

SUPREME COURT OF YUKON

Citation: *Angerer v. Cuthbert*,
2017 YKSC 54

Date: 20171011
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 Mr. Justice L.F. Gower

Appearances:

Graham Lang
Shelley R. Cuthbert

Counsel for the Plaintiffs
Appearing on her own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an action in nuisance claiming a permanent injunction to restrain the defendant, Shelley Cuthbert, from operating a dog rescue operation on her five acre property in Tagish Estates (“Lot 1048”), in the unincorporated community of Tagish, Yukon. The plaintiffs are all immediately adjoining neighbours of Ms. Cuthbert and all but one were residing on their respective properties before Ms. Cuthbert purchased her property in 2012. The neighbourhood is rural residential and includes at least one dog

mushing operation as well as a few hobby farms. As of the time of trial, Ms. Cuthbert claimed to have about 60 dogs on her property, but in 2016, there were as many as 80. The plaintiffs claim that their use and enjoyment of their respective properties has been negatively affected by the incessant noise from Ms. Cuthbert's barking dogs, the smell of dog feces from her property, and the sound of her power generator. Ms. Cuthbert claims that the dogs do not bark constantly and that she has taken several steps to mitigate the problem. She also emphasizes the social utility of her dog rescue operation. Because Tagish is an unincorporated community, it does not have the authority to pass local bylaws respecting dogs or noise and there is no territorial legislation which applies to address a problem with nuisance caused by dogs.

[2] The issue is whether the plaintiffs can establish an interference with the use and enjoyment of their respective properties which is both substantial and unreasonable and, if so, whether Ms. Cuthbert has a defence.

EVIDENCE

The Plaintiffs' Case

Gerry McGraw

[3] Mr. McGraw is a 68-year-old retired electrician. He lives on Lot 1066-2 in Tagish Estates. It appears that his property is about 10 acres. Half of his southeast property line is immediately adjacent to Ms. Cuthbert's lot, 1048. In other words, the entire northwest boundary of Ms. Cuthbert's lot abuts Mr. McGraw's lot.

[4] Mr. McGraw purchased his property in 1995 and spent several years developing it. From 2000 to 2010, he resided there about 50% of the time. After retiring in 2010, he

was there almost all of the time. He built his retirement home on the property and in 2012, he moved in full-time.

[5] Until 2012, Mr. McGraw had no issues with dogs barking in the area, although he was aware that there were some dog mushers residing in Tagish Estates. After Ms. Cuthbert moved onto her property in 2012, Mr. McGraw said the noise level went up drastically. Initially, he recalled that she had about four to six dogs, but the number soon increased significantly. He said the dogs barked every day, sometimes for hours. He would not say that they never stopped, but described the barking as “pretty constant”.

[6] Mr. McGraw testified that the level of barking has been “pretty much the same” since then. He said twice that the noise is “just too much”. He said that it is very rare that he sleeps all through the night without being awakened by the dogs. He testified that he cannot sit outside much anymore and enjoy his yard because of the barking. Mr. McGraw said that the barking is affecting his health and well-being because he does not get proper sleep, and he is often angry and anxious about it. He testified that he does not like going down to his shared property line with Ms. Cuthbert, because often as many as 10-to-12 dogs at a time come up to the fence barking and lunging at the fence and he is scared that they might breach the fence and attack him.

[7] Mr. McGraw described the predominant use of the Tagish Estates area as residential, although he understands it is also a rural area.

[8] In cross-examination, Ms. Cuthbert attempted to challenge Mr. McGraw about the fact that he could not be certain that he was hearing her dogs barking, as opposed to other dogs, such as those belonging to a nearby musher. Mr. McGraw responded

that he was sure it was not the musher's dogs and that he was "100% for sure positive" that the dogs he was hearing and seeing were Ms. Cuthbert's dogs.

[9] Initially, in 2012, when Ms. Cuthbert first moved onto her property, Mr. McGraw had a problem with some of her unfriendly dogs coming onto his property and frightening him, however he credited Ms. Cuthbert with taking care of that problem fairly quickly and containing her dogs. In general, the problem with dogs at large was resolved within the first year.

[10] Mr. McGraw did not have any particular issue with generator noise coming from Ms. Cuthbert's property. He said nothing about the smell of dog feces from Ms. Cuthbert's property.

[11] He was asked why he came to court to testify and responded, "The situation needs to change, there is something wrong here, it is not right."

[12] I found Mr. McGraw to be a credible witness. He was not seriously challenged by Ms. Cuthbert on cross-examination and I generally accept his evidence.

Anne Middler

[13] Ms. Middler is a 41-year-old self-employed environmental contractor. She is not one of the plaintiffs, but testified in their support. Ms. Middler purchased Lot 1050 in Tagish Estates in 2004. This lot is one lot over from Ms. Cuthbert's property, separated by Lot 1049, which is owned by Mr. and Mrs. Selinger. The southwest boundary of Ms. Middler's property is about 95 metres from the northeast boundary of Ms. Cuthbert's property. Ms. Middler can see Ms. Cuthbert's property from her deck.

[14] In 2011, Ms. Middler decided to build her "dream home" on Lot 1050 for herself and her baby daughter. She completed the home in 2012 and moved in, about the

same time as Ms. Cuthbert was moving on to her property. Ms. Middler described this as “a real turning point” because the noise level from barking increased.

[15] Ms. Middler said there is sometimes barking from 11 p.m. to 1 or 2 a.m. When asked to describe the level of barking from 2012 until the present, she responded that there are times when it does not seem so bad and then there are times when it is worse. Ms. Middler testified that the noise varies from either one dog to as many as 80 all “going at it”. She said that the barking noise is “more often there than it is not” and that it can be nonstop, all through the entire night and all day long. She can hear the dogs barking from inside her house. She has a hard time being in her yard because of the noise and that sometimes she cannot carry on a conversation because the noise is “inescapable” and “unbearable”.

[16] At one point in her testimony, Ms. Middler broke down into tears when she described the barking noise as “crazy-making and relationship destroying”. She said that Ms. Cuthbert’s property is not an appropriate location for this type of dog facility.

[17] When cross-examined about other dogs in the neighbourhood, Ms. Middler testified that she knows several of them and does not fear them. She said it is not that they never bark, but rather that they are not a problem. She said that the sound of their barking is entirely different and is usually short-lived, i.e. no longer than five minutes at a time. Ms. Middler testified that she knows the problem barking is coming from Ms. Cuthbert’s property.

[18] Ms. Middler described the Tagish Estates neighbourhood as a “mostly residential area”.

[19] I found Ms. Middler to be a generally credible witness and she was not significantly challenged by Ms. Cuthbert on cross-examination.

Stefan Angerer

[20] Mr. Angerer is 53 years old and is a master builder of prosthetic limbs. He has lived in Tagish since 1990. He purchased Lot 1047 in 2002. Lot 1047 is immediately next door to Ms. Cuthbert's lot, 1048. The two lots are each about five acres and rectangular in shape. The southwest border of Ms. Cuthbert's property is one of the long sides of the rectangle and is immediately adjacent to the northeast border of Mr. Angerer's property, also one of the long sides of his rectangle.

[21] Between 2002 and 2012 he would have visited his property between four and five times per week. His original intention was to build a home there, but he decided against that after Ms. Cuthbert moved onto her property with her dogs. He said that initially in 2012, the noise level from Ms. Cuthbert's dogs was "not too bad", but then it got to the point where it was "always high" and "pretty constant" during the day.

[22] Ultimately, Mr. Angerer decided to build his home on a property on Sidney Street, about five kilometres away. He said that he can hear Ms. Cuthbert's dogs from that location.

[23] Mr. Angerer testified that the primary use of the Tagish Estates Area is residential.

[24] Mr. Angerer testified with the assistance of a number of video recordings, which I will deal with later. They generally depict him walking towards his common fence line with Ms. Cuthbert and several dogs lunging at the fence barking loudly. I gathered from

his evidence that this is usually the case whenever he approaches the common fence line.

[25] With respect to the generator issue, Mr. Angerer testified that there was nothing out of the ordinary, although he acknowledged that he does not live on Lot 1047.

[26] He presently uses Lot 1047 as a storage area and for the occasional operation of a small sawmill.

[27] With respect to the issue regarding the smell of dog feces from Ms. Cuthbert's property, Mr. Angerer testified that sometimes it is so bad that he is forced to leave Lot 1047, particularly in the spring.

[28] Mr. Angerer acknowledged that there are other musher dogs in the area and that they usually bark when they are fed twice a day or when they get put into harness, but that he has never heard them barking at night.

[29] In cross-examination, Mr. Angerer was asked how the barking affects his use of the property. He rather candidly answered that it does not affect him "really", because he does not live there. On the other hand, he said that because of the noise level, he cannot sell the property, develop it or rent it out, so it is basically worthless to him as a result of the dog operation.

[30] Ms. Cuthbert suggested to Mr. Angerer that his conduct in approaching the common fence line from time to time, including occasions when he has recorded her barking dogs, was intended to provoke or incite her dogs to bark. However, the video recordings do not depict Mr. Angerer doing anything physically or audibly which could be interpreted as a provocative action towards the dogs. Further, it goes without saying

that he has a right to be on his property, and to access all portions of his property, including those areas immediately adjacent to the common property line.

[31] I found Mr. Angerer to be a credible witness. His credibility was not seriously challenged by Ms. Cuthbert on cross-examination and I generally accept his evidence.

Ursula Angerer

[32] Ursula Angerer is married to Stefan Angerer. She is 58 years of age. She takes care of the Selinger house during the winter, when they are residing in Austria.

Therefore she has visited that property several times. She testified that the Cuthbert dogs start to bark as soon as she drives onto the Selinger lot.

[33] Prior to 2012, Mrs. Angerer said the noise level in the area was just nominal traffic noise, but that after Ms. Cuthbert moved to her property, the area became noisy because of her dogs. She said she can hear the dogs from Ms. Cuthbert's property at her home on Sidney Street, which is about five kilometres away. She knows they are Ms. Cuthbert's dogs, because she has become familiar with the sound of their barking. Mrs. Angerer specifically testified that there is no chance the barking noise is coming from another lot. She is aware that there is a musher in the area and has been to the musher's property. She is also aware that the musher's dogs bark when they get fed or put into harness, but she specifically testified that they do not bark to the extent of Ms. Cuthbert's dogs

[34] Mrs. Angerer made a video recording of Ms. Cuthbert's dogs barking at 3:30 p.m. on October 25, 2016, which I will deal with later. For now I will simply observe that contrary to the suggestion by Ms. Cuthbert in cross-examination, Mrs. Angerer did not have her own pet dog with her on that occasion, nor was she doing anything physically

or audibly that could be described as provoking the dogs. She was simply standing approximately 10 feet from the common fence and recorded what I would describe as significantly loud and persistent barking by Ms. Cuthbert's dogs.

[35] As for the issue of the smell of dog feces, Mrs. Angerer simply acknowledged that you can smell that odour in the spring and summer time, but otherwise provided no particular details about how she has been adversely affected by the smell.

[36] I have no reason to question the credibility of Mrs. Angerer's evidence and I therefore generally accept it.

Stefan Landfried

[37] Mr. Landfried is 50 years old and operates a wilderness touring business. He purchased Lot 1065 in Tagish Estates in 1998 and took two years to build three log cabins on the property. One is his private residence and the other two he operates as a bed-and-breakfast for his tour customers. Lot 1065 appears to be approximately 20 acres and the southwest corner of his property abuts the northeast corner of Ms. Cuthbert's property, such that the two lots are kitty corner to each other. Mr. Landfried lives on the property full time, but goes on holiday in the winters for two months.

[38] Mr. Landfried testified that from 2000 to 2012 there were no issues with noise, despite there being dog mushers present in the area. However, after Ms. Cuthbert moved onto her property in 2012, he said the noise got worse from the dog barking, "pretty much" every day, not so much at night, but sometimes for minutes and sometimes for hours at a time. He said the dog barking noise has affected his business and that he has to apologize in advance to his customers for the noise. Mr. Landfried testified that he can hear the barking every day and at night and that it has woken him

up several times, at the frequency of two or three times per month. He described the barking as “on and off”, but says that he cannot enjoy his own home anymore. He can hear the dogs inside his house. He said it is “nerve-racking”. He has received several customer complaints, as recently as the week prior to this trial. He testified that he can be bothered by as few as two or three dogs barking at a time.

[39] Mr. Landfried testified with the assistance of 16 video recordings, all but one of which he took from his property. I will deal with these later, when I deal with the others.

[40] Mr. Landfried did not appear to testify with any particular *animus* towards Ms. Cuthbert. Notwithstanding his description of the dog barking as “madness” and feeling “helpless” and “completely stressed out”, when he was asked by his lawyer whether he was angry at Ms. Cuthbert, he answered “Personally I do not have nothing against Shelley Cuthbert, why would I?” I find this answer reflected well on his credibility.

[41] Mr. Landfried testified that Tagish Estates is primarily a residential area.

[42] As for the generator issue, Mr. Landfried said that he has heard the noise coming from the same direction as the dogs since 2013, but that it was “not as bad as the dogs”.

[43] Mr. Landfried gave no evidence about the odour of dog feces coming from Ms. Cuthbert’s property.

[44] Ms. Cuthbert suggested in cross-examination that Mr. Landfried could not be sure in all cases that the dog barking noise was coming from her property. He answered that there was “No doubt about it”.

[45] I found Mr. Landfried to be a credible witness and his credibility was not significantly challenged by Ms. Cuthbert in cross-examination. I therefore generally accept his evidence.

Leopold Selinger

[46] Mr. Selinger is a retired 77-year-old Austrian citizen who resides on Lot 1049, Tagish Estates, with his wife, Edeltraud. They reside there each year from approximately mid-April to mid-October. Lot 1049 is immediately next door to Ms. Cuthbert's Lot 1048. Mr. Selinger's southwest border abuts Ms. Cuthbert's northeast border on the long sides of their respective rectangular plots.

[47] Mr. Selinger suffered from some health issues leading to his retirement and his doctor recommended that he find a quiet place to live where he could relax. The couple came to Canada and drove an RV across the country looking for an appropriate property, eventually deciding to settle in Tagish Estates. They purchased the property in 2001. There is a cabin on the property in which the couple reside, approximately 16 to 17 metres away from the common property line with Ms. Cuthbert.

[48] Mr. Selinger testified that he and his wife had no problems with noise on the property when they purchased it, however that changed when Ms. Cuthbert moved onto her lot in 2012. After that, he heard dogs barking day and night, often so loud that he could not sleep at night. He could hear the dogs inside and outside of his house. When asked by his lawyer how long the dogs bark for, he responded that it varies, that he could not say, sometimes longer, sometimes shorter, with stops and starts, but it could be for as long as an hour with interruptions. Mr. Selinger said the dogs often come up to the common fence and keep barking. When he arrives at the property and leaves the

property, this often stimulates the dogs to bark. He said it is no longer a pleasure to live on his property anymore.

[49] In September 2012, he maintained a diary of the barking, which generally contains the following entries:

- September 6 – 5 a.m. dogs started barking; nobody home [at Ms. Cuthbert's] 7 – 11 a.m.;
- September 6 to 7 – barking started at midnight; the entire night with no sleep because of barking;
- September 15 – barking during the night;
- September 16 – barking during the night;
- September 17 – barking entire night;
- September 19 – barking into the night;
- September 21 – barking just before midnight;
- September 22 – barking until 5:30 a.m.;
- September 24 – barking during the night;
- September 27 – barking during the night;
- September 30 – barking during the night.

[50] Mr. Selinger further testified that that level of noise has continued throughout the years, and that he is still woken regularly by the Cuthbert dogs in 2017. He said that this happens almost every night.

[51] Mr. Selinger is aware that there are sled dogs in the area, but he testified that he knows the barking dogs are Ms. Cuthbert's because the sound is coming from her property.

[52] Regarding the smell of dog feces, Mr. Selinger said that when it rains, the earth is really smelly and the odour carries into their cabin. He said the odour is especially strong in the summer when it is warm out. He said this prevents him and his wife from sitting on the patio or eating outside.

[53] When asked by his lawyer what steps he has taken to reduce the sound of the dog barking, he responded that he has insulated his bedroom window with wood, styrofoam and rubber mats. He also responded that the couple built another room on the other side of the cabin, further away from the common property line. I understood this room was intended to be a new bedroom. However, Mr. Selinger said that they can still hear the Cuthbert dogs through the walls.

[54] Mr. Selinger testified with the assistance of a number of video recordings of the Cuthbert dogs that he made from his house. I will deal with these later. Generally, the videos depict the dogs barking for various periods of time, stopping, and then starting again.

[55] Mr. Selinger said that a small number of dogs can still create a noise in their home and that even one or two dogs can be quite loud. He testified that there is an echo through the forest in the area in which they live. This echo tends to have an amplification effect and is corroborated in particular by the videos taken by Mr. Landfried and also by the evidence of Ms. Cuthbert herself. She said that it is particularly apparent in the fall, winter and spring, when there are no leaves on the trees.

[56] Mr. Selinger testified that he has health issues in connection with the sounds of the dogs. If he is unable to open windows at night, he has a hard time breathing and

feels like he is having a “panic attack”. He also talked about suffering from stress and anxiety.

[57] He said he would never have bought the property if he had known that Ms. Cuthbert was moving on to the lot next door.

[58] As for the generator, Mr. Selinger said that he could hear it and it was part of the other noise, but did not testify as to any particular adverse effects.

[59] In cross-examination, Ms. Cuthbert suggested that Mr. Selinger was trying to create an impression that her dogs bark “constantly”. He responded “They bark on and off, again and again”.

[60] Mr. Selinger did exhibit some anger towards Ms. Cuthbert during her cross-examination of him, however this is perhaps understandable after experiencing the noise for about five summer seasons now. Beyond that, I did not find Ms. Cuthbert’s cross-examination to significantly detract from Mr. Selinger’s credibility. Accordingly, I generally accept his evidence.

Edeltraud Selinger

[61] Mrs. Selinger generally confirmed and corroborated Mr. Selinger’s evidence that the Cuthbert dogs barked day and night, although “not always”. She said that you can hear it inside the house and it wakes her up.

[62] In cross-examination, Ms. Cuthbert tried to create the impression that Mrs. Selinger had falsely stated that she is not able to work outside and enjoy her garden doing the things she needs to do because of the dog barking. However, when pressed on this Mrs. Selinger said “I have to”, which I took to mean take care of the garden and the yard, notwithstanding the dog barking.

The Defendant's Case

Karen Richardson

[63] Ms. Richardson is normally a resident of Kitchener, Ontario, and she testified by telephone with the consent of the plaintiffs. She came to the Yukon in late March 2017 with her boyfriend, who was seeking employment. Through a combination of circumstances, Ms. Richardson stayed in her motorhome at Ms. Cuthbert's property on Lot 1048 for about nine weeks in total, leaving the first week of June 2017. During that time, there were four other adults residing with Ms. Cuthbert at her residence.

[64] She said that when she first arrived with her motorhome, the dogs went crazy, barking for about 20 minutes or so.

[65] When asked if the dogs barked constantly, she responded "No, they did not bark all the time", but that they did bark when Ms. Cuthbert came home, when the other people residing in the residence came and went, and at times when Ms. Richardson went outside her motorhome.

[66] From time to time she observed other people driving down the road past Ms. Cuthbert's property honking their horns and "flipping the bird". Once she observed flashlights from across the road in the bushes.

[67] For three weeks during the month of May, she observed two boys peddling their bicycles slowly past the property every day at 8:15 a.m. This would cause the dogs to bark for 10 minutes or so. The dogs would also bark in response to people walking or diving by the property, especially if horns were honking, or to wildlife in the area.

[68] Ms. Richardson acknowledged being woken up by dog barking approximately six times during the nine weeks that she resided on the property.

[69] She heard other dogs howling from other locations in the distance, but said that this only happened a couple of times.

[70] Ms. Richardson acknowledged the use of a generator on Ms. Cuthbert's property, but did not report any adverse effects from this noise.

[71] She said the dog yard was cleaned daily, that it was really clean and that she did not notice any odour when she arrived.

Michelle Parsons

[72] Ms. Parsons is the executive director for the Carcross/Tagish First Nation ("C/TFN"). She testified that Ms. Cuthbert's business as an animal rescue has assisted C/TFN citizens by removing dangerous dogs from the Carcross community. Ms. Cuthbert has also had the contract for dog catching in the community since 2016. She feels that Ms. Cuthbert provides an essential service to the community in this regard. Because Carcross is an unincorporated community, like Tagish, it is not always possible to obtain the assistance of the RCMP or the Government of Yukon's Animal Protection Officer in response to dog problems.

Cpl. Geoffrey Peters

[73] Cpl. Peters was stationed with the Carcross RCMP detachment in 2012 and the years following. He also testified by telephone with the consent of the plaintiffs.

[74] Cpl. Peters received a number of complaints from Ms. Cuthbert in 2012 regarding threats and damage to her property. One of these included the death of one of her dogs, which a veterinarian determined was consistent with anti-freeze poisoning. Other complaints included damage to her fence and the cutting of her electric fence.

[75] In 2012 and again in July 2016, the RCMP received complaints from Stefan Landfried of barking dogs on Ms. Cuthbert's property.

[76] Cpl. Peters also testified that there were other informal complaints by area residents of barking dogs on Ms. Cuthbert's property over the years, but that nothing could be done because there was no violation of any territorial legislation and the problem was not criminal in nature.

[77] Cpl. Peters testified that no territorial statutes applied to the dog complaints relating to Ms. Cuthbert. This was also explained at a meeting of the Tagish Advisory Council on October 3, 2012. Mr. and Mrs. Selinger and Mr. and Mrs. Angerer attended that meeting. Ms. Cuthbert did not. RCMP member Rob Morin also explained to the group that Tagish is an unincorporated community and does not have the authority to pass its own dog by laws.

[78] Cpl. Peters said that in December 2013, Ms. Cuthbert reported to the RCMP that a Government of Yukon highway superintendent had thrown garbage at her and been rude and threatening. An RCMP member spoke to the individual, and he apologized to her.¹

[79] In October 2015, Cpl. Peters said that Ms. Cuthbert complained to the RCMP that her truck had been egged and that there had been people racing up and down the road in front of her property.

[80] In June 2016, Ms. Cuthbert complained that there had been two vehicles racing up and down the road in front of her property.

¹ Ms. Cuthbert's evidence is that this occurred in 2014.

[81] In October 2016, Ms. Cuthbert complained that Stefan Angerer was looking over their common fence towards her property. Cpl. Peters said that Mr. Angerer was warned not to do so.

[82] In June 2017, Gerry McGraw made a complaint to the RCMP about feeling harassed by Ms. Cuthbert's dogs.

[83] At other times Ms. Cuthbert made reports of shots being fired, bear bangers being used and other loud noises near her property.

[84] Other than the RCMP giving a warning to Mr. Angerer in October 2016, it is important to note that none of these complaints, either towards Ms. Cuthbert or from her, have resulted in any charges against any of the individuals concerned.

[85] Cpl. Peters also testified that over the years Ms. Cuthbert's dog rescue business has assisted the RCMP with community dogs on approximately six occasions and that Ms Cuthbert has always conducted herself professionally.

Rebecca Miller

[86] Ms. Miller is a recent supporter of Ms. Cuthbert and her dog rescue business. She first met Ms. Cuthbert over the phone in 2016. In May 2017, she attended at Ms. Cuthbert's property for about 1-to-1½ hours. She testified that the area was clean and that she did not see any dog feces. She said there was also no odour from feces, which was something that she was particularly looking for as she had been told by others that conditions at the dog rescue were deplorable. Ms. Miller said that the dogs initially made noise upon her arrival, but that they all settled relatively quickly, to the point where she was able to have a conversation with Ms. Cuthbert.

[87] Ms. Miller testified that other services provided by Ms. Cuthbert's rescue operations include dog catcher, providing expertise on dogs, and the private boarding of dogs.

[88] Ms. Miller feels that Ms. Cuthbert has come under unusual scrutiny in the press and social media. She described Ms. Cuthbert as a person who has been fingered and scapegoated by other members of the public.

Shelley Cuthbert

[89] Ms. Cuthbert comes from Ontario, where she was trained as a registered practical nurse, with a specialty in psychiatry. She has also lived and worked in the Northwest Territories and Nunavut. She has been in the Yukon now for over 10 years. She testified that in every community in which she has lived there were dog issues and that this motivated her to create a dog boarding facility with the capacity to take in rescue dogs with behaviour problems. Her intention is to rescue dogs with bad behaviour, rehabilitate them if possible, and then turn them over to appropriate owners. In particular, she was aware that there was a dog problem in Carcross.

[90] Ms. Cuthbert made no effort to attempt to contact her immediately adjoining neighbours, i.e. the plaintiffs, before commencing her dog rescue/boarding operation.

[91] Ms. Cuthbert purchased Lot 1048 in April 2012. She said she did so specifically because there was no zoning dealing with dog ownership in the area, no dog bylaws and no legislation pertaining to her animal rescue business. She also wanted a large property. Ms. Cuthbert was aware that there were two other dog mushers in the area at the time, as well as other agricultural endeavours. She said she purchased the property with a view to retiring there. The property is about five acres, with about 100 metres of

frontage along the Tagish Estates Road. She resides there full time. In April 2012 she started with about 15 dogs, but by the fall of that year she had approximately 29 dogs.

[92] On September 26, 2012, the Yukon News published an article in which Mr. and Mrs. Selinger, Mr. and Mrs. Angerer and Stefan Landfried all complained about dog barking noise from Ms. Cuthbert's property. Ms. Cuthbert was also interviewed for the article, and so was aware of the concern of her neighbours at that time.

[93] Indeed, Ms. Cuthbert has deposed in an affidavit that from the day she moved into the area she felt very unwelcomed by the community.

[94] Nevertheless, Ms. Cuthbert began to receive dogs from all over the Yukon, the Northwest Territories, British Columbia, Alberta and Alaska. The number of dogs on her property varies from day-to-day or week-to-week because they rotate in and out. There is evidence that she has had up to 80 dogs on-site in 2016, but as of the time of trial, Ms. Cuthbert maintains it was closer to 60.

[95] Ms. Cuthbert talked about her usual daily routine. At night, she said there are as many as 45 dogs that sleep inside her house in individual crates. There is also a group of 15 dogs that sleep outside for the entire night. She referred to this group as her "night crew". She gets up in the morning anywhere between 3 a.m. and 6 a.m., lets out the dogs that have been indoors and allows the night crew to come inside to sleep during the day. Ms. Cuthbert then does one-to-two hours of chores. After that, she often has to make a trip into Whitehorse to either drop dogs off at the airport or pick them up, or pick up other problem dogs or dogs about to be boarded. She has two part-time jobs that require her to work two-to-three hours per day a few days a week. She also has her dog catching contract responsibilities in Carcross. Feeding time for her dogs is between 7

and 9 p.m. She currently has no employees, but from time to time is assisted by volunteers. Typically when she is away from her property, there is nobody else there to control the dogs.

[96] Ms. Cuthbert claims that she picks up the dog feces daily and takes the waste to a landfill site. However, she acknowledged that there is an ammonia-like smell in the area because of the dog urine.

[97] Ms. Cuthbert acknowledges that her dogs do bark, but says it is only at certain times and in response to certain stimuli. She testified that it is very rare that the dogs will bark for longer than 20 minutes at a time, unless there is danger in the area. Ms. Cuthbert said that the stimuli which can cause her dogs to bark are many and varied:

- motor vehicles, including ATVs and motorcycles, driving up and down the road in front of her property;
- people walking up and down the road in front of her property;
- children riding bicycles up and down the road in front of her property;
- when Ms. Cuthbert comes and goes from her property;
- when other people, including clients, come and go from her property;
- when “daycare” dogs come to the property in the morning and go home in the evening;
- when the night crew dogs come into the house in the morning and the dogs which have been inside are allowed to go outside;
- when the night crew dogs are allowed outside for the night and the daytime dogs are brought inside;
- during feeding time between 7 and 9 p.m.;

- when there is wildlife in the area;
- when there are domestic farm animals, such as sheep, running at large in the area;
- when people approach the dog pen fences, including the immediate neighbours on their own properties;
- when loud noises occur in the area;
- when other dogs are at large in the area; and
- when the Cuthbert dogs themselves begin to play with each other.

[98] Ms. Cuthbert testified, not surprisingly, that when she is not home, she cannot control whether her dogs bark.

[99] Ms. Cuthbert acknowledged that sound carries very easily in the area, especially in the form of an echo in the fall and winter.

[100] Ms. Cuthbert testified that she has made a number of improvements to her property since 2012. She claims to have spent approximately \$80,000 in renovations over the years. These include:

- erecting privacy fencing, using lateral wooden planking and metal roofing material, in order to minimize visual triggers for her dogs;
- removal of trees along fence lines to minimize the risk of a falling tree taking down a fence and dogs escaping;
- creating two separate pens in her front yard near her house; and
- improving vehicle access in her front area.

[101] Ms. Cuthbert believes she has done everything within reason to mitigate the issue of dog noise from her property.

[102] Ms. Cuthbert also complained of a number of harassing incidents towards her over the period from 2012 to 2017, some of which have been referred to in the evidence of Cpl. Peters:

- minor mischief and vandalism, particularly with respect to her fencing;
- an electric fence which was cut;
- vehicles racing on the road in front of her property;
- her truck being egged;
- garbage being thrown at her;
- two dogs dying;
- urine pucks being used by Mr. Selinger on his side of the common fence line, one of which was apparently eaten by one of her dogs; and
- golf balls being thrown or hit into her dog pens.

[103] In cross-examination, Ms. Cuthbert admitted that she has an outstanding money judgment against her in favour of the Royal Bank of Canada in the amount of \$54,631.62, although she indicated that she is working on paying that off. She also has a money judgment against her in favour of Emerald Gillespie in the amount of \$4,050.00. There are writs of seizure and sale on both judgments registered with the Yukon Land Registration District, Land Titles Office.

The Video Recordings

Stefan Angerer

[104] In October 2016, Mr. Angerer made three recordings of Ms. Cuthbert's dogs at the common fence line, taken from Lot 1047.

[105] The first is dated October 22, 2016 at 10:10 a.m. In the recording, Mr. Angerer narrates that he is going no closer than 20 feet to the fence line, but, in my estimate, it appears from the video that he is more like 20-to-30 metres from the fence line. The recording begins with Mr. Angerer driving into the property in his truck, getting out of the truck and walking towards the fence line. There is another unidentified individual with him. Within seconds of approaching the fence, numerous dogs, I estimate at least a dozen, are seen coming up to the common fence, barking. They continue to bark for the duration of the recording, which is 2 minutes and 21 seconds. The barking is loud and continuous.

[106] The second recording was made on October 23, 2016 at 3:45 p.m. from a slightly different location on Lot 1047. The recording begins with Mr. Angerer in place, again about the same distance from the common fence. A similar number of dogs, which I estimate to be at least a dozen, are seen barking for the duration of the video, which is 1 minute and 7 seconds. Again, the barking is loud and continuous.

[107] The third video was made from yet another location on Lot 1047, but still facing towards the common fence, and this time Mr. Angerer was somewhat closer. It begins with Mr. Angerer already in place and the same number of dogs are seen barking throughout the duration of the video, which is 1 minute and 8 seconds.

[108] Contrary to the suggestion by Ms. Cuthbert, there is no evidence that Mr. Angerer, or anyone else, was doing anything to provoke her dogs into barking. This is corroborated by videos taken by Ms. Cuthbert of Mr. Angerer on his property and also on the Selinger property looking towards the common fence, and perhaps video

recording Ms. Cuthbert's property. Mr. Angerer is simply seen walking or standing still, watching or videoing and doing nothing overtly to provoke the dogs into barking.

Ursula Angerer

[109] Mrs. Angerer made a recording on October 25, 2016 at 3:30 p.m. from the Selinger property on Lot 1049. She is walking around the Selinger's cabin to the approximate location of the Selinger's bedroom window, facing towards the common fence with the Cuthbert property. In my estimate, she appears to be about 10-to-20 metres from the fence. Within seconds, about 15 to 20 dogs congregate along the fence and bark for the duration of the video, which is 2 minutes and 55 seconds. The barking is noticeably louder than in Mr. Angerer's videos.

Stefan Landfried

[110] Mr. Landfried made 17 recordings of Ms. Cuthbert's dogs. Sixteen are taken from his property, Lot 1065, and one is taken from the Selinger property, Lot 1049. Unless indicated otherwise below, one can assume that the videos are made from Lot 1065.

[111] The first recording was taken on October 8, 2016. It is very short, only 16 seconds. It is daytime, although the actual time is not specified. It is taken from Mr. Landfried's residence. Several dogs are heard barking in the distance, presumably from Ms. Cuthbert's property. Mr. Landfried announces on the video that the barking has been going on for 2-to-3 hours.

[112] The second recording was taken on October 10, 2016 at 7 p.m. It is 29 seconds long. Mr. Landfried narrates that Ms. Cuthbert's property line is over 100 yards away. He estimates that there are over 20 dogs barking for the duration of the video. He

remarks upon how the barking sound echoes in the open area around his residence and guest cabins.

[113] The third, fourth and fifth videos were all taken on October 19, 2016. The third is very short, only 14 seconds. It is 6 a.m. and dogs are heard barking in the distance. Mr. Landfried narrates that the dogs have been barking all night. The fourth video is also short, only 15 seconds. It is taken at 8 a.m., and the dogs are still heard barking, this time from inside the house. Mr. Landfried testified that the barking was constant between 6 a.m. and 8 a.m. The fifth video was taken at an unspecified time during the day. Dogs are heard howling in the distance with some intermittent barking, which Mr. Landfried narrates as being “really quiet”, presumably in comparison with the earlier noisier barking. The video lasts 13 seconds.

[114] The sixth, seventh and eighth videos were all taken on October 27, 2016 from Mr. Landfried’s residence. The sixth video is taken at 8 p.m. and is 13 seconds long. Although dogs can be heard in the background, Mr. Landfried narrates that it is “quiet”, again presumably in relative terms. The seventh video is taken at 8:30 p.m. and is 18 seconds long. Dogs are heard barking in the background and Mr. Landfried narrates that the barking has been steady for the previous half-hour. The eighth video was taken around midnight. Dogs are still heard barking in the background. Mr. Landfried narrates that the barking has been steady for 2-to-3 hours. The video is 27 seconds.

[115] The ninth video is taken on October 30, 2016 at around midnight. It is 30 seconds long. Although only one or two dogs can be heard barking in the distance, Mr. Landfried narrates that the barking has been constant for 2-to-3 hours. He also testified that he can be bothered by as few as two or three dogs. He further remarked on the

extent to which the sound appears to be amplified through the natural echo in the area of his cabins.

[116] The tenth and eleventh videos are both taken on November 8, 2016. The tenth is taken at 6 p.m. from one of Mr. Landfried's guest cabins, which he estimates is about 300 yards away from Ms. Cuthbert's property. Dogs are heard barking in the background. Mr. Landfried said the dog noise can be heard inside the guest cabin. He also testified that he had "no doubt" that the dog noise was coming from Ms. Cuthbert's property, because it always came from the same direction. The video is 58 seconds long. The eleventh video is taken from the bathhouse used by Mr. Landfried's guests. Mr. Landfried estimated that it was about 400 yards from Ms. Cuthbert's property, but the dog barking could still be heard coming from the direction Ms. Cuthbert's property. The video is 29 seconds long and was taken at 6:05 p.m.

[117] The twelfth video was taken on December 10, 2016 at 8:45 a.m. Dogs are heard barking from the direction of Ms. Cuthbert's property and Mr. Landfried narrates that it has been going on all night. The video is 16 seconds long.

[118] The thirteenth and fourteenth videos were taken on May 8, 2017. The thirteenth is taken at 8 a.m. from another of Mr. Landfried's guest cabins. Dogs are heard barking from the direction of Ms. Cuthbert's property and Mr. Landfried narrates that he has to apologize in advance to his guests for the barking. The fourteenth video was taken at 10 p.m. and dogs are heard barking from the direction of Ms. Cuthbert's property. Mr. Landfried narrates that the barking had been going on for the previous two hours.

[119] The fifteenth and sixteenth videos were both taken on August 28, 2017 at 5:47 a.m. and 5:48 a.m. respectively. They are taken from Mr. Landfried's porch door

and dogs can be heard barking in the background. He narrates that he was woken up again by the dog barking. He also narrates “This is madness... You feel so helpless”, because he is unable to get any assistance from the RCMP. He testified in relation to these videos that he feels “completely stressed out”.

[120] The seventeenth video is taken from the southern corner post on Mr. Landfried’s property which abuts the northeast corner post of Ms. Cuthbert’s property. It was taken on November 2, 2016 at 3 p.m. The Selinger cabin is seen off to the left. The video lasts one minute 15 seconds and Ms. Cuthbert’s dogs are barking for the entire duration. Mr. Landfried appears to be about 10 metres from Ms. Cuthbert’s fence and there are about 20 dogs barking. Mr. Landfried testified that he did nothing to antagonize the dogs and he does not know what triggers them to bark in that fashion.

Leopold Selinger

[121] Mr. Selinger made five video recordings on September 6, 2017. All were taken from inside his cabin, from his living room window through what appeared to be an open screen. The camera was faced towards Ms. Cuthbert’s property. The first of these videos was taken at 3:15 p.m. and lasted for two minutes and 41 seconds. Mr. Selinger estimated that about 10 dogs were outside barking by the common fence. The dogs are heard barking loudly for the duration of the video. Mr. Selinger testified that there was no one outside the cabin antagonizing the dogs and that this type of barking was a normal occurrence “most of the time”.

[122] The second of the videos taken September 6th begins at 7:45 p.m. and goes on for 21 minutes 39 seconds. It is also taken from the Selinger’s living room window through the open screen. Dogs are initially heard barking, not from immediately next to

the common fence, but rather from other parts of Ms. Cuthbert's property. Nevertheless, the barking is still loud. Mr. Selinger testified that it is common for the dogs to start barking, then stop, then start up again. He said that this happened for the entire duration of the video. In particular, barking is heard at the following times, each of which represent minute markings:

- 0:00 to 3:30;
- 6:30;
- 8:30;
- 14:00 to 15:00;
- 16:00; and
- 20:50 to 21:39.

[123] The third and fourth videos from September 6th were taken at 8:52 p.m. and 9:03 p.m., respectively. The duration of the third video is 24 seconds and the duration of the fourth is 25 seconds. They are taken from the same living room window location through the open screen, and dogs are heard barking from Ms. Cuthbert's property, although not directly against the common fence. Nevertheless, the sound is significant and the amplification echo effect is noticeable. The barking occurs for the duration of both videos. Mr. Selinger testified that he was not outside antagonizing the dogs.

[124] The final recording made by Mr. Selinger was on September 7, 2017, commencing at 9:15 p.m. The duration of the video is 52 minutes 27 seconds. The camera is placed in the same location in front of the open screen. Dogs are heard barking from various locations on Ms. Cuthbert's property. Some are closer to the living room window than others, but the amplification echo effect is noticeable. The dogs do

not bark throughout the duration of the video, but rather at the following times, again each of which represent minute markings:

- 3:15 to 6:30;
- 8:00;
- 13:30 to 14:45;
- 15:30 to 16:15;
- 19:00 to 19:30;
- 20:20 to 23:30;
- 46:00 to 46:30; and
- 48:50 to 50:06.

Thus, it is noteworthy that the dogs were heard to be barking significantly as late as 10 p.m.

Shelley Cuthbert

[125] Ms. Cuthbert filed 137 video recordings of her property and her dogs at various times, principally during the summer of 2017. I have reviewed them all. They depict her dogs as silent and well behaved at various times. I do not feel it is necessary to go into the details of the dates and duration of the videos, for reasons which I will discuss during my analysis of the legal issues in this case.

The Photographs

[126] Ms. Cuthbert also filed 122 photographs of her property and her dogs. I have reviewed them all. Ms. Cuthbert referred to some of the photographs during her direct testimony. My impression is that the purpose of doing so was to give this Court a better

understanding of the layout of her operation and also the extent to which she has made improvements to her property.

The Documents

[127] There were 38 exhibits submitted in documentary form. I have reviewed them all. The majority of these exhibits were submitted by Ms. Cuthbert and many are several pages in length. These exhibits included several affidavits from witnesses supporting Ms. Cuthbert, which the plaintiffs' counsel consented to being admitted, notwithstanding that most of the witnesses were not subject to cross-examination. These exhibits also included 41 letters of reference supporting Ms. Cuthbert. The majority of the exhibits relate to Ms. Cuthbert's complaints about being harassed by community members and Ms. Cuthbert's attempts to establish that she has been duly diligent in attempting to mitigate the barking problem.

ANALYSIS

The Plaintiffs' Case

[128] The question of whether nuisance has been proven or not is essentially a question of fact.² Each party bears the onus of proving its side of the case. The plaintiffs must prove that there was a substantial and non-trivial interference with their enjoyment of their respective properties, which is unreasonable in all the circumstances. If that is established, then the onus shifts to the defendant to prove that her conduct was otherwise reasonable or falls within one of the established positive defences.

[129] Thus, the plaintiffs must satisfy a two-part test to prove a claim in private nuisance. First, they must establish, on a balance of probabilities, that the interference

² Gregory S. Pun and Margaret I. Hall, *The Law of Nuisance in Canada* (Markham: LexisNexis, 2010), at p. 67.

amounts to more than a slight annoyance or trifling interference, and one that materially interferes with their ordinary comfort or convenience.³ Second, they must establish that the interference is unreasonable. Thus, the interference must be both substantial and unreasonable.

[130] I am satisfied on a balance of probabilities, meaning that it is more likely than not, that the plaintiffs have suffered a substantial interference with their enjoyment of their respective properties as a result of Ms. Cuthbert's dogs barking. All of the plaintiff witnesses residing near Ms. Cuthbert's property, as well as Ms. Middler, testified to their sleep being disturbed by the barking dogs and a general loss of enjoyment of outside activities such as barbecuing, gardening and entertaining. The New Brunswick Court of Appeal implicitly agreed with the suggestion that the loss of even one night's rest is no trivial matter.⁴ In this case, the plaintiffs and Ms. Middler reported numerous occasions on which their sleep has been disturbed.

[131] Although the Angerers did not experience sleep disruption, they both testified that they can hear Ms. Cuthbert's dogs from their Sidney Street property, which is about five kilometres away. They were also deterred from building their residential home on Lot 1047 because of the dog noise and decided to move their construction to the Sidney Street location.

[132] Further, all of the plaintiff witnesses, as well as Ms. Middler, testified to a substantial interference with their enjoyment of the outdoors on their respective properties because of the incessant dog barking.

³ *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, ("*Antrim Truck*") at paras. 19, 22 and 23.

⁴ *La-Ko Enterprises Ltd. v. Van Wart* (1981), 124 D.L.R. (3d) 553, at para. 10.

[133] I am not satisfied that the plaintiffs have met their onus in establishing either that the smell of dog feces or the sound of the generator on Ms. Cuthbert's lot were more than a trivial interference with their enjoyment of their respective properties.

[134] The only plaintiff witnesses who testified as to the dog smell were Mr. and Mrs. Angerer and Mr. Selinger. Mr. and Mrs. Angerer mentioned that the smell can be bad in the spring and summer, but did not specifically say how that adversely affected their enjoyment of the property. Mr. Selinger also testified that the smell is especially strong in the summer when it is warm out and when it rains. However, Mrs. Selinger said nothing about the smell whatsoever. Thus, I conclude that the plaintiffs have not established that the dog feces smell is any worse or any more significant of an interference with the enjoyment of their properties than might be expected from a neighbouring hobby farm, of which there are a few in the Tagish Estates area. Further, Ms. Cuthbert has provided a good deal of evidence that she keeps her property very clean of dog feces. Not only does she clean the area daily and transport the waste to a landfill, in virtually all of the numerous videos and photographs which I have reviewed, I do not recall noticing any dog feces.

[135] The evidence from the plaintiffs about interference resulting from generator noise was even more weak.

[136] However, returning to the issue of the dog barking noise, it is sufficient for the plaintiffs to have established that that particular source of annoyance is more than trivial.

[137] Ms. Cuthbert attempted to defend herself on this point by repeatedly suggesting that the barking was not constant. Presumably, this was the reason for her filing 137

videos of her dogs at times when they were not barking and were relatively quiet. However, in my view, that approach misses the point. That is the reason why I did not spend much time detailing the nature of her video evidence in comparison with that presented by the plaintiffs. The plaintiffs have argued that the barking is ‘incessant’. Incessant barking is not necessarily constant or continuous barking. “Incessant” is defined in *The Concise Oxford Dictionary of Current English*, 1990, as “unceasing, continual, repeated” (my emphasis). It is the last version of that definition which I think is applicable in this case. Virtually all of the plaintiff witnesses testified that the dogs do stop barking at times, but then they start up again and it is the repetitive nature of this starting up again which gives rise to the nuisance and disturbs their ability to reside in relative comfort.⁵

[138] Ms. Cuthbert also attempted to defend herself on this point by suggesting that the various plaintiffs could not be certain where the dog barking noise was coming from. She suggested that, because there is a dog musher in the area, the noise could have been coming from that location. However, it is sufficient for the plaintiffs to prove their case on a balance of probabilities. As long as they establish that it is more likely than not that the disturbing dog noise is coming from Ms. Cuthbert’s property, they have met their burden. Here, virtually all of the plaintiff witnesses were very certain in their evidence when they said they could hear the dogs on Ms. Cuthbert’s property. As well, Ms. Cuthbert herself stated that when she hears the mushing dogs, she can determine where the sound is coming from. Therefore, it is not unreasonable to conclude that the plaintiff witnesses have the same ability. Finally, all of the plaintiff witnesses testified that the two dog mushers in the area were not a problem prior to Ms. Cuthbert’s arrival

⁵ See also *R. v. Wright*, 2003 YKTC 5, at para. 25.

in Tagish Estates in April 2012. This makes it highly unlikely that the remaining dog musher continues to be the source of the objectionable dog noise.

[139] The other point Ms. Cuthbert repeatedly made in her defence is that she cannot control her dogs when she is not on her property. Once again, this misses the point. It is Ms. Cuthbert herself who has created the situation which gives rise to the probability that her dogs will bark uncontrollably when she is not on the property.

[140] The second part of the two-part test which the plaintiffs must meet to establish nuisance is that the interference with the enjoyment of their properties was unreasonable in all the relevant circumstances.⁶ The list of circumstances or factors which courts have considered in determining reasonableness is not closed, but includes:

- the utility of the defendant's conduct;
- the severity of the interference;
- the frequency of the interference;
- the duration of the interference;
- the sensitivity of the plaintiffs;
- the character of the neighbourhood; and
- carelessness of the defendant.

[141] I will deal firstly with the utility of the defendant's conduct. Ms. Cuthbert has presented evidence that her dog rescue business has social utility within the Yukon, and perhaps even further afield. She takes dogs with behaviour problems who may be otherwise unsafe, and might otherwise have to be euthanized, and contains them within

⁶ *Antrim Truck*, cited above at footnote 3, at para. 25.

her property. Ideally, she is then able to rehabilitate the dogs and place them back into society with appropriate owners. This is particularly the case with the Carcross/Tagish First Nation, which views her service, as well as her dog catching contract, as essential to the safety of the community of Carcross.

[142] However, the severity of the harm caused by the defendant and the social utility of the injurious activity are not equally weighted considerations.⁷ Ms. Cuthbert cannot justify the infliction of significant harm upon the plaintiffs simply by urging that there is a greater benefit to the public at large from her conduct.⁸ In balancing the gravity or significance of the harm against the utility of the defendant's conduct, this Court must answer the question whether, in all of the circumstances, the plaintiffs have shouldered a disproportionate and unreasonable share of the burden of the interference.⁹

[143] In this case, it cannot be said that the harm being suffered by the plaintiffs is their fair share of the costs associated with Ms. Cuthbert providing a public benefit.

[144] Firstly, she is not a public authority providing an essential service such as an airport, a highway or a hospital. Rather, she is a private business person, who is operating a dog kennel for a profit. The plaintiffs receive no benefit from her business, but shoulder virtually all of the associated injurious effects. Even accepting that her business is essential to C/TFN, this does not justify the need to place 60 to 80 dogs on a relatively small parcel of land in the middle of a rural residential area. I find the degree of interference here is beyond the level where it can be reasonably expected that a few

⁷ *Antrim Truck*, at para. 30.

⁸ *Antrim Truck*, at para. 30.

⁹ *Antrim Truck*, at para. 2.

unfortunate residents, such as the plaintiffs, bear a disproportionate burden to facilitate the greater public good.¹⁰

[145] I will deal next with the severity, frequency and duration of the interference. I am satisfied that the plaintiffs have established that the dog noise interferes with their most basic, everyday activities, and that it causes them significant anxiety. The dog noise is also repetitive, on virtually a daily basis, and often lasts for hours at a time, albeit with periods of relative quiet, as I described above.

[146] As for the sensitivity of the plaintiffs, there is no evidence that they are unduly sensitive to the dog noise. Rather, the evidence establishes, particularly in the Selinger and Angerer videos, that the volume of the dog noise would be unbearable to any reasonable person in the plaintiffs' shoes given its duration.

[147] Turning to the character of the neighbourhood, there is uncontradicted evidence that this is a rural residential neighbourhood. Of the 67 lots in Tagish Estates, 32 lots contain full-time residents, 26 contain seasonal residents and nine are vacant lots. The standard of comfort to be expected in a predominantly residential area differs from that of an industrial or commercial one.¹¹ The residential character of the neighbourhood is such that the interference from the dog noise is unreasonable.

[148] Lastly, I will address the carelessness of the defendant. Where the conduct of the defendant is found to be careless, that will be a significant factor in the reasonableness analysis.¹² Here, I agree with the plaintiff's counsel that Ms. Cuthbert appears to have been wilfully blind to the disturbance her business has caused to the neighbourhood.

¹⁰ *Sutherland v. Attorney General of Canada*, 2001 BCSC 1024, at para. 209; overturned on appeal to the SCC, but not on the finding of private nuisance.

¹¹ *340909 Ontario Ltd. v. Huron Steel Products (Windsor) Ltd.* (1992), 9 O.R. (3d) 305 (Ont CA,) at p.13.

¹² *Antrim Truck*, at para. 29.

First, she made no attempt whatsoever to contact her immediately adjoining neighbours before starting up a business which might reasonably be expected to cause some noise issues. Second, although she was almost immediately aware that there was neighbourhood opposition to her business, and certainly would have been aware no later than the Yukon News article of September 26, 2012, she nevertheless continued to expand her operation significantly, obtaining as many as 80 dogs in 2016. Finally, she has repeatedly stated that her dogs bark in response to numerous ordinary stimuli. Indeed, she kept a log of such barking from June 29 to August 24, 2017 admitting that sometimes it takes at least half-an-hour to settle the dogs down.¹³ Nevertheless, she seems oblivious to the extent to which this is bothersome to her neighbours. Rather, she continuously focuses on the facts that: (1) it is natural for her dogs to bark; (2) she cannot control her dogs when she is not on her property; and (3) she has been victimized by harassment from her neighbours. Thus, I agree that her disregard for the neighbourhood's concerns is careless conduct that is relevant to considering the reasonableness of the interference.

[149] In conclusion on this point, I am satisfied that the significant and non-trivial interference from the dog noise is also objectively unreasonable and that a nuisance has been established.

The Defendant's Case

[150] There are a number of positive defences that a defendant may raise once a plaintiff has established a nuisance, namely:

- statutory immunity;
- statutory authority;

¹³ Exhibit 22.

- contributory fault and “coming to the nuisance” (i.e. moving into an area where a nuisance is already in progress);
- consent (acquiescence, estoppel and willingly entering a risky situation);
- the act of a third party;
- an act of God;
- prescription (a previous right existing under law); and
- the existence of a limitation period.¹⁴

None of these defences are available to Ms. Cuthbert, nor has she asserted any of them.

[151] What Ms. Cuthbert has focused on seems to be the social utility of her rescue business and the fact that she has been duly diligent in attempting to mitigate the dog noise. However, as was discussed during final submissions, neither of those points can be raised in her defence. Social utility has already been taken into account in determining whether the plaintiffs have established nuisance. It is not considered again in determining whether the defendant’s conduct has been reasonable. Further, due diligence is often a defence when there is a charge under some legislation, such as a noise bylaw, which is not the case here. Alternatively, diligence can be put forward as a defence to a claim of negligence, which is also not the case here. Rather, these are among what are known as the “ineffectual defences” listed in the leading case of *Russell Transport Ltd. et al v. The Ontario Malleable Iron Company Limited*, [1952] 4 D.L.R. 719, at p. 728:

...

¹⁴ *The Law of Nuisance in Canada*, cited above at footnote 2, at p. 143.

2. It is no defence that the nuisance, although injurious to the plaintiffs, is beneficial to the public at large.

...

4. It is no defence that all possible care and skill are being used to prevent the operation complained of from amounting to a nuisance. Nuisance is not a branch of the law of negligence.

...

6. He who causes a nuisance cannot avail himself of the defence that he is merely making a reasonable use of his own property. No [use] of property is reasonable which causes substantial discomfort to others...

[152] Thus, as Ms. Cuthbert herself effectively conceded during final submissions, she has no viable defence to the plaintiffs' claim.

Precedent

[153] I find additional support for my decision in this matter from the case of *Anderson v. Jeffries*, 2008 BCSC 1410. This is a case with many similarities to the case involving Ms. Cuthbert. It was also an action in nuisance seeking an injunction to restrain the defendant from operating a dog rescue shelter in a rural area which was nonetheless primarily residential. The defendant's property was 13 acres, but the dogs were kept on one-to-two acres of her property. There were 60 dogs on the property by the time of trial. The plaintiffs' complaints included incessant barking, for extended periods of time, sometimes for hours. Witnesses testified about interrupted sleep and the fact that the noise caused them to discontinue outdoor activities, such as barbecues. There was animosity between the plaintiffs and the defendant. The defendant alleged that much of the barking was due to harassment by the plaintiffs. The defendant also maintained that she brought all but three dogs indoors with her each night to keep them from barking.

The defendant operated the shelter on her own. The Court was satisfied that the operation of the dog shelter was an unreasonable interference with the use of the plaintiffs' neighbouring property, stating:

...As a matter of common sense, a shelter housing a substantial number of dogs, many with troubled backgrounds, is a use of land that almost assuredly will create a nuisance within a residential area... (para. 20)

Remedy

[154] An injunction is the standard remedy in the case of nuisance. An award of damages, rather than an injunction, will be the exception.¹⁵ The relevant factors to consider in granting an injunction are:

- a) the inadequacy of damages;
- b) the nature of the plaintiff's injury; and
- c) the balance of convenience.¹⁶

[155] In situations where the nuisance is likely to continue without the granting of an injunction, the inadequacy of damages is easily established.¹⁷ In this case, there is no question that the nuisance will continue if there is no injunction, just as it has continued, and indeed increased in severity, over the last five years. Further, it is unlikely that Ms. Cuthbert could pay any damages, given the outstanding judgments against her totalling approximately \$58,000.

[156] With respect to the nature of the plaintiffs' injury, I have already concluded above that it is significant, non-trivial and repetitive. It is also an injury which the plaintiffs have had to endure now for over five years.

¹⁵ *The Law of Nuisance in Canada*, cited above, at p. 209.

¹⁶ *Suzuki v. Munroe*, 2009 BCSC 1403, at para. 110.

¹⁷ *Suzuki*, at para.111.

[157] With respect to the balance of convenience, once again, I agree with the plaintiffs' counsel that a number of factors favour the imposition of an injunction rather than damages:

- a) the nuisance will likely continue if an injunction is not granted;
- b) the corresponding harm suffered by the plaintiffs' is significant;
- c) it was Ms. Cuthbert who altered the *status quo* by choosing to start her operation in a rural residential area which the plaintiffs already inhabited;
and
- d) Mr. McGraw, Mr. Landfried and Ms. Middler have each made significant investments in building their homes on their respective properties prior to Ms. Cuthbert starting her rescue operation.

CONCLUSION

[158] Based on the above, I order a permanent prohibitive injunction on the following terms:

- 1) the injunction will take effect four (4) months after the date of this Court's order;
- 2) Ms. Cuthbert will be permitted to keep two dogs as personal pets, but no more than two dogs shall be on her property at any given time, and those dogs shall be reasonably kept inside her residence between the hours of 10 p.m. and 7 a.m.;
- 3) Ms. Cuthbert, or any subsequent owner of her property, may apply to this Court to vary the injunction on the following conditions:

- I. that the Government of Yukon, or other lawful regulatory body, has instituted zoning or land use regulations applicable to Ms. Cuthbert's Lot 1048, governing the creation of noise and the keeping of dogs; and
- II. that the owners of the plaintiffs' lots in Tagish Estates be given notice of that application.

[159] I will dispense with Ms. Cuthbert's signature approving the form of the order resulting from these reasons, but I will direct that the draft order come to me for personal review before it is issued.

[160] The plaintiffs shall have their costs for this trial on a party and party basis.

GOWER J.