In the Court of Appeal of the Northwest Territories

Citation: Christensen v. Northwest Territories (Commissioner of), 2012 NWTCA 1

Date: 2012 01 13
Docket: A-1-AP2010000017
Registry: Yellowknife, N.W.T.

Between:

Agnes Christensen and Clayton Christensen

Appellants
(Defendants)

- and -

The Commissioner of the Northwest Territories

Respondent
(Plaintiff)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment
Delivered from the Bench

Appeal from the Judgment by
The Honourable Mr. Justice J.E. Richard
Dated the 5th day of November, 2010
Filed on the 5th day of November, 2010
(Docket: S-1-CV-2010-000065)

Memorandum of Judgment
Delivered from the Bench

O'Ferrall J.A. (for the Court):

[1] The is an appeal of a judgment ordering the appellants to vacate and deliver up certain lands they had been living on for the past decade. In furtherance of the appeal, the appellants made a fresh evidence application. Since the Commissioner conceded that application, we granted it, and admitted the affidavit of Agnes Christensen. The fresh evidence is relevant to the issue of whether the judgment granted ought to be set aside.

[2] Very briefly, the facts that led to the appeal are as follows. The Christensens, Agnes and her son Clayton, are status Indians registered in the Fort Resolution First Nation treaty group. Eleven or twelve years ago (May 1999 or May 2000), the Christensens moved two mobile homes onto three quarters of an acre of land north of Yellowknife and have lived there ever since, paying taxes to the local authority with respect to their occupation. In an affidavit, based largely on information and belief and a review of the files of the North Slave Regional Office of Municipal and Community Affairs by a senior lands officer, the Commissioner asserts administration and control of the land.

[3] Section 5 of the *Commissioner's Land Act*, RSNWT 1988, c C-11 permits the Commissioner to apply to a judge for a "summons" to obtain vacant possession when, in the opinion of the Minister or his or her delegate, a person is "wrongfully or without lawful authority, using, possessing or occupying Commissioner's lands."

[4] Rather than applying to a judge for a summons directing the Christensens to show cause why an order or warrant should not be made for their removal pursuant to the *Commissioner's Land Act*, the Commissioner filed a statement of claim in trespass in April 2010, alleging the Christensens were on the land without permission. Shortly after being served with the claim Ms. Christensen wrote the Commissioner's lawyer advising that she and her adult son (a co-defendant in the trespass action) intended to retain counsel to defend the action. Despite being given three months to do so, Ms. Christensen and her son were unable to obtain counsel, did not defend in time, and were noted in default. In mid-September 2010 the

Commissioner brought an application on notice to the appellants for an order for possession. That application was heard on November 5, 2010.

[5] At the November 5 hearing, the appellant, Agnes Christensen appeared, but again was self-represented. She advised the chambers judge she had treaty rights to the land but was still unable to find a lawyer to represent her. She explained that she had "talked to many lawyers, and a lot [of them had a] conflict of interest". The chambers judge ruled that she had had ample time to put her case before the Court with evidence, and he had "no choice but to grant the relief sought" by the Commissioner. The Christensens appeal from that judgment granting the Commissioner vacant possession of land and also apply to set that judgment aside on the basis that it was granted in default of defence.

[6] Although a chambers judge is entitled to deference, appellate intervention is warranted if there is likely to be a failure of justice: *Hover v Metropolitan Life Insurance Company*, 1999 ABCA 123 at para 10, 237 AR 30.

[7] The Christensens have now retained a Calgary-based lawyer who has drafted a statement of defence which raises arguable defences based on the appellants' aboriginal treaty rights.

[8] In addition, Agnes Christensen has filed a fresh evidence affidavit attesting to facts which might have been put before the Court below on an application to set aside a default judgment. That fresh evidence has been admitted by consent and no issue has been taken with the basic facts deposed to therein.

[9] In our view, the affidavit and the appellants' actions satisfy the tests for setting aside a default judgment. Although, Agnes Christensen was in court when judgment was granted, we would characterize the judgment as effectively a judgment granted in default of a defence. The Christensens were unable to obtain legal representation in the time permitted. Mrs. Christensen appeared on her own behalf and explained her predicament. In fairness to the learned chambers judge he quite properly thought he had no choice but to grant the relief sought by the Commissioner. But there was no adjudication on the merits. It was, in effect, a default judgment.

[10] As mentioned, the appellants have satisfied the tests for setting aside a default judgment. Their application was timely. There is rarely a good excuse for a failure to defend, but the appellants have put forward evidence of the difficulty they had in retaining counsel to properly represent them. It was a reasonably excuse. It also

appears the appellants may have an arguable defence. And there was no evidence before us of prejudice to the Commissioner, beyond the prejudice of the delay itself.

[11] In view of these unique circumstances, the appeal is allowed, the judgment vacated and the noting in default set aside pursuant to Rule 171 of the *Rules of the Supreme Court of the Northwest Territories*, R-010-96. The statement of defence is ordered to be filed forthwith and we also order the matter to proceed to a hearing or trial as soon as practicable.

[12] The appellants are entitled to party and party costs of the appeal, but no the costs for the fresh evidence application.

Appeal heard on October 18, 2011

Memorandum filed at Yellowknife, N.W.T.
this 13th day of January, 2012.

O'Ferrall J.A.

Appearances:

J.R.W. Rath
for the Appellants

I. Blackstock
S. Kay
for the Respondent

A 1 AP 2010 000017

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