

SUPREME COURT OF YUKON

Citation: *Yukon (Minister of Energy, Mines and Resources) v. Cuthbert*, 2019 YKSC 6

Date: 20190125
S.C. No.: 18-A0105
Registry: Whitehorse

BETWEEN:

THE MINISTER OF ENERGY, MINES AND RESOURCES,
as represented by Brenda Sproule, Manager of Land Use,
Department of Energy Mines and Resources

PETITIONER

AND

SHELLEY CUTHBERT

RESPONDENT

Before Mr. Justice B. Mahoney

Appearances:
Julie DesBrisay
Shelley Cuthbert

Counsel for the Petitioner
Appearing on her own behalf

REASONS FOR JUDGMENT

[1] MAHONEY J. (Oral): The Minister of Energy, Mines and Resources for Yukon petitions for an order or warrant for Ms. Cuthbert's summary removal from the territorial lands near Tarfu Creek ("the site"), including the removal of all fences, structures, tents, and other physical debris, as well as dogs and other things belonging to Ms. Cuthbert.

[2] Ms. Cuthbert opposes the Minister's application.

[3] In the case of the *Minister of Energy Mines and Resources Re: Bonnet Plume Outfitters (1989) Ltd. and Chris McKinnon*, 2008 YKSC 03, this Court held that:

[24] . . . if the Government of Yukon determines that someone is "using, possessing or occupying territorial lands"

either "wrongfully or without lawful authority", then it can seek a remedy under s. 18 of the *Territorial Lands (Yukon) Act*. . . .

[4] Another remedy the government can seek is a summons, under s. 18(1)(b) of the *Act*, which will require an occupier, like Ms. Cuthbert, to show cause within 30 days of service of the summons why she and her structures and dogs should not be removed from the lands.

[5] At the time that the government first applies for a summons, the facts at that point are undetermined as to whether Ms. Cuthbert is or is not in lawful possession or use of territorial lands. That determination must be made by a judge of this Court.

[6] At the start of this hearing Wednesday, January 23, 2019, Ms. Cuthbert and counsel for the Minister agreed that this proceeding would be a show cause hearing, where Ms. Cuthbert would present her case justifying her use and occupation of the site and show cause why she, the structures on the site and the dogs should not be removed. Both parties agreed that proceeding with the show cause hearing made sense, since all the evidence and court documents were before the Court and neither party required further time to file additional evidence or prepare for the hearing.

[7] The Minister's position is summarized in their brief as follows.

[8] Ms. Cuthbert is living full-time on a plot of vacant territorial land located approximately 1.2 km off the Atlin Road near Tarfu Creek. That is the site that she has turned into a residential compound for herself and roughly 65 dogs with tents, a wall tent, wire fencing, and dog houses.

[9] The site is public land under the administration and control the Commissioner of Yukon. The Government of Yukon has asked Ms. Cuthbert to stop using, occupying, and possessing the land in this matter and she has declined to do so.

[10] Having admitted to now having no other residence or home, Ms. Cuthbert is using the site as her full-time residence to provide dog rescue services. Some of these services are provided to third parties for payment to her corporation.

[11] The Minister states that Ms. Cuthbert's use and occupation of the territorial land is unreasonably interfering with the rights of other members of the public to access and use the site. Also, the Minister asserts that Ms. Cuthbert's use and occupation of the site is outside the scope of the common-law right afforded to the public to use public land, and that her use and occupation is not authorized under any Yukon legislation.

[12] The Minister submits that the affidavit evidence confirms that Ms. Cuthbert's occupation and use of the site prevents the public from using and enjoying the site and the surrounding area. Her fenced enclosures and tethered dogs prevent access to attractive wilderness land over 200 metres by 50 metres in size. Her dogs bark loudly when persons approach the site and intermittently on other occasions. Their barking is loud enough to be heard from at least 300 metres away and makes conversation difficult for persons near the site.

[13] The Minister's affidavit evidence states that there is a strong smell of dog urine around the site. On several occasions, an animal protection officer found that the dogs are a threat, a danger, and aggressive. They are likely to attack and could kill if they got out or if someone was to enter their pens. This is what Ms. Cuthbert told the animal protection officer.

[14] The Minister submits that even if properly contained, the visibly aggressive temperament and behaviour of some of the dogs affects the sense of comfort and safety of other persons in the area.

[15] The following background facts found in the Minister's brief are not seriously disputed and are accepted by this Court.

[16] Throughout 2016 and 2017, Ms. Cuthbert operated a dog boarding business and dog rescue enterprise from a property she owned near Tagish. There, she kept as many as 80 dogs at a time.

[17] In 2017, some of Ms. Cuthbert's Tagish neighbours brought an action in nuisance asking the Supreme Court of Yukon to restrain Ms. Cuthbert from continuing to use the property for dog rescue purposes.

[18] On October 11, 2017, Justice Gower issued a permanent injunction that permitted Ms. Cuthbert to keep only two dogs and imposed other restrictions on her.

[19] On May 25, 2018, Court of Appeal of Yukon dismissed Ms. Cuthbert's appeal from Justice Gower's decision.

[20] By August 1, 2018, Ms. Cuthbert relocated herself and her dogs to the Tarfu Creek site, a plot of vacant territorial land that is under the administration and control of the Commissioner of Yukon.

[21] Since abandoning her home in Tagish, Ms. Cuthbert does not have a home; she resides at the site. Ms. Cuthbert uses the site as the base for her dog rescue services. The site is located in a forested area. There are a number of public access roads, campgrounds, and trails near the site, and a few rural residential properties in the surrounding area. The area is otherwise a wilderness area. The site is located on a tract of land identified in the Carcross/Tagish First Nations Final Agreement as a special management area to be designated as Agay Mene Natural Environment Park under the *Parks and Land Certainty Act*, R.S.Y. 2002, c. 165.

[22] The Land Management Branch first became aware of Ms. Cuthbert's occupation of the site on August 6, 2018, after receiving a complaint from an individual who lives in a private residence near the site. Officials with the Land Management Branch made repeated and written requests, delivered personally to Ms. Cuthbert, to vacate the site and remove her dogs and possessions. Ms. Cuthbert has not done so.

[23] Ms. Cuthbert has never applied for or been given any permission from any regulatory authority with the Government of Yukon to use or occupy the site.

Ms. Cuthbert, according to the Minister, is living continuously at the site. She has erected significant infrastructure on the site, including at least seven dog enclosures of varying sizes constructed with wire fencing — some covered with tarps — and containing dog houses, four camping-sized tents, a wall tent, a large water tank, pallets, and a camper.

[24] Pursuant to s. 18(6) of the *Territorial Lands (Yukon) Act*, S.Y. 2003, c. 17, the Minister has delegated his powers under s. 18(1) to the Director of the Land Management Branch, who formed the opinion that Ms. Cuthbert's use and occupation of the site constitutes an unlawful use, possession, or occupation of territorial land. The Director of the Land Management Branch has authorized Brenda Sproule, Manager, Land Use, to file this petition under s. 18 of the *Territorial Land (Yukon) Act*.

[25] The Minister argues that the only issue in this petition is whether Ms. Cuthbert's occupation and use of the land is without lawful authority, whether under common law or by operation of legislation.

[26] Ms. Cuthbert asserts that she is camping at the site and is authorized to do so under Yukon legislation.

[27] The Minister's position is that Ms. Cuthbert's residence constitutes squatting, an occupation of territorial land that is unauthorized and without lawful authority.

[28] The *Territorial Lands (Yukon) Act* applies to those lands that the Commissioner of Yukon obtained administration and control over effective April 1, 2003. These lands, including the site, are defined as territorial lands. It is not disputed that territorial lands are held by the Commissioner for the benefit of the public. The public's right to access and use territorial lands is subject to both statutory and common law limits.

[29] The Minister's position is authorized under s. 18(1) of the *Territorial Lands (Yukon) Act*. It says:

18(1) Where, under this Act, the right of any person to use, possess, or occupy territorial lands has been forfeited or where, in the opinion of the Minister, a person is wrongfully or without lawful authority using, possessing, or occupying territorial lands and that person continues to use, possess, or occupy, or fails to deliver up possession of, the lands, an officer of the Government of the Yukon authorized by the Minister for that purpose may apply to a judge of the Supreme Court for a summons directed to that person calling on that person

(a) to forthwith vacate or abandon and cease using, possessing, or occupying the lands; or

(b) within thirty days after service of the summons on that person to show cause why an order or warrant should not be made for the removal of that person from the lands.

[30] The Minister refers to an order of Justice Veale in the case of *Yukon (Minister of Energy, Mines and Resources) v. Kijewski*, 13-A0113, made January 21, 2014, where

Justice Veale said:

Any person not having a permanent residence is by virtue of placing a tent, camper, trailer, or other similar shelter on land administered under the *Territorial Lands (Yukon) Act* SY 2003, c. 17, and using any such shelter as their place of residence is deemed to be occupying that land.

[31] If it is without lawful authority to do so, then the person is liable to be subjected to an order of the Supreme Court of Yukon under s. 18(1) of the *Act* to vacate and cease using, occupying, or possessing the territorial lands.

[32] The Minister states that Ms. Cuthbert has established a full-time residence at the site with tents, a wall tent, fencing, a water tank, and other infrastructures constituting shelter for herself and her dogs and no longer has any other permanent home; she is occupying territorial lands at the site; she does not have authorization to do so; and has failed to deliver up possession of the lands, despite having received repeated written requests from the Minister.

[33] Ms. Cuthbert states that she currently is camping within a forested area which is outside a designated campground. She submits that currently there is no legislation noted anywhere in the Yukon or elsewhere that dictates how long a person can camp outside a designated area. Ms. Cuthbert also states that she walked away from her titled land at Tagish and refused to pay any further mortgage payments, as the property was rendered useless to her for the keeping of dogs by the Justice Gower court order. Ms. Cuthbert states she does not have a home where her dogs can reside with her. She said the Tagish land remains in her name temporarily but the bank has taken over the property and she is about to be removed from title.

[34] Ms. Cuthbert emphasizes that she cares for each one of her dogs and has insured they receive proper care. She states that the veterinary expenses for 2018 were over \$12,000 and food expenses were close to \$15,000. In order to provide care and control over the dogs at all times and to ensure the safety of the dogs and the public, she has erected temporary fencing.

[35] Ms. Cuthbert states that the Animal Health Unit visits the area every two or three weeks to check on the dogs. At no time have any of the dogs been in distress or has there been any intervention from the Animal Health Unit. Ms. Cuthbert states that the dogs are well cared for. She has made a significant investment to ensure that care is maintained. Each dog is her responsibility and she insists that she will not hand them over to the Yukon government to be euthanized.

[36] Concerning the dogs' threat and danger, Ms. Cuthbert states that it depends on the situation. Any dog, no matter whose is the owner, can be a threat or a danger depending on the circumstances. She states her dogs are well-trained and well-socialized but have histories of being abused, neglected, lack training, and lack trust for strangers. In certain situations they may act out but this would be rare.

[37] This Court has read the affidavits submitted by seven individuals in support of Ms. Cuthbert, which all say the same thing: they did not feel threatened in any way by the dogs and, once settled, the only barking is for short periods of time. There were no offensive odours when these individuals attended the area.

[38] Ms. Cuthbert quotes the Yukon government policy for occupancy brochure that states that the Land Management Branch has this guideline:

In cases, make every effort to resolve trespass situations outside of court procedures while maintaining a fair and consistent approach. In cases that may result in the need for removal or relocation, the file must demonstrate that every effort has been made to achieve an out-of-court resolution and the initiation of legal filings must be approved in advance by the Director of Land Management.

[39] Ms. Cuthbert states that she has taken the following steps to find a resolution instead of coming to court. She went to Teslin and attempted to make an application, as requested. She says she was informed that she cannot apply for occupancy in that

area. She was encouraged to work with Carcross/Tagish First Nations to find a suitable location. She says she sent a letter to Mr. McDowell to request assistance in finding solutions instead of a confrontational approach. Instead of finding solutions, the manager determined that the matter needed a court ruling.

[40] Ms. Cuthbert argues that the ministry by its own policy is required to demonstrate that it has made every effort in finding a resolution out of court. She states this did not happen. Instead, Ms. Cuthbert was immediately told by the authorities that the matter would end up in court.

[41] Ms. Cuthbert argues that Mr. Colbert, Natural Resource Officer, verified that a person can camp for 400 man days but he did not say anything to her at any time that she needed to apply for a permit. Ms. Cuthbert states that at no time has she told anyone that this was a permanent solution. She says that this site/location is temporary.

[42] Although she referred to the homelessness case in *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, at Tab 1 of her authorities, she states that she is not your typical homeless person as set by society's standards. She said she is not an addict, not mentally ill, and not disabled. Ms. Cuthbert chooses to be a responsible dog owner, which means taking care of her dogs until they pass away or finding homes with suitable owners.

[43] The facts and plight of a homeless person in East Vancouver are not the same as the facts of this case.

[44] Ms. Cuthbert went on to state that society has generally accepted that animals are disposable and, as a result, many shelters and rescues are completely filled to the

point of innocent animals being euthanized for the reason of humans' lack of commitment to care for them until the end. She says her dog rescue efforts have been in operation since 2012. Ms. Cuthbert points out that she has never been charged with any offences under the *Animal Protection Act*, R.S.Y 2002, c. 6, or the *Dog Act*, R.S.Y 2002, c. 59.

[45] Ms. Cuthbert states that the court order, regarding the Tagish nuisance case decided by Justice Gower, completely shut down her business of boarding dogs, doggie daycare, and boot camp. She states that income from the business paid for the rescue dogs in her case. Now she has no business income at the campsite, as she currently collects social assistance.

[46] To summarize Ms. Cuthbert's position, she argues that she camps on the site as she has no place to live with her dogs. Having a site this size allows her for the dogs to be spaced out enough to minimize barking, allows people to walk through without incident, and ensures adequate shelter for the dogs and her. Ms. Cuthbert says she chose to walk away from her Tagish property due to court orders not allowing her to operate her business and continue to care for her dogs. Ms. Cuthbert says that she is virtually homeless. Her Tagish house is in the hands of the bank.

[47] Ms. Cuthbert argues that s. 7 of the *Charter* allows a person their right to life, liberty, and security, and cites the *Abbotsford* case, where the presiding judge declared the bylaws of the City of Vancouver, by not allowing homeless people to set up temporary shelters overnight or sleep in a park without permits, violate the guarantee of the right to life, liberty, and security of a person as set out in the *Charter*.

[48] I find that this is not a s. 7 *Charter* case, just the same as the nuisance case before Justice Gower was not a *Charter* case. Ms. Cuthbert lost her home by choice.

[49] Ms. Cuthbert says that she set up a temporary camping arrangement to ensure she was safe, able to continue to care for the dogs, and ensure she had shelter.

Ms. Cuthbert argues that the Yukon government did not consult with the First Nations government prior to asking the Court to remove her.

[50] I note that the Minister filed an affidavit of Manon Moreau, Assistant Deputy Minister, attaching a letter from Patrick James, Co-Chair of the Carcross/Tagish First Nation Land Management Board, stating that the First Nation passed a document supporting the position of the Minister in this petition.

[51] Ms. Cuthbert argues that both the Carcross/Tagish First Nation and the Yukon government have not complied with the *Parks and Land Certainty Act* regarding the management plan for the Agay Mene Territorial Park within the required timeline set out in the legislation and settlement agreement.

[52] I note that the Minister filed an affidavit of Brenda Sproule, dated 12 December 2018. Ms. Sproule is the Manager, Land Use, and she states that the site was located within the Agay Mene Territorial Park and that the Land Management Branch is not accepting applications, as the process for creating the park is underway.

[53] Ms. Cuthbert points out that she requested the department to work with her to find a solution instead of a confrontational approach. She states this did not happen. Ms. Cuthbert states she was never informed she needed to fill out an application for a permit to camp for 400 days.

[54] This, I reject, since she submitted to the Court on Wednesday that she was told by officials, "Don't bother applying for a permit for that site. It won't be permitted." The need for an application for a permit did come up but the process never got launched.

[55] Ms. Cuthbert argues that, according to the department's internal policies, the government is to make every effort to resolve the issue prior to court. This, she said, did not happen.

[56] Counsel and Ms. Cuthbert agree that there was a meeting on January 4, 2019 to discuss Ms. Cuthbert applying for a lease. Ms. Cuthbert has requested to continue camping for her 400 days and that she will leave the area to move on to hopefully a permanent location.

[57] At their core, Land Use controls, such as those in the *Territorial Lands (Yukon) Act*, are used to satisfying individual and community preferences about territorial land use, to reduce environmental degradation, and to make the lands capable of being enjoyed by individuals and groups now and in the future. Legislated Land Use controls are limitations on the use of land recognized by the community and enforced by the justice system.

[58] That proposition is not being challenged.

[59] Ms. Cuthbert argues that she is camping, that under the *Territorial Lands (Yukon) Act*, Regulations and that she has up to 400 days to obtain a Class A permit to occupy the site, which she labels as a camp site. (see Regulations (O.I.C. 2003/51)).

[60] The Minister is challenging Ms. Cuthbert's claim to be camping and "the order of Justice Veale" in the case dated January 21, 2014, which states:

Any person not having a permanent residence is by virtue of placing a tent, camper, trailer, or other similar shelter on land

administered under the Territorial Lands (Yukon) Act SY 2003, c. 17 and is using any such shelter as their place of residence is deemed to be occupying that land.

[61] The Minister argues that such deemed occupation is without lawful authority and is liable to be subject to an order of the Supreme Court under s. 18(1) of the *Act* to vacate and cease using, occupying, or possessing the territorial lands.

[62] There is no Yukon statutory definition of what is and what is not "camping". For example, a campsite can serve both recreational campers, and others like itinerant workers or temporary homeless persons. To distinguish whether someone is "camping", as broadly understood, or "squatting" requires an examination of the intent and the nature of activities involved.

[63] A migrant worker or homeless person living on public land may involve camping activities, such as sleeping in a tent or preparing meals over a fire. This is different than the individual who makes a recreational choice to enjoy nature, which is also a large part of camping. A lack of permanent dwelling for oneself and 60-plus rescue dogs with dog houses and fenced off dog pens and four more tents, a water tank, pallets, and a camper is not camping.

[64] Justice Gower pointed out in the *Bonnet Plume Outfitters* case that:

[22] In the Yukon context, it was brought to my attention in the previous application by counsel for the Minister that it is not unusual for government inspectors to discover camps, cabins or other structures on territorial lands. Such structures may be legitimately located on trapline concessions, on placer or quartz mining claims, or authorized by historic Crown grants from the late 1800s.

[65] Justice Gower went on to say:

[23] Alternatively, such structures may have been erected by big game outfitters prior to the devolution of administration and control of lands and resources from

Canada to the Government of Yukon on April 1, 2003. In relation to those cases, the Government of Yukon approved a policy in the fall of 2005 which is designed to facilitate applications for leases or licences by outfitters for lands which they have occupied on a long-standing basis, such as hunting camps or airstrips, prior to devolution.

[66] Ms. Cuthbert does not fit within the plain meaning of "camping", nor does her situation compare within the concessions granted to trappers, miners, or outfitters, nor does she have a lease or permit.

[67] I find that she is occupying territorial land that she does not have lawful permission to occupy. She and her multitude of dogs are not "camping"; they are "squatting".

[68] Ms. Cuthbert stated to this Court that she occupies this site because, having been found liable for creating a nuisance and subject to a permanent injunction with her rescue dog operation and court order to possess only two dogs, she abandoned her home in Tagish. She found this site on territorial lands near Tarfu Creek, that she thought she could occupy without a permit and continue her rescue dog operation for at least 400 days.

[69] The *Territorial Lands (Yukon) Act* provides permission-based rules in which permits are required before certain land uses will be allowed. The enforcement of the legislation includes sanctions for violations, including suspensions, cancellation of permits, fines, and imprisonment.

[70] Because I find Ms. Cuthbert is in violation of the statute, I am granting the Minister's petition and find that Shelley Cuthbert is unlawfully occupying territorial lands at the Tarfu Creek site.

[71] I order Ms. Cuthbert to cease occupying and to vacate the Tarfu site. Given Ms. Cuthbert's circumstances, she must vacate on or before March 1, 2019. If Ms. Cuthbert fails to vacate the Tarfu site, according to this order, then the Minister is authorized without further order to affect the summary removal of Ms. Cuthbert from the lands, including the removal of all fences, structures, tents, and other physical debris and all dogs and other things belonging to Ms. Cuthbert, pursuant to ss. 18(2) and (3) of the *Territorial Lands (Yukon) Act*.

[72] This ruling allows Ms. Cuthbert to further make arrangements to locate her dog rescue operations on appropriately zoned private land or make a proper application to locate on territorial land.

[73] In carefully considering the relevant evidence and the applicable law in making this ruling, I considered the circumstances of Ms. Cuthbert and her dog rescue endeavours. She has been through considerable financial and emotional strain in her efforts to operate her dog rescue project. Those who gave affidavit evidence in support of Ms. Cuthbert are concerned for her and the plight of her dogs. Their evidence and that of Ms. Cuthbert and government inspectors shows they are all concerned that the dogs are adequately cared for.

[74] To be sure, the concern of the Minister and agents in carrying out their administrative responsibilities, as already mentioned, is to protect territorial lands from environmental degradation and to make the lands capable of being enjoyed by all individuals and groups now and in the future. Placing a significant number of rescue dogs on the land without consultation and without territorial permission could threaten the environment and deter the majority of individuals from enjoying the land.

[75] Given the financial resources, as described by Ms. Cuthbert, to adequately care for 60 to 80 rescue dogs in a temporary, make-shift, out-of-the-way location, constitutes a legitimate concern of the Minister for the condition and safety of the public, Ms. Cuthbert, and the 60-plus rescue dogs.

[76] While this order gives a reasonable but limited amount of time to make arrangements to relocate from the site, it must be clearly understood that the ultimate responsibility rests with Ms. Cuthbert to comply with the *Territorial Lands (Yukon) Act* and this court order. Ms. Cuthbert, who says she is responsible for her dogs, must accept that part of the responsibility is locating her dog rescue undertaking within the proper observance and prerequisites of the *Territorial Lands (Yukon) Act* or any other applicable Yukon land use law.

[77] That is my ruling.

[78] Ms. DesBrisay is to draft the order. She is to present a draft copy of the order to Ms. Cuthbert, who will have 48 hours to make comments on the order. If she makes comments, then those comments will be sent to me along with the draft order and I will do what is necessary to finalize the order.

MAHONEY J.