Citation: *Kluane First Nation v. Johnson,* 2015 YKTC 20

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IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Chisholm

IN THE MATTER OF THE *LANDLORD AND TENANT ACT*
RSY 2002, c.131 AND AMENDMENTS THERETO

BETWEEN:

KLUANE FIRST NATION

LANDLORD

AND:

DEREK JOHNSON AND
WILFRED SHELDON

TENANTS

Appearances:
Graham Lang — Counsel for the Landlord
Ken Hodgins — Appearing with Derek Johnson and Wilfred Sheldon

REASONS FOR JUDGMENT

Introduction

[1] Kluane First Nation ('KFN') is seeking to regain possession of the residential premises of Mr. Derek Johnson and Mr. Wilfred Sheldon, respectively, pursuant to the *Landlord and Tenant Act,* RSY 2002, c.131 (the '*Act')*. The homes are located in the community of Burwash Landing, Yukon, on settlement land of KFN. As the result of criminal court proceedings, Mr. Johnson and Mr. Sheldon are presently prohibited from residing in Burwash Landing. Messrs. Johnson and Sheldon take the position that the

Act does not apply to settlement land. Alternatively, they argue there is no tenancy under the *Act* and as such, this Court has no jurisdiction to deal with the matter.

[2] In 2006 and 2009, respectively, Mr. Johnson and Mr. Sheldon applied for housing from their First Nation. No formal agreement was entered into in either case. In each case, a housing application form was filled out and submitted to KFN and in each case, a section of the completed application form indicated a desire to pay to own the respective homes. Neither KFN nor Messrs. Johnson and Sheldon formally pursued such an arrangement. As with other KFN citizens, KFN did not request that Messrs. Johnson and Sheldon pay rent.

[3] Mr. Johnson states he was involved in the design of his house and that he paid a $2500 deposit on the house. Mr. Sheldon alleges he made significant improvements to his house and property since taking possession.

[4] KFN borrowed money to pay for the construction of the respective dwellings and it makes monthly payments on the CMHC mortgages. It also pays the insurance for the homes. Messrs. Johnson and Sheldon were responsible for the payment of water and sewer and electricity.

Questions in issue

1) Does the Territorial Court have jurisdiction to deal with these matters pursuant to the *Act?*

   i) Does the Act apply to First Nations' settlement land?

   ii) Are there any laws enacted by KFN to displace the Act?

   iii) Is the relationship between the respective parties in the form of a tenancy?

2) If the Court has jurisdiction and a tenancy exists, was there abandonment of the respective homes?

3) If there was not abandonment, what notice period is required to end the tenancy?

Analysis

1) Does the Territorial Court have jurisdiction to deal with these matters pursuant to the *Act*?

i) Does the Act apply to First Nation's settlement land?

[5] The first question to resolve is whether the *Act* applies to the homes in question: namely Lot 401, Copper Joe Subdivision (the premises of Mr. Johnson) and Lot 418, Copper Joe Subdivision (the premises of Mr. Sheldon). KFN takes the position that the *Act* applies whereas Messrs. Johnson and Sheldon argue that it does not.

[6] Both homes are located on KFN settlement land. These lands were transferred from the Federal Government to KFN subsequent to the signing of a Land Claims Agreement (the 'KFN Final Agreement') and a Self-Government Agreement in 2003.

[7] The KFN Final Agreement states that settlement land shall be deemed not to be lands reserved for Indians within the meaning of section 91(24) of the *Constitution Act, 1867*, nor a Reserve. (para. 5.2.6)

[8] This situation is therefore different than where a Self-Government Agreement stipulates that the lands are reserved for the First Nation within the meaning of section 91(24) of the *Constitution Act, 1867*, and therefore subject to federal jurisdiction. In such a case, the British Columbia Court of Appeal found that provincial legislation

purporting to regulate possession of land under tenancy agreements was constitutionally inapplicable. (see *Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer),* 2013 BCCA 262).

[9] The Court of Appeal decided that the clause of the Self-Government Act reserving the land pursuant to section 91(24) manifested a clear intention to preserve 'the Indian land status' of those lands. No such language is found in the Final or Self-Government Agreements of the KFN. The land in question is not subject to exclusive federal jurisdiction and, in my view, would fall under the jurisdiction of the Landlord and Tenant legislation.

ii) Are there any laws enacted by KFN to displace the Act?

[10] Messrs. Johnson and Sheldon further argue that if the *Act* is found to apply, it is subject to KFN rental policies from 2008 and 2014, respectively. More precisely, they submit that only parts of the *Act* specifically adopted by the rental policies would be applicable.

[11] I understand the argument to be that KFN did not fulfill its obligations under the respective rental policies. For instance, it did not enter into rental agreements as stipulated in the respective policies. The breach of terms of the respective rental policies should disentitle KFN from obtaining the remedy sought.

[12] By way of background, the KFN Self-Government Agreement speaks to laws of general application in section 13.5.1:

> Unless otherwise provided in this Agreement, all Law of General Application shall continue to apply to Kluane First Nation, its Citizens and Settlement Land.

[13] Section 13.3 of the KFN Self-Government Agreement states that KFN shall have the power to enact laws of a local or private nature on settlement land in relation to the following matters:

> 13.3.1 use, management, administration, control and protection of Settlement Land;

[14] Section 13.5.3 of the Self-Government Agreement states that except in the area of taxation, a Yukon Law of General Application shall be inoperative for any matter for which provision is made in a law enacted by KFN.

[15] In order to enact a law, section 13.5.5 of the Self-Government Agreement makes it clear that there must be consultation between KFN and the Yukon Government before KFN is able to enact a law that will impact on a law of general application.

[16] The difficulty with the argument of Messrs. Johnson and Sheldon is that a rental housing policy cannot be elevated to the status of a law. Laws and policies may co-exist (*Toronto (City) v. Goldlist Properties Inc*. (2003), 67 O.R. (3d) 441 ONCA), but, ultimately it is the law that takes priority. Even if there are inconsistencies between the 2008 and 2014 rental housing policies and the *Act*, it is the *Act* which takes priority. The policies cannot be elevated to the status of laws. As KFN has not enacted any laws of general application to supplant the *Act*, it has force and effect with respect to settlement land. Rental housing policies do not supersede that legislation.

[17] In any event, in my view, neither the 2008 nor the 2014 rental housing policy applies to the situation of Messrs. Johnson and Sheldon. Neither individual entered into a written tenancy agreement and neither individual paid rent. Since major elements of both rental housing policies were not adhered to, they are not, in my view, applicable in this case.

iii) Is the relationship between the respective parties in the form of a tenancy?

[18] KFN submits that a tenancy exists between the respective parties**.** I must consider, in determining whether a tenancy exists, what was contemplated by the parties when Messrs. Johnson and Sheldon, respectively, applied for housing with KFN, as well as considering what occurred subsequently.

[19] Based on the application form, KFN foresaw various housing possibilities including renting and paying to own. Both Messrs. Johnson and Sheldon specifically indicated that they wished to pay to own. Neither of them indicated they wished to rent. Mr. Johnson, in fact, specifically indicated that he did not wish to rent.

[20] When Mr. Johnson applied for housing in 2006, it appears that no formal housing policy existed. This changed prior to Mr. Sheldon's application in 2009, as a housing policy and rental policy came into force and effect in 2008. It should also be noted that a home ownership program policy was drafted in 2007. The 2008 housing policy included sections dealing with home ownership programs. This latter policy was approved by council resolution.

[21] The 2008 housing policy does address sales agreements for individuals wishing to become home owners. Pursuant to s. 6.0 of the Home Ownership section, the applicant must submit an application for home ownership, including particulars to enable KFN to make credit inquiries. If approved, the applicant would be required to enter into a sales agreement, with certain terms and conditions.

[22] A section entitled 'Citizens and Elders Existing Home Ownership' includes a provision that the number of years a homeowner had lived in and maintained the home would 'correspond with an immediate equity transfer at no cost…'. Arguably, this section might apply to Mr. Johnson's situation at the time. He testified to having been involved in the design of his house, and although no documentation was filed, he stated having put a down payment on the house.

[23] Aside from the application for home ownership and what is described above, none of the other steps set out in the 2008 policy regarding home ownership was taken in the case of either Mr. Johnson or Mr. Sheldon.

[24] In 2014, KFN adopted a comprehensive rental housing policy which states in its introduction that the housing program is to be administered according to the rental housing policy and the *Act.* The policy is to apply to all existing and future rental units (section 1.0). One of the obligations of the tenant is to sign a residential tenancy agreement and meet the conditions of the agreement (section 6.6 (a)).

[25] As mentioned, neither Mr. Johnson nor Mr. Sheldon ever signed a residential tenancy agreement. No evidence was led to suggest the KFN ever asked them to do

so. As previously stated, in my view, the rental housing policies do not apply to either Mr. Johnson or Mr. Sheldon.

[26] Despite this, the question remains as to whether a tenancy under the *Act* exists*?*

[27] The *Act* stipulates that a residential tenancy agreement 'means an agreement between a tenant and a landlord for possession of residential premises, whether written or oral, express or implied'.

[28] KFN argues that because the ownership program became stalled and because neither Mr. Johnson nor Mr. Sheldon entered into a sales agreement, they must be residing in the respective homes pursuant to a tenancy at will*.*

Tenancy at will

[29] Supporting the notion that a tenancy at will exists is the fact that Mr. Johnson and Mr. Sheldon had exclusive possession of the homes in question. Also, as in some tenancy at will cases, no rent was being paid by the occupants (see, for example, *McCowan v. Armstrong* [1902] O.J. No. 40).

[30] On the other hand, exclusive possession alone will not create a tenancy at will (*Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.* [1975] 1 S.C.R. 684; *Errington v. Errington* [1952] 1 All E.R. 149). In order for a tenancy at will to exist, there must be an express or implied agreement between the parties that the tenancy is determinable at the will of either party (*Errington v. Errington*; *Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.*; *MacKinnon Estate v. MacKinnon,* 2010 ONCA 170). The Court is to look at the

surrounding circumstances, including the intention of the parties (*Ocean Harvester Ltd. v. Quinlan Brothers Ltd.*).

[31] In terms of the surrounding circumstances, including the intention of the parties, home ownership was the initial goal of Mr. Johnson and Mr. Sheldon. As evidenced by the housing application form, KFN viewed home ownership as a valid option. The respective parties foresaw entering into a legal relationship.

[32] However, neither KFN nor Messrs. Johnson and Sheldon pursued the pay-to-own avenue. No attempts were made to enter into a written sales agreement as stipulated by s. 6.2 of the 2008 housing policy. There is some evidence that the move towards a formal home ownership program was stalled due to concerns over whether land could be transferred as the result of the CMHC encumbrances.

[33] In any event, an interest in property was not transferred to either Mr. Johnson or Mr. Sheldon. No certificate of home ownership was ever issued as set out in section 9.0 of the 2008 housing policy. No authorization was ever granted in accordance with the KFN *Lands and Natural Resources Act.*

[34] KFN made the mortgage payments and was apparently responsible for maintenance issues related to each home. Despite the initial intentions of the parties, the actions of KFN during the years that followed the initial applications are consistent with that of a landlord.

[35] Messrs. Johnson and Sheldon state that they considered themselves owners because of the application process. However, aside from indicating that they would like

to become home owners, on a pay-to-own basis, neither made any attempt to pursue such an arrangement. They did not pursue the completion of a sales agreement, they did not make any payments towards the purchase of the respective homes, and they did not make any effort to support a claim that they were fulfilling the terms of an agreement whereby they would become home owners.

[36] Unlike the situation in *Swire v. Laite*, 2014 NLTD(G) 127, where the Court found that it was a contractual matter as opposed to a tenancy matter, Messrs. Johnson and Sheldon have paid no monies to KFN, aside from the initial deposit Mr. Johnson recalls making.

[37] In the *Errington* case, the Court found that there had been a unilateral offer by the father to transfer title to his son and daughter-in-law if they paid the mortgage. The Court upheld this contract - despite the father's will leaving the house to his wife - as the son and daughter-in-law had commenced performance by making payments. Again, this is not the situation before me.

[38] Mr. Sheldon argues that he made substantial improvements to the home and property and this fact is contrary to a landlord and tenant relationship. The improvements were no doubt made in the anticipation that he would become the owner of the premises. However, this only shows that he enjoyed sole occupation of the premises.

[39] In my view, the relationship between KFN and Messrs. Johnson and Sheldon, respectively, defaulted to that of landlord and tenant. In my view, a tenancy at will does exist with respect to the respective premises.

2) If the Court has jurisdiction and a tenancy exists, was there abandonment of the respective homes?

[40] KFN argues that the tenants have abandoned or vacated their respective homes pursuant to s. 97 of the *Act*. I disagree. Messrs. Johnson and Sheldon were convicted of a criminal offence arising out of an incident in Burwash Landing. Both are subject to a condition to not live in the community of Burwash for a period of time. Prior to their convictions, each was subject to court process with a condition to not live in the community.

[41] In my view, the notion of vacating or abandoning a property implies a conscious decision made by the tenant to leave the premises and not return. In order to rely on this section of the *Act*, the landlord must have good reason to believe that the tenant no longer intends to live in the premises. KFN submits that it was acting under a reasonable belief that the tenants had abandoned the homes in question.

[42] However, KFN was well aware of what prompted the non-occupancy. In fact, the Chief and Council wrote to the Crown prior to the sentencing hearings in the criminal matters, effectively indicating that a form of banishment from the community would be appropriate for both individuals. In my view, it is disingenuous for them to now suggest that abandonment of the properties has occurred.

[43] KFN further argues that if the tenants did not abandon the homes, they instead vacated them. The Supreme Court of Canada has found that both the terms ‘vacated’ and ‘abandoned’ equate to the tenant having given up possession (*Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; see also *Mu v. 503295 N.B. Inc.*, 2008

NBQB 272). In the circumstances of this case, it is clear that neither tenant has willingly given up possession.

3) If there was not abandonment, what notice period is required to end the tenancy?

[44] Having determined that the relationship between Messrs. Johnson and Sheldon and KFN is a tenancy at will, I must now decide the applicable notice period for KFN to terminate the tenancy.

[45] KFN argues that a tenancy at will allows either party to terminate at its pleasure, as long as the notice provisions of the *Act* are respected. KFN states that based on the provisions of the 2014 housing and rental policy, I should deem the tenancies in this case to be monthly tenancies.

[46] The tenants argue that if I find a tenancy agreement exists, it should be deemed to be a yearly tenancy.

[47] The 2014 rental housing policy stipulates that tenancies for community housing are month to month. However, I have found that the rental policy is not applicable to either Mr. Johnson or Mr. Sheldon. In the circumstances of this case, I find the respective tenancies to be the equivalent of yearly tenancies.

[48] The appropriate notice is therefore 90 days.

[49] KFN provided notice to the respective tenants by way of registered mail on March 3, 2015. The 90 day notice period commenced on that date and ran until June 1, 2015. The respective tenancies are terminated as of that date.

[50] KFN is granted possession of the premises in question pursuant to s. 96 of the *Act*. Messrs. Johnson and Sheldon are entitled to the return of their respective personal property. If there is no negotiated return of the said personal property, the matter may be brought back before this Court for resolution.

[51] Mr. Johnson testified to making a $2500 deposit to KFN in 2006. However, no formal claim has been filed with the Court. Additionally, no documentation has been filed in this regard in these proceedings. If he is unable to negotiate a settlement with KFN with respect to this deposit, he may pursue the avenues available to him for recovery of this amount.

[52] Regarding the improvements claimed by Mr. Sheldon with respect to the home and property in issue: there is no formal claim filed with the Court; there has been no documentary evidence led and the amount in question exceeds the jurisdiction of this Court under the *Small Claims Court Act,* RSY 2002, c.204.

[53] Mr. Sheldon is at liberty to pursue the options available to him to recover the amounts he says are owed to him.

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CHISHOLM T.C.J.