

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ERNEST GRANT NAGY

Plaintiff

-and-

NORTHTECH DRILLING LTD.

Defendant

**Transcript of the Reasons for Decision held before the
Honourable Justice S. Smallwood, sitting in Yellowknife, in the
Northwest Territories, on the 18th day of September, 2020.**

APPEARANCES:

C. Buchanan:

**Counsel for the Plaintiff,
appearing by teleconference**

M. Turzansky:

**Counsel for the Defendant,
appearing by teleconference**

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RULINGS, REASONS

Reasons for Decision

1

1 THE COURT: This is an Application by the defendant,
2 Northtech Drilling Ltd., for an order setting aside default
3 judgment and the garnishee summons obtained by the
4 plaintiff, Ernest Grant Nagy.

5 The plaintiff filed a Statement of Claim on
6 September 23rd, 2019, in which he claimed damages
7 of \$119,000 for the purchase price of a drill, plus other
8 damages, interest and costs against Northtech Drilling
9 Ltd.

10 The plaintiff alleged that he sold a
11 diamond drill to the defendant for \$160,000 and that the
12 defendant failed to comply with the agreed-upon
13 payment plan. The plaintiff alleged that some
14 payments were made but that \$119,000 was the
15 balance remaining to be paid by the defendant.

16 According to the Affidavit of Service, the
17 Notice to the defendant and Statement of Claim was
18 personally served on September 24th, 2019, on Stan
19 Cochrane, who was described in the Affidavit of Service
20 as the part owner of the defendant and that he was
21 served at 104 Falcon Road in Yellowknife, Northwest
22 Territories.

23 No Statement of Defence was filed and a
24 direction to note the defendant in default for failing to
25 deliver a Statement of Defence or Appearance was
26 filed on October 22nd, 2019. Default judgment was
27 also obtained on March 6th, 2020, for damages in the

1 amount of \$119,000 plus interest and the plaintiff's
2 taxed costs.

3 Once the costs were taxed and the
4 interest calculated, default judgment was entered on
5 April 29th, 2020, in the amount of \$ 131,436.42. The
6 plaintiff obtained a garnishee summons on May 8th,
7 2020.

8 The Northwest Territories courts received
9 \$ 5,221.88 on June 3rd, 2020, from the Bank of
10 Montreal in response to the garnishee summons. As
11 there was no Affidavit of Service on file of the default
12 judgment or garnishee summons being served, those
13 funds were not disbursed to the plaintiff, but instead
14 transferred to the Sheriff's trust account pending
15 distribution.

16 An Affidavit of Service was filed on June
17 10th, 2020, indicating that the garnishee summons and
18 default judgment had been served on May 21st, 2020,
19 on Jack Williams, solicitor for the defendant. This sets
20 out the procedural history with respect to the steps that
21 the plaintiff took with respect to this litigation.

22 It is also relevant that prior to filing the
23 Statement of Claim that legal counsel for the plaintiff
24 sent a demand letter on March 19th, 2019, to Jack
25 Williams at Field Law demanding payment of the claim.
26 Mr. Williams replied to the demand letter by email on
27 April 9th, 2019, confirming that he had been retained by

1 the defendant in this matter and indicated that if the
2 plaintiff wished to proceed with litigation that he would
3 accept service at the Yellowknife office of Field Law.
4 Mr. Williams was not served with a Statement of Claim.

5 The defendant filed a Notice of Motion on
6 June 2, 2020, seeking to have the default judgment
7 and the garnishee summons set aside. I heard the
8 application on September 4, 2020, and adjourned to
9 today's date for a decision.

10 The application to set aside the default
11 judgment is brought pursuant to Rule 171 of the *Rules*
12 *of the Supreme Court of the Northwest Territories*,
13 which states:

14
15 The Court may, on such terms as it considers
16 just, set aside or vary a judgment entered on
17 default of defence or pursuant to an order
18 obtained *ex parte* or permit a defence to be filed
19 by a party who has been noted in default.

20
21 The Court also can set aside the
22 garnishee summons pursuant to Rule 538.

23 The defendant claims that the default
24 judgment was obtained through a procedural flaw
25 where the Statement of Claim was not properly served
26 on the defendant, and as such, that the defendant is
27 entitled to open up the judgment as of right.

1 The plaintiff acknowledges that service
2 was not done in accordance with the *Business*
3 *Corporations Act*, but that the Court can modify the
4 rules to achieve a fair and just result because service
5 was made on the husband of the owner who was the
6 only employee at the only business location of the
7 company. The plaintiff argues that the Court has the
8 discretion to find that the service was valid in the
9 circumstances.

10 The facts with respect to service of the
11 Statement of Claim are not controversial. As previously
12 stated, an Affidavit of Service indicates that the Notice
13 to defendant and Statement of Claim was personally
14 served on September 24, 2019, on Stan Cochrane,
15 who is described as the part owner of the defendant
16 and it was served at 104 Falcon Road.

17 On March 19, 2019, the demand letter
18 had been sent by the plaintiff through a lawyer at the
19 McLennan Ross Edmonton office. Mr. Williams on
20 behalf of the defendant replied on April 9, 2019, and
21 indicated at the end of the email:

22
23 Should you still wish to proceed with the
24 litigation of this matter, I would be pleased to
25 accept service at my Yellowknife offices.

26
27 When the Statement of Claim was

1 served, it was not served upon Mr. Williams. Counsel
2 who filed the Statement of Claim was located in the
3 Yellowknife office of McLennan Ross and was not
4 aware of Mr. Williams' willingness to accept service on
5 behalf of the defendant.

6 The process server who served the
7 Statement of Claim provided a further affidavit
8 explaining the process of serving the defendant. The
9 process server searched Google to determine where
10 the Statement of Claim should be served. She located
11 the defendant's website which showed Stan Cochrane
12 as the owner and a business address of 104 Falcon
13 Road.

14 She also searched the Department of
15 Industry, Tourism and Investment's BIP Registry, which
16 provides contact information for businesses operating
17 in the north. The physical and mailing address of the
18 defendant was identified as 104 Falcon Road. Using
19 that information, she determined that she should serve
20 Stan Cochrane at 104 Falcon Road.

21 The defendant, Northtech Drilling Ltd., is
22 incorporated in the Northwest Territories. Its registered
23 office is the Yellowknife office of Field Law. The
24 process server did not search the corporate registries
25 database to locate the registered office, nor did she
26 apparently refer to the Statement of Claim which
27 included the address of the defendant as the registered

1 office, the address of the Field Law office in
2 Yellowknife.

3 The requirements for service are set out
4 in the *Rules of Court* and originating documents such
5 as a Statement of Claim must be served personally.
6 Where service must be effected on a corporation, Rule
7 30(3) is applicable. It states:

8
9 Personal service of a document is effected on a
10 body corporate in the manner provided by
11 statute or, where the manner of service is not
12 provided by statute,

13 (a) in case of a body corporate other than
14 a municipal corporation

15 (i) by leaving a true copy of the
16 document with an officer or director of
17 the body corporate or a person in
18 charge of any office or place of
19 business of the body corporate,

20 (ii) by leaving a true copy of the
21 document at, or by sending it by
22 registered mail addressed to, the
23 registered or head office of the body
24 corporate, or [...]

25
26 And there is also a subsection (iii), which
27 is not relevant as it is applicable to corporations

1 registered or headquartered outside of the Northwest
2 Territories.

3 In this case, personal service on a
4 corporation is provided by statute. Section 257 of the
5 *Business Corporations Act* requires a notice or
6 document that is to be served on a corporation to be
7 either delivered to its registered office or sent by
8 registered mail to its registered office or the post office
9 box designated as its address for service by mail.

10 The defendant was not served with the
11 Statement of Claim in the manner in which it should
12 have been, either through service at its registered office
13 or by registered mail to the registered office or post
14 office box designated as its address for service by mail.

15 A similar situation arose in *Anstar*
16 *Enterprises Ltd. v Transamerica Life Canada*, 2009
17 ABCA 196, where the Alberta Court of Appeal stated at
18 paragraph 13:

19
20 Because a default judgment does not involve an
21 adjudication on the merits of a claim, the plaintiff
22 must act in 'the utmost good faith and in strict
23 compliance with the Rules.' In other words, a
24 party seeking to hold an opposing party in
25 default must strictly comply with the procedural
26 rules. Accordingly, where there is a flaw in the
27 procedure leading up to default judgment, a

1 defendant, proceeding promptly, is entitled to
2 open up the default judgment as of right.
3 [Citations omitted]

4
5 In *Amexon Property Management Inc. v*
6 *Paramedical Rehabilitation Solutions Inc.*, 2011 ONSC
7 4783, that Court also held that where a default
8 judgment was irregularly obtained, it may be set aside
9 as of right. An irregularity can include failing to serve
10 the Statement of Claim in the proper manner.

11 Where there is no procedural flaw, the
12 defendant must rely on the Court's discretion in seeking
13 to set aside a default judgment. In that situation, the
14 law in the Northwest Territories with respect to setting
15 aside a default judgment is as stated in *McDonald v*
16 *Koe*, 2014 NWTSC 57 at paragraph 24:

17
18 The decision is a discretionary one, and the
19 overarching aim of the Court must be to do what
20 is fair and just. In exercising its discretion,
21 however, the Court is guided by the following
22 considerations:

- 23 a. whether the Defendant has
24 demonstrated that there was an intention to
25 defend the action;
- 26 b. the Defendant's excuse for allowing
27 the matter to proceed by default;

1 c. whether the Defendant moved
2 promptly to set aside the noting in default or
3 default judgment; and

4 d. whether the Defendant has an
5 arguable defence.

6
7 While the plaintiff acknowledges that
8 service was not completed in the prescribed manner,
9 they argue that the Court should exercise its discretion
10 to find that the defendant was served, that the
11 defendant had notice of the Statement of Claim.

12 The issue of deemed service arose in
13 both *Anstar* and *Amexon*, as while service had not
14 been properly completed, there was some evidence
15 that the defendant in each case had, or should have
16 had, knowledge of the Statement of Claim.

17 The Alberta Court of Appeal in *Anstar*
18 endorsed the proposition that defective service can be
19 deemed to be good and sufficient in circumstances
20 where the document came to the attention of the party
21 being served and that party gained knowledge of the
22 general nature of the claim against them. The
23 challenge is that the plaintiff cannot know whether or
24 when a defendant acquires actual knowledge of the
25 claim. Paragraph 16 and 17.

26 That is the challenge here. The
27 Statement of Claim was served upon Stan Cochrane,

1 who is the husband of Karen Cochran who is the sole
2 director, shareholder and officer of the defendant. Ms.
3 Cochran stated that Mr. Cochran is not and has
4 never been a part owner of the corporation, which was
5 stated in the original Affidavit of Service, and she also
6 says that she has always been the sole director,
7 shareholder and officer.

8 Service was completed at the only office of the
9 defendant. There is no reason to doubt that
10 Mr. Cochran was served with the documents. The
11 affidavit of the process server has not been challenged.
12 There is no explanation regarding what Mr. Cochran
13 might have done with the documents, although Ms.
14 Cochran's evidence, albeit hearsay, is that he had no
15 memory of being served.

16 Ms. Cochran's evidence is that she had
17 no knowledge of the Statement of Claim until the
18 corporation's bank account was garnished and that she
19 did not see the Statement of Claim until after this
20 occurred. While Mr. Cochran is the husband of Ms.
21 Cochran and an employee of the corporation, I have
22 some hesitation in concluding that this necessarily
23 means that the corporation had knowledge of the
24 Statement of Claim.

25 While it may be reasonable to assume
26 that Mr. Cochran would bring the Statement of Claim
27 to his wife's attention, I am not prepared to conclude

1 that service of the Statement of Claim on one spouse
2 necessarily means that the other spouse can be
3 imputed with knowledge of that claim. It will depend on
4 the circumstances of each case.

5 I am troubled that there is no explanation
6 provided by Mr. Cochrane about what happened with
7 the Statement of Claim. There is no evidence
8 regarding whether he acknowledges receiving it, and if
9 so, what he might have done with it. What I am left with
10 is that Ms. Cochrane is the sole director, shareholder
11 and officer of the defendant and her uncontroverted
12 evidence is that she had no knowledge of the
13 Statement of Claim until after default judgment had
14 been entered.

15 In these circumstances, I am not
16 prepared to conclude that Ms. Cochrane should be
17 saddled with the failure of Mr. Cochrane to bring the
18 Statement of Claim to her attention. As well, after Ms.
19 Cochrane learned of the default judgment and
20 garnishee summons, the corporation acted swiftly to
21 have the default judgment and garnishee summons set
22 aside. A Notice of Motion was filed with the court and
23 an affidavit within a couple of weeks.

24 For these reasons, I conclude that
25 service on the corporation was not validly made, and as
26 such, the corporation is entitled as of right to have the
27 default judgment and garnishee summons set aside.

1 Given this conclusion, it is not necessary for me to
2 consider whether the Court should exercise its
3 discretion to set aside the default judgment.

4 The parties also made submissions on
5 costs. The plaintiff seeks to have their throw-away
6 costs for the steps taken after the Statement of Claim
7 was served on the defendant. Given that I have found
8 that service was not properly made and any resulting
9 costs stem from the improper service, I am not
10 prepared to award the plaintiff throw-away costs. I will
11 award the defendant their costs for this application in
12 the amount of \$500.

13 For these reasons I order that the default
14 judgment of Justice Mahar is set aside. The garnishee
15 summons is set aside. The defendant shall have 30
16 days to file and serve a Statement of Defence. The
17 funds that were garnished that are currently held in the
18 Sheriff's trust account arising from the garnishment of
19 funds of the defendant's bank account shall be retained
20 pending the conclusion of this matter, and the
21 defendant shall have their costs in the amount of \$500.

22 Right. Counsel, is there anything else
23 that needs to be addressed?

24 C. BUCHANAN: I don't think so, Your Honour.

25 M. TURZANSKY: One matter would be -- and I think it
26 flows from the decision that was already given, but
27 there's also a writ of execution that was entered in

1 connection with the default judgment. I would just ask
2 for clarification, just that that should be specifically
3 mentioned in the order as well that that be set aside.

4 THE COURT: Okay, that will also be addressed. The
5 writ of execution will be set aside. Is there anything
6 else then, counsel?

7 M. TURZANSKY: No, Your Honour.

8 C. BUCHANAN: No, no, thank you.

9 THE COURT: All right. Thank you, counsel. We will
10 adjourn.

11 **(PROCEEDINGS ADJOURNED)**

12

13

14 **CERTIFICATE OF TRANSCRIPT**

15 Neesons, the undersigned, hereby certify that the foregoing
16 pages are a complete and accurate transcript of the
17 proceedings transcribed from the audio recording to the best
18 of our skill and ability. Judicial amendments have been
19 applied to this transcript.

20

21 Dated at the City of Toronto, in the Province of Ontario, this
22 7th day of October, 2020.

23

24

25



26

Kim Neeson

27

Principal