longer find such pursuits enjoyable due to the noise and odour.

4. He indicates he has taken his own steps to attempt to remediate the situation by using wooden shutters and Styrofoam bafflers on his windows at night and by moving his bedroom to a position farther away from the property line. He confirms that he rejected the suggestion of the MLA to construct a privacy fence because he felt it would be unsightly and would do nothing to lessen the noise. Mr. Selinger denies that either he or his wife harasses or taunts the dogs in any way.

5. Mr. Landfried resides on a property immediately adjacent to that of Ms. Cuthbert and has done so since 2000. He has operated a business renting cabins on his property since 2003. Ms. Cuthbert purchased the neighbouring lot in 2012 and operates an animal shelter thereon. Mr. Landfried exhibited to his affidavit a news article dated November 2, 2016 in which Ms. Cuthbert is quoted saying her shelter houses over 80 dogs.

6. Mr. Landfried swears that the noise from the animal shelter disturbs both himself and his customers at all hours; that he is not able to enjoy the use of his property, his sleep is disturbed and his cabin rental business suffers. He attaches two pieces of correspondence he says are from customers in which they comment on the "terrible dog noise even during the night". Exhibited to Mr. Landfried's affidavit is a flash drive containing 8 short videos from Ms. Cuthbert's Facebook page, a CBC video from 2016 and 11 videos taken by Mr. Landfried between October 2016 and May 2017.

7. These videos depict significantly loud barking. Although the video clips are short the narrator describes the depicted barking as going on for 2-3 hours at a time.

8. In his reply affidavit Mr. Landfried confirms that he has never spoken directly to Ms. Cuthbert regarding the issues but that he has called police on multiple occasions, has contacted the MLA and Local Advisory Council and has contacted the media. He denies harassing or taunting any of the dogs. He confirms that there have historically been mushers and other people in the neighbourhood who keep animals on a "hobby" basis but

there was never a problem with noise or odour before Ms. Cuthbert began operating the shelter.

[15] The evidence relied on by the Respondent is contained in the affidavits of Shelley Cuthbert sworn June 23, 2017 and July 6, 2017; the affidavit of Michelle Parsons sworn June 13, 2017; the affidavit of Amy Grenier sworn June 22, 2017; and the affidavit of Colin Hickman sworn June 20, 2017, summarized as follows:

1. Ms. Cuthbert confirms that she purchased the property at 1048 Tagish Estates Road April 1, 2012. She describes the property as "just shy of 5 acres". She observes that the Selingers are resident on their property only from April to September each year; that Mr. Landfried goes to Mexico each winter; that the Angerers do not reside on their property but operate a sawmill there and that no one lived on the McGraw property until last year.
2. Ms. Cuthbert indicates that there are several mushers in the area with anywhere from 30-60 dogs on various properties. She further notes that there are no regulations in the area governing dogs running at large and that there are many in the area that provoke the dogs on her property into barking. She notes as well the presence agricultural endeavours leading to an increase of wildlife in the area including wolves, bears, coyotes and foxes. Ms. Cuthbert acknowledges that the local MLA and police requested, in October 2012, that she attend a meeting of the Local Advisory Committee. Exhibited to her affidavit are the October 3, 2012 Minutes of the Tagish Advisory Council in which it is noted that Tagish

does not fall under the Dog Act regulations and that dogs are permitted to run at large; there is no legislation pertaining to noise; that police can investigate Criminal Code violations of causing a disturbance and public mischief but that it is difficult to lay charges relating to noisy dogs. It is noted that the RCMP will respond to any immediate threat of harm and that the Animal Welfare Officer should also be notified. The Minutes note that a specific situation regarding dogs in Tagish Estates was discussed. It was suggested that members of the community could meet with the dog owner to discuss solutions and that the MLA and police would also meet with this person to try to come up with a solution.

3. Ms. Cuthbert indicates that she did meet with the MLA, police and two members of the Local Advisory Committee and agreed to have a privacy fence erected between the Selinger property and hers. The materials and labour were being provided by the community. The Selingers refused. Ms. Cuthbert notes that none of the neighbours have attempted to speak to her directly about any of their issues.

4. Ms. Cuthbert advises that she added her own privacy fence at her own expense over 2014 and 2015 investing some $80,000 in fencing and yard improvements in order to mitigate the issues.

5. In response to the assertion by Mr. Landfried that he has lost business as result of the dogs on Ms. Cuthbert's property she indicates that a competing business, offering a riverside location and a restaurant, opened in May 2012.

6. Ms. Cuthbert observes that she frequently sees the Selingers walking around their property without any dogs barking at them until they begin speaking to the dogs. Ms. Cuthbert asserts that Mr. Landfried provokes the dogs into barking when he videotapes her property and also plays loud music at all hours of the night during the summer months.

7. Ms. Cuthbert asserts that 90% of the dogs are indoors at night but are provoked into making noise by guns being shot off in the area, people throwing golf balls at them, people talking to the dogs and sticking fingers through the fencing, other dogs in the area coming and going and barking and howling, wildlife and people honking car horns in passing. She asserts that the dogs settle after about 10 minutes unless people continue to bother them. Ms. Cuthbert asserts that some of the barking captured on video are dogs other than hers.

8. Ms. Cuthbert indicates that the yard is cleaned daily and sometimes twice daily of dog waste which is disposed of off the property. Ms. Cuthbert indicates that the RCMP, Local Advisory Council and Animal Welfare officer inspect the property yearly and have had no issues. She exhibits to her affidavit the Minutes of the Tagish Advisory Council of December 5, 2012 in which police indicated one of the dogs was poisoned with anti-freeze and that there had been a few incidents of mischief and minor vandalism of the property. Police advised they had attended the property with a member of the Local Advisory Council and were confident the dogs are secure and the fencing is solid.

9. Ms. Cuthbert details various incidents in which she has been harassed online and in person, dogs have been deliberately provoked by people attending on or near her property and fencing damaged.

10. Exhibited to Ms. Cuthbert's affidavit are many letters from persons who have resided on the Cuthbert property or have otherwise been involved with Ms. Cuthbert's business or the dogs. They corroborate Ms. Cuthbert's description of the operation, her good care of the dogs and of the harassing behaviour of others Ms. Cuthbert has received from time to time.

11. Also exhibited to Ms. Cuthbert's affidavit are a number of photographs and video clips. These depict the housing and yard arrangements for the dogs, the cleanliness of the premises and numerous short clips showing the dogs calm and quiet in different circumstances. The video clips also show the dogs reacting, by running to the fence and barking loudly on occasions when Mr. Angerer has come right to the fence line and appears to be videoing or photographing the Cuthbert property. The photographs also depict the results of an encounter between the dogs and a porcupine on Ms. Cuthbert's property and what she describes as injuries incurred between the dogs when they have been provoked.

12. Ms. Cuthbert notes that the generator is used by current roommates who she expects to leave.

13. Ms. Cuthbert asserts that without the income she earns through the operation of her shelter she would have to rely on social assistance.

14. Ms. Cuthbert notes that Mr. Landfried himself operates a business on his property and that numerous uses, not strictly residential, are made of various properties in the community. In particular she notes that other properties are used by mushers who also have many dogs on those properties.

15. Michelle Parson, Executive Director of the Carcross/Tagish First Nation confirms that Shelley Cuthbert is contracted by them to provide dog control services. She indicates that the Carcross/Tagish First Nation Government has made dog control a priority since 2012 as citizens fear for their/their children's safety with dogs running at large. She indicates that there have been numerous complaints of loose dogs "packing up" within the Traditional Territory of the Carcross/Tagish First Nation to which Ms. Cuthbert has responded. She indicates that Ms. Cuthbert provides an essential service to the Carcross/Tagish First Nation Government. She indicates she has visited Ms. Cuthbert's property and believes it is well run and the dogs well cared for.

16. Amy Grenier, a client of Any Domestic Animal Rescue, indicates that she uses the boarding facility operated by Ms. Cuthbert frequently. She has visited the facility several times finding it to be "clean, organized, well fenced, responsibly run, safe and full of happy dogs".

17. Colin Hickman, a former resident and former Recreation Director for the Tagish Community Association has adopted a dog from Any Domestic Animal Rescue and boards his dogs at the facility. He indicates while an

> employee of the Tagish Community Association he observed negative comments made toward Ms. Cuthbert. He speaks to the kindness shown by Ms. Cuthbert to persons in the community and indicates that she takes exceptional care of all the dogs, devoting time, effort and finances to providing the dogs with a safe and healthy environment and that he has never experienced the lot to be insecure or unsanitary.

ANALYSIS

Serious Question to be Tried

[16] The Applicants acknowledge that as the relief requested may lead to a shuttering of Ms. Cuthbert's operation and therefore may be a final determination of the matter the Court may wish to engage in a more extensive review of the merits of the case.

[17] The Applicants submit that the evidence before the Court satisfies the elements for the tort of nuisance. They rely on a summary of the law set out in *Conrad v. Jinchi* 2011 ONSC 6985 at paragraph 13 referencing the Supreme Court of Canada decision in *Schenck v. Ontario (Minister of Transportation and Communications); Rokeby v. Ontario*, [1987] S.C.J. No. 55 as follows:

> the specific elements of the modern tort of nuisance are:
>
> a. Substantial interference with or damage to the plaintiff's lands;
>
> b. A causal link between the interference and the plaintiff's lands and the use of the defendant's lands; and
>
> c. A finding that the use of the defendant's land is unreasonable having regard to locality in question, the utility of the defendant's conduct and the extent of the interference with the plaintiff's interest.

[18] My review of the *Schenk* decision does not result in such a clear articulation. The Supreme Court simply affirmed the Court of Appeal decision which in turn affirmed the decision at the High Court of Justice of Ontario.

[19] Nonetheless, I can rely on the Supreme Court of Canada's description of the common law of nuisance in Canada in *St. Lawrence Cement Inc. v. Barrette* [2008] S.C.J. No. 65 at paragraph 77:

> At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct (A. M. Linden and B. Feldthusen, Canadian Tort Law (8th ed. 2006), at p. 559; L. N. Klar, Tort Law (2nd ed. 1996), at p. 535). Nuisance is defined as unreasonable interference with the use of land (Linden and Feldthusen, at p. 559; Klar, at p. 535). Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (Linden and Feldthusen, at p. 559). The interference must be intolerable to an ordinary person (p. 568). This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity (p. 569). The interference must be substantial, which means that compensation will not be awarded for trivial annoyances (Linden and Feldthusen, at p. 569; Klar, at p. 536).

[20] It is the position of the Applicants that this evidence shows a substantial interference with the enjoyment of the Selinger and Landfried properties caused by the noise and odour from the dogs.

[21] The Applicants rely on a statement of law set out in Linden and Feldthusen, at p. 569 cited in *Conrad v. Jinchi* at paragraph 14:

> The onus of proof that the defendant caused an unreasonable interference with the use and enjoyment of the plaintiff's land rests on the plaintiff, but once that is shown, the onus is on the defendant to establish that the use of the land is reasonable.

[22] It is the Applicant's position that Ms. Cuthbert has not shown that the use of the land is reasonable. They submit that the severity of the noise is not that which a reasonable person would be expected to endure; the Applicants are not unusually sensitive nor are they using their properties in any unusual way; the neighbourhood is primarily residential and any social utility of Ms. Cuthbert's operation does not approach that of other legal examples such as hospitals or highways. The Applicants take the position that the "community mobbing" Ms. Cuthbert complains of demonstrates that the social utility of her operation to the immediate community is very limited.

[23] The Applicant Selinger in particular points to evidence that he and his wife purchased their property for peaceful retirement use which use has been disturbed by the Respondent's dogs.

[24] The Applicants acknowledge the statement of law set out in *340909 Ontario Ltd. v. Huron Steel Products (Windsor) Ltd.* [1990] O.J. No. 997 (C.A.) at page 14:

> The importance of the defendant's enterprise and its value to the community is a factor in determining if the defendant's conduct is unreasonable. However, this tends to go to the leniency of the remedy, rather than liability itself. Furthermore, the question whether the defendant took all reasonable precautions is relevant as to whether the interference is unreasonable.

[25] In response they submit that:

1) the operation is private endeavour of Ms. Cuthbert;

2) the utility of the operation is enjoyed almost exclusively by Ms. Cuthbert and others from outside of the community;

3) the issue of dog control can be accomplished by euthanizing animals as opposed to the cost and noise related to keeping "unadoptable" dogs in the long term; and

4) Ms. Cuthbert, short of erecting a wire fence, took no steps to curb the noise issue and in fact heightened the problem by taking in more dogs in the face of objection from the community.

[26] The Applicants rely on the case of *Anderson v. Jeffries* [2008] B.C.J. No. 2000 (S.C.) on similar facts in which the court awarded a permanent injunction against the defendant.

[27] The Respondent takes the position that the Applicants have not demonstrated a causal connection between her use of her property and the loss of enjoyment in the use of their properties. In particular she points to evidence that the Applicants' efforts to create support for their position in the community has resulted in various incidents in which persons in the area have deliberately provoked the dogs into barking. She points as well to the video evidence of the dogs reacting to Mr. Angerer's presence at the fence line as provocation. Absent this interference, she submits, the Applicants' enjoyment of their property would not be affected in any significant way.

[28] The Respondent also points to evidence of the importance of her operation enterprise and its value to the community. This supports her position that her use of her property is reasonable in all of the circumstances. She points to the social service she provides by way of dog rescue and safe return of those animals to the community, animal control and indeed instances in which she has housed dogs for the RCMP during their investigations.

[29] In respect of the reasonableness of her use of the land the Respondent points to the fact that neither Applicant has ever approached her directly in order to resolve matters in a 'respectful, adult manner''. She points to her own significant efforts to remediate the issues at significant cost including time and effort.

[30] While Ms. Cuthbert raises some significant issues in respect of causation and has strong evidence of the social utility of her operation, I find that the very low threshold of a serious issue to be tried has been demonstrated by the Applicants.

Irreparable Harm

[31] The Applicants submit that the type of harm is not one that can be cured by an award of monetary damages and further that Ms. Cuthbert would be unable to pay any damages.

[32] The Applicants rely on *Suzuki v. Munroe* [2009] B.C.J. No. 2019 (S.C.) at paragraph 111 which stated:

> In situations where the nuisance is likely to continue without the granting of the injunction, as is the case here once the interlocutory order ends … the inadequacy of damages is easily satisfied: Linden & Feldthusen, Canadian Tort Law at 594.

[33] They further rely on *Walker et al. v. Pioneer Construction Co*. (1967) Ltd. (1975), 8 O.R. (2d) 35 (H.C.J.) wherein Morden J. (as he then was) indicated that the loss of even one night's rest is no trivial matter (*Andreae v. Selfridge & Co.,* [1938] Ch. 1, 8).

[34] The Applicants rely on evidence that Ms. Cuthbert has outstanding judgments against her in support of their position that she is unlikely to be able to pay any damages.

[35] The Respondent submits that an interim injunction would cause irreparable harm by causing many dogs to lose their homes, Ms. Cuthbert to lose income and dogs possibly losing their lives. She submits that a restriction on letting dogs out at night could be viewed as animal cruelty as it would prevent house-trained dogs being unable to relieve themselves when needed. The Respondent further submits that singling out her property in an area unregulated as to use unfairly discriminates against her on the ground of source of income prohibited by the *Human Rights Act*.

[36] I find the evidence of any potential monetary harm to either of the Applicants to be marginal at best. Mr. Landfried has provided no evidence beyond a bald statement that his business has been negatively affected by Ms. Cuthbert's dogs; he does not address the point raised by Ms. Cuthbert as to the impact of a competing business coincident with Ms. Cuthbert's purchase of her property; and, I find that the two pieces of correspondence which Mr. Landfried claims are from customers to be suspiciously similar in both form and content, suggesting that they have been either manufactured or dictated by Mr. Landfried.

[37] Counsel for the Applicants, in the course of argument, indicated that his clients have abandoned any claim for monetary damages.

[38] It is trite to say, however, that loss of sleep over a protracted period of time amounts to irreparable harm, and so I find that the Applicants have met their onus on the second part of the test for an interlocutory injunction.

The Balance of Convenience

[39] The Applicants submit that the Court must weigh the on-going interference with the Applicants' basic use of their land against any consequences faced by Ms. Cuthbert should the requested relief be granted.

[40] They submit that the interference to their use of their property is acute as Mr. Landfried, Mr. Selinger and his wife are not able to enjoy the use of the outside of their properties and their sleep is frequently and for long periods disturbed and Mr. Landfried's business suffers as his customers are disturbed day and night. They submit that the peaceful use of their properties outweighs the negative repercussions of shutting down Ms. Cuthbert's operation as her operation is revenue negative and she would suffer only the out-of-pocket costs of moving or disposing of the dogs for which she could be compensated by the Applicants if she is ultimately successful in this action.

[41] The Applicants submit that the dog control function performed by Ms. Cuthbert is not intrinsically linked to keeping dogs on a long term (to end of natural life) basis and that dog control in other areas is performed on the basis that unadoptable dogs will be euthanized within a relatively short period of time.

[42] Further, the Applicants submit that the requested relief would permit Ms. Cuthbert to retain five dogs, which would allow her to maintain her dog-catching contract with Carcross/Tagish First Nation provided the animals are kept inside at night.

[43] The Applicants submit that any impact on Ms. Cuthbert would be relatively short-term given the scheduled date for a final determination of this matter.

[44] The Respondent submits that the economic impact on her, in respect of being unable to comply with her contractual obligation to provide dog control to the Carcross/Tagish First Nation and the loss of daycare and boarding income will be significant.

[45] In addition, and more significantly, Ms. Cuthbert's approach to ensuring that the dogs she takes in are safe to be adopted requires a period of time, sometimes up to six months depending on the dog's history, in order to ensure that the dog is well cared for; in a stable environment and sufficiently socialized to be a safe companion dog. In addition, the dog needs to be matched with an appropriate new owner, all of which takes time. It is her position that if she is forced by a court order to "move out" the dogs in short order, many dogs will have to be euthanized as they are not yet ready to be safely adopted.

[46] The Respondent's position is that the harm to her of the interim injunction proposed would be permanent and irreversible.

[47] I am not persuaded in all of the circumstances that the balance of convenience lies in the Applicants' favour. In part this is due to the relatively short time (70 days) between now and the trial date.

[48] I am of the view that while the Applicants might enjoy undisturbed use of their properties over that time period, realistically, as acknowledged by counsel for the Applicants, Ms. Cuthbert would have to be granted a reasonable period of time in order to place the dogs elsewhere. Taking this into account, the relief to the Applicants would be very short term indeed, and with, I am satisfied, devastating effect on Ms. Cuthbert both economically and psychologically.

[49] For these reasons the Application fails on the balance of convenience test.

[50] It is open to the Court in granting the relief permitted pursuant to s. 26 of the *Judicature Act*, to impose any terms and conditions the Court thinks just. I have considered in that light whether the sole portion of the relief sought which would require Ms. Cuthbert to keep the dogs inside at night is a viable option, tilting the balance of convenience in the Applicants' favour.

[51] I am persuaded, however, that given the nature of the dogs which Ms. Cuthbert maintains must remain outdoors on a 24-hour basis, that even an injunction of that nature would cause greater hardship on the Respondent than the Applicants will suffer in the short period of time between now and the trial.

[52] The Application is dismissed.

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MILLER J.