Court of Queen's Bench of Alberta

Citation: Coombes v. National Phoenix 1984 Firearms Information and Communication Association, 2009 ABQB 566

Date: 20090929
Docket: 0803 09930
Registry: Edmonton

Between:

Randy L. Coombes

Applicant (Plaintiff)

- and -

National Phoenix 1984 Firearms Information and Communication Association, also known as the National Firearms Association, Blair Hagen and Sean Penney

Respondents (Defendants)

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

I. Introduction

> *People, as Kant said somewhere, are ungregariously gregarious. They may associate for some purpose and then may quarrel. The group, its majority or those in power, may want to expel the troublemaker; and he, in his turn, may complain of unfair treatment. Both sides may have their points, though an impartial observer may think the quarrel not worth the ado, nor the offence perhaps worth expulsion...*
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> (Samuel Stoljar, *The Internal Affairs of Associations, Legal Personality and Political Pluralism*, Melbourne University Press, 1958 at pp. 67, cited in ***Lakeside Colony of Hutterian Brethren v. Hofer***, [1992] 3 S.C.R. 165)

[1] This dispute concerns quarrels and a struggle for control of a club dedicated to promoting education, firearms safety, and natural justice for firearms activities.

[2] Randy Coombes' application for declaratory and injunctive relief triggers questions about the Court's role in resolving club disputes and whether failure to strictly comply with the club's bylaws gives access to judicial intervention that otherwise might be denied.

II. The Parties and Their Positions

[3] Headquartered in Edmonton, the National Phoenix 1984 Firearms Information and Communication Association ("NFA") is a not-for-profit organization, incorporated under the *Canada Corporations Act*, R.S.C. 1970, C-32, that enjoys a membership of over 12,000.

[4] Mr. Coombes, a former Vice-President of the NFA's National Executive ("Executive"), claims to have been wrongfully stripped of his place on the Executive.

[5] Blair Hagen is President of the NFA. Together with his Vice President, Sean Penney, he passed resolutions accepting Mr. Coombes' purported resignation from the Executive, terminating his membership and then deferring an election of the Executive. Mr. Coombes had been nominated with two other members of the NFA on a slate running in the election.

[6] Having abandoned his request for certain injunctive relief, Mr. Coombes now asks the Court for:

1. A declaration that he is the NFA's acclaimed President and that Caron Denomie and Robert Klay are the acclaimed Vice Presidents.

2. Alternatively, an order deeming that he is a member of the NFA and directing that an election for the Executive be held with him assuming the Presidency and Carol Denomie and Robert Klay assuming the Vice Presidencies pending the election.

3. An order requiring Messrs. Hagen and Penney to retain counsel other than counsel for the NFA at their own expense.

[7] Mr. Coombes claims that Mr. Penney was disqualified from acting as a member of the Executive as a result of the failure to pay his membership dues from 2004 on. Consequently, all resolutions passed by the Executive where Mr. Penney was one of a two person quorum must be a nullity. Moreover, he asserts that because Messrs. Hagen and Penney have acted in bad faith, and are in a conflict of interest with the NFA, they should be required to retain separate counsel at their own expense.

[8] The Respondents claim that the application is premature as Mr. Coombes must exhaust the NFA's internal procedure for appealing his expulsion before seeking judicial intervention. Alternatively, they assert that the NFA had waived payment of dues by Mr. Penney in

recognition of his service to the organization, all of the actions complained of were made in good faith, and there is no evidence to support the request that they obtain representation separate from that of the NFA.

III. The Facts

[9] Comprised of a President and two Vice-Presidents, the Executive is empowered to exercise full control of and authority over the NFA's business. The NFA also has a National Board of Directors composed of elected Branch members.

[10] In 2007, the founder, "guiding light" and then president of the NFA, David Tomlinson, died. Acting under the authority given the Executive by the Bylaws the Vice-Presidents at the time, Messrs. Coombes and Hagen, decided that Mr. Hagen would assume the Presidency, while Mr. Coombes would continue on as VP Finance and Mr. Penney would be brought on board to fill Mr. Hagen's former position as VP Communications (to complete the remaining term of office). It is unclear whether they obtained advice from the appropriate Branch Executive in making the decision to appoint Mr. Penney, as they were required to do under the Bylaws. Mr. Coombes was keen on Mr. Penney at the time and no one thought to confirm Mr. Penney's membership status, which had to be current in order for him to qualify for the Executive.

[11] In addition to his other Executive duties, Mr. Coombes was tasked with overseeing the head office staff and retaining a consultant to lead a membership drive. There were problems. By the spring of 2008, tensions had mounted. The office staff complained that Mr. Coombes was acting "aggressively and bizarrely." Mr. Coombes delivered an ultimatum demanding suspension of the NFA newsletter's editor which Mr. Hagen reluctantly acceded to. There were concerns about the membership drive and the actions of the marketer Mr. Coombes had retained for the drive.

[12] Tempers flared at a meeting of the Executive on March 13th when an innocuous question to Mr. Coombes was met with a threat to destroy the NFA's relationship with the campaign drive marketer and Mr. Coombes' offer of resignation. In response, Mr. Hagen adjourned the meeting, conferred with Mr. Penney and together they decided to accept Mr. Coombes' resignation, which they took to be from the Executive.

[13] Later that day, Mr. Coombes emailed the Executive and others to say that he had been given a choice at the meeting - resign or be expelled. Claiming to not have resigned, he said that he would appeal any decision to expel him from the NFA pursuant to the internal appeal process set out in the Bylaws ("Internal Appeal").

[14] On March 16th, the National Board passed a resolution accepting Mr. Coombes' resignation from the Executive, after hearing from Messrs. Hagen and Penney, who apparently did not refer to Mr. Coombes' March 13th email.

[15] March 31st saw a flurry of events to force an election. Christopher di Armani and Dan Lupachuk nominated Mr. Coombes for the Presidency on a slate with Caron Denomie and

Robert Klay ("Coombes' slate"). Within hours, Mr. Penney nominated Mr. Hagen for President and Sheldon Clare for VP Finance. Mr. Penney was nominated for VP Communications.

[16] In the ensuing days and weeks:

- Robert Klay withdrew from the election after discussions with Mr. Hagen, who offered support for Mr. Klay's candidacy on the National Board.

- The NFA believed (for reasons that are both unclear and disputed) that the nomination for the Coombes' slate was withdrawn and deferred the election.

- Coombes was advised of his expulsion from membership in the NFA, which he later was told was "for cause," although the "cause" was not disclosed**.**

- The Executive further deferred the election on the basis that the Coombes' slate had disintegrated.

[17] The election never proceeded. Mr. Hagen and Mr. Penney continued on as President and VP Communications. There has been no annual general meeting of the NFA since 2007. Mr. Coombes did not appeal his expulsion. However, in mid-July 2008 he sued for conspiracy, seeking damages and the same relief as today. The litigation proceeded in fits and starts until May 2009, when Mr. Coombes learned from a disgruntled former NFA employee that Mr. Penney had not paid membership dues since 2004.

IV. The Issues

[18] The issues to be sequentially addressed are:

1. Is the application premature? Inextricably connected to this is the question of whether the appeal panel can address quorum concerns and the fate of the aborted election. If the appeal panel cannot make such determinations and the application is not premature, then:

2. What is the status of Mr. Coombes' membership in the NFA? In order to answer this, it will be necessary to address the issue of whether Mr. Penney was a voting member of the NFA in 2008 and entitled to hold a position on the Executive? If not, the issue arises as to whether the decision of the Executive expelling Mr. Coombes as a member was void for lack of a proper quorum?

3. What is the fate of the deferred election? Should a new election be directed?

4. Must Messrs. Hagen and Penney retain separate counsel at their own cost?

V. Analysis

A. Is the Application Premature?

1. Whether the Court can intervene?

[19] It is evident that the NFA operates as a fairly loosely organized group, more concerned with day-to-day operations and fulfilment of its objects, than attending to details of a more corporate nature according to proper corporate procedures.

[20] Like many social, sports, and philanthropic organizations, the NFA is a "voluntary association" and the relationship between its members is contractual in nature (***Lakeside Colony of Hutterian Brethren***). Members' conduct is regulated by the constitution, bylaws, and rules to which they have subscribed (***Conacher v. Rosedale Golf Association Ltd.***, [2002] O.T.C. 113 (S.C.J.); ***Kaplan v. Canadian Institute of Actuaries*** (1994), 161 A.R. 321 at para. 27 (Q.B.)).

[21] Courts are reluctant to interfere in the internal management of clubs (***Lakeside Colony of Hutterian Brethren***; ***Street v. B.C. School Sports***, 2005 BCSC 958). However, as was noted in ***Street v. B.C. School Sports*** at para. 45:

> …There are certain basic principles that govern relationships between people, which all people are bound by, and which cannot be contracted out of. The Courts have always retained the jurisdiction to govern those basic principles, and so long as the jurisdiction remains restricted and limited to those rarest of cases, the Courts have jealously guarded it.
>
> …The Courts have no interest in the day-to-day activities of voluntary associations, but they have traditionally maintained a real and important interest in the processes by which those organizations govern themselves.

[22] In those rare cases where judicial intervention is appropriate, the Court will entertain only these questions: "... first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to bonâ fide" (***Lakeside Colony of Hutterian Brethren*** at para 10, citing a statement by Stirling J. in ***Baird v. Wells*** (1890), 44 Ch. D. 661 at 670).

[23] With that backdrop, I now consider whether and to what extent the Court should intervene in the affairs of the NFA.

2. The Internal Appeal

[24] Anticipating trouble after the March 13th meeting of the Executive, Mr. Coombes gave notice of his intention to exercise his right to the Internal Appeal under the Bylaws, which provides that:

> 30.2 A Member suspended or expelled by the National Executive shall have a right to a hearing before a committee of three, one chosen by himself, one chosen by the National Executive, and one chosen by the two. All courtesy and assistance shall be offered to the Member, who shall receive a full hearing including presentation of the evidence. The decision of the committee is final. If the vote of the committee does not confirm the suspension or expulsion, the Member in question resumes status as a Member in good standing.

[25] While Mr. Coombes threatened to appeal any effort to expel him, instead he chose to sue the NFA and brought this application for summary relief. He asserts that the Internal Appeal process does not exclude the Court's jurisdiction, citing as authority ***Posluns v. Toronto Stock Exchange and Gardner***, [1968] S.C.R. 330; ***Canadian Union of Public Employees, Local 3197 v. Edmonton (City of)***, 1998 ABCA 69, 212 A.R. 71; ***Barron v. Warkentin***, 2005 ABCA 351, 380 A.R. 314 and ***Knox v. Conservative Party of Canada*****,** 2007 ABQB 180, [2007] 6 W.W.R. 551, var'd 2007 ABCA 295; 286 D.L.R. (4th) 129, leave to appeal to S.C.C. ref'd 2007] S.C.C.A. No. 567. In my view, these cases are readily distinguishable. Coombes' complaints do not affect democratic rights (***Barren*** and ***Knox***), involve a statutory body (***Posluns***) or a trade union (***Canadian Union of Public Employees Local 3197***).

[26] The present case is more akin to the circumstances of ***Trumbley v. Saskatchewan Amateur Hockey Association*** (1986), 49 Sask. R. 296 (C.A.), which involved a suspended hockey coach who started but abandoned an appeal under the organization's internal appeal mechanism before turning to the court for assistance. Citing ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 26 N.R. 364, 96 D.L.R. (3d) 14 as an analogous case and noting the absence of prejudice, the Saskatchewan Court of Appeal ruled that completion of an internal appeal process was a prerequisite to seeking discretionary relief from the court (at paras.19 and 22). The Court considered the following factors in reaching this conclusion:

1. Fair Hearing: There was no evidence to suggest that there would not be a fair hearing from the appeal panel.

2. Prejudice: There was no prejudice.

3. Sufficiency of Remedy: The remedy was more convenient to both parties in terms of costs and expeditiousness.

[27] Applying these considerations, I find that:

1. Fair Hearing: There is a presumption that a member of a tribunal will act fairly and impartially in the absence of evidence to the contrary. While Mr. Coombes may suspect that the Internal Appeal panel would be biased against him, he has presented no evidence to demonstrate a real risk of perceived or actual bias. Accordingly, he has not met the threshold to show that the Internal Appeal would be unfair (***R. v. R.D.S.***, [1997] 3 S.C.R. 484).

2. Prejudice: There is no real prejudice.

3. Sufficiency of Remedy: The Internal Appeal process is designed to promote justice, fairness and economy in resolving disputes about the suspension or termination of membership in the NFA. Inextricably connected to the panel's determination concerning Mr. Coombes' expulsion is the issue of whether there was a proper quorum of the Executive who expelled him. This issue likely would entail hearing evidence and certainly would require interpretation of the Bylaws, which in my view are well within the panel's purview. However, the Internal Appeal panel has no jurisdiction to address the issues arising from the aborted spring 2008 election. Accordingly, it could not provide an adequate alternate remedy.

[28] The Internal Appeal panel's inability to deal with issues arising from the aborted election would result in piecemeal and costly proceedings if that process first had to be exhausted; an undesirable outcome that is simply avoided by dealing with all of the issues now.

[29] I conclude that the application is not premature and that it is appropriate that the Court hear the matter.

B. What is the Status of Mr. Coombes' Membership in the NFA?

1. Quorum

[30] ***IBM Canada Ltd. v. Deputy Minister of National Revenue (Customs & Excise)***, [1992] 1 F.C. 663, 129 N.R. 369 at para. 9, speaks to the requirement of a proper quorum in the context of a statutory tribunal:

> …Having the proper quorum at all relevant times, from the beginning up to the very last moment is a question of principle, of public policy and of sound and fair administration of justice.

[31] The same policy reasons largely apply to a consensual board such as the Executive. The NFA's Bylaws provide that a quorum at a meeting of the Executive is two.

2. What was Mr. Penney membership status?

[32] Paradoxically, Mr. Coombes' membership status depends on the membership status of Mr. Penney. If Mr. Penney was not a voting member of the NFA, he was not entitled to hold executive office. If he was not a proper member of the Executive, any two person quorum of the Executive that involved him would have acted without jurisdiction and any resolutions by such a quorum, including Mr. Coombes' expulsion as a member-at-large and the deferral of the 2008 election, would be a nullity for failure to comply with this jurisdictional requirement. If Mr.

Penney was a properly appointed member of the Executive, the quorum requirement was met in terms of those resolutions.

[33] Only a "voting member" as defined in the Bylaws is entitled to hold an Executive position in the NFA. A "voting member" must have (1) paid their annual dues; (2) donated a specified monetary amount to the organization; or (3) been designated as a life member ("Membership Bylaw"). The qualifications for life membership are specified in the Membership Bylaw, which reads as follows:

> 28.4 Is qualified as a Life Member by serving as a Legislative Action Member for five years, or by submitting, as a Field Officer, 60 monthly reports. This provision may be varied in special cases by National Policy Directives issued by the National Executive.

[34] Mr. Penney has not paid dues since 2004, made a monetary donation, served as a Legislative Action Member or served as a Field Officer. Accordingly, his status as a "voting member" entitled to an Executive seat hinges on whether there was a valid: (1) National Policy Directive ("NPD") varying the Membership Bylaw concerning life membership; or (2) a waiver of the payment of dues for life in recognition of Mr. Penney's service to the organization.

[35] NPD's are addressed in the Bylaws, which provide that the Executive and Branch Executive Officers are "designated as spokesmen for the NFA national policies, as set forth in writing in National Policy Directives…". The Bylaws also allow the Executive to make "such regulations relating to the management and operation of NFA as it deems vitally necessary, provided that such regulations do not violate these Bylaws."

[36] Leaving aside questions about the proper interpretation of the Executive's power to amend the requirements for life membership by NPD, there is no evidence of a written NPD having been issue in this regard and no evidence to establish that any relief from the requirement that it be in writing was available and had been taken advantage of.

[37] The Respondents contend that Mr. Penney's membership fees were waived for life in 2004 in consideration of his contributions to the NFA. They suggest that:

1. The late Dave Tomlinson exempted Mr. Penney from paying membership dues from 2004 onward. They say that it is irrelevant that Mr. Tomlinson was not the *de facto* president at the time since Mr. Hagen retroactively waived Mr. Penney's membership fees in 2009.

2. Jim Hinter, the *de facto* president in 2004, granted Mr. Penney a lifetime membership in recognition of his service to the organization.

3. Mr. Hagen invoked Bylaw No. 3 in June 2009 to interpret the Membership Bylaw as permitting Mr. Penney's past efforts to constitute payment of "all relevant membership fees." Bylaws No. 3 provides that: "If a question

> arises regarding the interpretation of one or more of these Bylaws, the decision of the National President is final and binding."

[38] There is no direct evidence (or explanation for its absence) to support the contentions that Dave Tomlinson or Jim Hinter waived payment of Mr. Penney's dues. Mr. Hagen suggests that they (and he) had invoked the Presidential power under the Bylaws to interpret them in such a way as to permit this action. In my view, the grant of power under Bylaw No. 3 is to make a final determination on the interpretation of a Bylaw in order to resolve ambiguities. It does not permit the President to supercede the plain and unambiguous language of the Membership Bylaw to bootstrap the NFA's position.

[39] It is ironic that Mr. Coombes is seeking to bootstrap his position by relying on Mr. Penney's membership status to nullify the actions he complains of when it was he who was keen to appoint Mr. Penney to the Executive and was responsible for the NFA's finances, presumably including oversight of membership dues' payment.

[40] Nevertheless, Mr. Coombes' involvement does not excuse the failure to comply with the Bylaws, which have legal effect with respect to the work of the Executive (***Boucher v. Métis Nation of Alberta Association***, 2009 ABCA 5, 448 A.R. 185; ***The Queen v. Walker*** (1875), 10 L.R. 355 at 358 (Q.B.); *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1995), vol. 44(1) at para. 1510; ***Pawlett v. Newfoundland*** (1984), 12 D.L.R. (4th) 755 (Nfld. C.A.); and ***Young v. British Columbia College of Teachers***, [1999] B.C.J. No., 2104 (S.C.) (QL)).

[41] This is not a case of a club member waiving their entitlement to strict compliance with the Bylaws, nor is it a case where there is statutory authority to offer any relief from the consequence of the jurisdictional error that was made (see, for example, ***Bhatti v. Nagra***, [1993] B.C.J. No. 1287 (S.C.)). As I have stated, the consequence of this jurisdictional error is that resolutions that Mr. Penney voted on as one member of a two person quorum of the Executive are a nullity.

[42] Mr. Coombes is entitled to a declaration that he was not properly expelled as an NFA member in 2008 and to an order directing the NFA to accept his 2008-2009 membership renewal form and accompanying cheque.

C. The Election Issues

[43] Another consequence of Mr. Penney's membership status is that his 2008 nomination of Mr. Hagen and Sheldon Clare for election was a nullity. The Bylaws require that "National Executive Officers may be nominated by any two Executive Officers", which includes members of the Executive and the Branch Executives.

[44] However, this does not translate into Mr. Coombes being the acclaimed President or his running mates being the acclaimed Vice-Presidents of the NFA. Robert Klay's self-removal from the election race aside, significant disagreement and lack of clarity in the evidence about whether and under what circumstances the Coombes' slate was withdrawn would require a trial of the

entire election question. Even if it was determined at the end of the day that an election should have been held in 2008 or that the Coombes' slate should have been acclaimed as the Executive, that does not necessarily assist the club now. There is no way of knowing what the result of an election in 2008 would have been. Further, even if the Coombes' slate should have been acclaimed, time has passed. Other members of that slate may no longer have any interested in sitting on the Executive.

[45] The Bylaws of the NFA require that every even numbered year an annual general meeting is to be held, during which the Executive are elected. Given that a decision on a trial of the election issue might well take until the new year, I am of the view that the most practical relief would be to grant a direction requiring that the NFA hold its annual general meeting and election for Executive as soon as reasonably possible in 2010. Until that time the matter of Mr. Penney's position on the Executive will have to be properly addressed by the organization. Mr. Penney's role in the appointment of Mr. Clare to the Executive (to fill the vacancy created by Mr. Coombes' expulsion) is unclear. If he participated in the appointment, that position will also have to be properly addressed.

D. Should Mr. Hagen and Mr. Penney be Required to Obtain Counsel Separate from Counsel for the NFA?

[46] As the matters in issue have been resolved and relief awarded, there is no need to address whether Mr. Hagen and Mr. Penney should be required to obtain separate counsel from that of the NFA. However, even if it were otherwise I would find that there is no need for Mr. Hagen and Mr. Penney to obtain separate representation.

[47] Ordering separate representation without a strong basis for doing so would have a palpable and chilling effect on volunteer participation in voluntary associations. The Alberta Court of Appeal's direction in ***Barron v. Warkentin*** that there must be evidence of bad faith, malice, capricious or arbitrary conduct to award costs against a volunteer organization resonates in this regard.

[48] While Mr. Coombes feels that there was bad faith by the Respondents in their dealings with him, the evidence does not clearly support that finding. It shows a breakdown of the relationship and possible overreactions. I am far from being satisfied that the Respondents, individually or collectively, have acted in bad faith, capriciously, or maliciously in their dealings with Mr. Coombes. Further, there is no evidence of inconsistency between the NFA's and the individual Respondents' best interests. Finally, this is essentially a request for injunctive relief, but the well established tri-partite test is not made out.

VI. Costs

[49] If the parties cannot agree on costs they may speak to me within 45 days.

VII. Conclusion

[50] The result of this application is that for strictly jurisdictional reasons:

1. Mr. Coombes is declared to have been a member of the NFA in 2008.

2. The NFA is directed to accept Mr. Coombes' application to renew his membership and accompanying cheque.

3. The NFA is directed to hold its annual general meeting and election for Executive as soon as reasonably possible in 2010. In the interim it is to address filling the vacancies created on the Executive arising as a consequence of this application.

4. The application requiring Messrs. Hagen and Penney to obtain separate representation at their own cost is denied.

5. If the parties cannot agree on costs they may speak to me within 45 days.

Heard on the 14th day of August, 2009.
Dated at the City of Edmonton, Alberta this 28th day of September, 2009.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

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