Date: 20001025
Docket: S.H. Nos. 163871 & 163409

IN THE SUPREME COURT OF NOVA SCOTIA

Between:

THE COLCHESTER YMCA

Applicant

- and -

YMCA CANADA

Respondent

D E C I S I O N

HEARD BEFORE:	The Honourable Justice Arthur J. LeBlanc
PLACE HEARD:	Halifax, Nova Scotia
DATE HEARD:	July 11, 2000
ORAL DECISION:	September 28, 2000
WRITTEN RELEASE:	October 12, 2000
COUNSEL:	Mr. Vincent K. Roberts, for the Applicant Mr. Robert G. Grant, Q.C. Ms. Leah Hutt, for the Respondent

LEBLANC, J.:

[1] This is the decision on the application by the Colchester YMCA for an injunction. Earlier in the proceedings I had given an interim order directing that the vote held by the YMCA Canada be held in secret and that nothing be done with respect to the vote until I had heard the parties further and furthermore that I had rendered a decision respecting the injunction application. Therefore the decision which I give today will supercede that order. The within order will no longer have any effect.

[2] This is an application by YMCA Colchester for an interim injunction restraining YMCA Canada from releasing the results of a recent secret ballot vote to disaffiliate the applicant from the national organization and from implementing the same.

[3] YMCA Canada (the National Council of Young Men's Christian Associations of Canada) is a federation of independently incorporated Canadian YMCA's and YWCA's with a constitution and a set of bylaws that define conditions of membership in that federation. There is also a separate federal corporation without share capital that holds property for the council. Article 12 of its bylaws provides the conditions for affiliate membership. Article 15 provides a procedure for disaffiliation of a member organization. The national board runs the day-to-day proceedings of the federation while the council meets annually for major decisions.

[4] YMCA Colchester is an association incorporated under the laws on Nova Scotia and currently an affiliate member of the YMCA Canada national federation.

[5] If the applicant loses its affiliation with the national federation, it could no longer use the initials "YMCA" and would no longer receive any assistance from the federation.

History of Disaffiliation

[6] There is a long history to the events of this case.

[7] In March 1999, the board of YMCA Canada informed YMCA Cochester that it was bringing a motion before the national council to disaffiliate it from the national body if it did not comply with conditions of membership which would include, *inter alia*, payment of outstanding debts and provisions of audited financial statements for the year ending May 31, 1998. Through April and May of that year, the parties negotiated repayment of amounts owing, however, no progress was made concerning the provision of statements. On May 19 and 20, 1999 YMCA Colchester indicated that it was "prepared to meet all the requirements outlined in [YMCA Canada's] previous correspondence". Specifically, on May 20, Mr. Archibald, President of the YMCA Colchester Board wrote to YMCA Canada stating:

> We are prepared to have the said audited financial statements for year end May 31, 1999 performed in accordance to the YMCA Canada's request on or before January 31, 2000. [emphasis added]

[8] As a result of the recommendation of the national board, the motion for disaffiliation was removed from the National Council's agenda. On June 25, 1999, Mr. Kasimer, the new CEO of YMCA Canada set out a number of conditions the performance of which would ensure YMCA Colchester's adherence to conditions of membership in the national bylaws. The first of these was confirmation by September 30, 1999 that YMCA Colchester had engaged external auditors to complete the audited financial statements.

[9] Despite requests from YMCA Canada in August and November, YMCA Colchester did not provide any evidence of its progress on completing audited statements until December 8, 1999 when it informed YMCA Canada that it was still seeking an auditor for such purpose. On January 24, 2000 YMCA Canada informed YMCA Colchester that failure to provide an audited financial statement by January 31, 2000 would, itself, be grounds for revisiting the vote on disaffiliation. YMCA Colchester wrote a letter on March 20, 2000 indicating that it had hired an accountant to perform the audit but that it would be completed in May 2000. The national board decided on April 1, 2000 to place the vote for disaffiliation back on the national council agenda and informed YMCA Colchester of the same on April 7, 2000.

[10] On April 28, 2000, the applicant brought a styled "Originating Notice Application" for an injunction to prevent YMCA Canada from proceeding with a vote on disaffiliation. Justice Hamilton in Chambers on May 4, 2000 adjourned the application so that YMCA Colchester could bring an originating notice (action) and a statement of claim against YMCA Canada so that it

could bring a proper application. YMCA Colchester then brought an action claiming negligence and breach of contract by YMCA Canada.

[11] In another application hearing on May 26, I ordered that the vote on disaffiliation at the YMCA Canada national council meetings from May 26 to 28, 2000 be by secret ballot, contrary to the organization's regular procedure. The results of that vote would be released only to the C.E.O.'s of YMCA Canada and YMCA Colchester and their counsel. That vote took place on May 28, 2000. YMCA Colchester seeks to have the results of this vote kept secret and not implemented by way of an injunctive proceeding.

The Law on Interim Injunctions

[12] The basic starting point for any examination of the law concerning interim injunctions in Canada is the decision of the Supreme Court in R.J.R.-MacDonald v. Canada (Attorney General), [1994] 1 S.C.R. 311. There the court found that the three-part test established by American Cyanimid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.) should apply to both interlocutory and interim injunctions in both Charter and private law matters. Simply put, the three questions the court must ask itself in considering whether to grant an interim injunction are:

1. Is there a serious issue to be tried?
2. Would the applicant, if ultimately successful in the main action, suffer irreparable harm if the injunction is not granted?

3. Which of the two parties, on balance, will suffer the greater inconvenience if the injunction is or is not granted?

Application to this Case

[13] The application does not actually have anything to do with the relief sought in the main proceeding of the case. From the affidavits and pleadings file in this matter, I have concluded the issue of disaffiliation is not connected to the main action other than by identity of the parties. The Colchester YMCA has not brought a case alleging impropriety with the process of the vote for disaffiliation.

1. Serious Issue to be Tried

[14] I recognize that this branch of the test for an interim injunction is usually passed without much discussion. That is, is there a serious issue to be tried? I feel that in this particular case, however, I will address this factor. The Supreme Court in R.J.R. MacDonald, stated at 348, that a chambers judge at this stage should make his determination on the "basis of common sense and an extremely limited review of the case on the merits" [emphasis added]. Technically, there is a serious issue to be tried. I have examined the respondent's detailed brief on this question. With deference, the standard to be met by the applicant at this stage is a minimal one. Since American Cyanimid, the applicant is no longer required to present a *prima facie* case or, as the respondent

suggests, the likelihood of success at trial, before an injunction is granted. Generally, all that is required is that the claim not be frivolous or vexatious. I do not find that to be the case here.

[15] However, the two criteria mentioned by the Supreme Court above lead me to the same conclusion: the main cause of action is not related to the injunction sought. The serious issue to be tried is not one to which this injunction has any relevance and therefore the applicant has not shown that this first test has been met.

[16] Even if YMCA Colchester were successful in its claim of negligence and breach of contract with YMCA Canada, that will not dispose of the proceedings for disaffiliation. Such proceedings will still exist. YMCA Canada has not brought disaffiliation proceedings against YMCA Colchester based on the lawsuit between them or even on the alleged failure to pay an amount of money owing but rather on a failure of the applicant to provide audited financial records by the dates it promised. In fact, I note that in both the materials provided by YMCA Canada to its general council and in a transcript of the proceedings of the vote, it reiterated that the existence of the lawsuit was not to be taken into consideration during the disaffiliation vote. Thus no matter what the eventual disposition of this will be at trial, it will have no effect on such proceedings.

2. Irreparable Harm

[17] If I am in error on the first point, I find that the applicant has failed to show that irreparable harm will result from my not granting the injunction.

[18] I do not believe the vote in favour of disaffiliation, I do not believe will cause irreparable harm to YMCA Colchester for which the respondent cannot compensate with damages.

[19] In RJR - MacDonald, Justices Cory and Sopinka noted (at 341):

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228 (Sask Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanimid, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

[20] Applying this reasoning, I have come to the conclusion that the potential harm that YMCA Colchester may suffer is not irreparable.

[21] The Applicant has alleged before me that it will become bankrupt and cease to exist should it be disaffiliated from the national organization. I agree that, were that result to arise, damages would certainly not be adequate to repair that harm. However, I do not see how this

harm is likely to happen as a result of disaffiliation. This association is not a business and its name is not its entire livelihood. From what I understand of the relationship of the parties, disaffiliation will not result in the elimination of the corporate entity of the Colchester YMCA. Simply, it would no longer be able to use the letters "YMCA" and would not receive help from the national organization. I recognize that affiliation with the national organization generates a great deal of goodwill and that it may be a blow to the Colchester YMCA to lose that goodwill, particularly in terms of fund-raising. Such a blow however is not a fatal one, however. I believe that it could still fill a role in the Truro community that organizations in areas without a YMCA or YWCA are able to fill. Any harm it suffers could be compensated for by damages. Furthermore, it would still be able to pursue its claim against YMCA Canada.

[22] Moreover, there is a process for affiliation (or reaffiliation in this case) for the Colchester organization to rejoin YMCA Canada at some point in the future. This could obviously repair the possible harm resulting from my not granting this injunction. However, I wish to make it clear that this is not a direction to YMCA Canada to allow reaffiliation should the applicant be successful at trial or, for that matter, that it consider an application for reaffiliation in the future.

3. Balance of Convenience

[23] Each party has provided reasons on the inconvenience it might suffer by the granting or not granting of the injunction. I have already examined the potential harm that might befall the applicant should I not grant this injunction. The respondent alleges that if I grant the injunction,

it will be denied its right of self-governance. Further, its well-earned reputation as a national charitable organization will be in jeopardy should the applicant be allowed to continue as an affiliate without respecting the bylaws of the national organization. I find there is some merit in each position.

[24] One of the main factors that the Supreme Court mentioned in R.J.R.-MacDonald is the retention of the *status quo*, all other things being equal. I do not agree that maintaining the *status quo* is appropriate here. It should be remembered that the granting of an injunction is discretionary and it is an equitable remedy. Neither equity nor my discretion allow me to find that this *status quo* should be maintained. I realize that these criteria may properly be considered outside the third part of the test, but in this case they are integral in finding where the balance of convenience lies.

[25] One of the main features of any equitable remedy is that the applicant must come with "clean hands." Here, YMCA Colchester was given a reprieve from an earlier vote on disaffiliation in 1999. It failed to adhere to the directions from YMCA Canada that would permanently remove the resolution on disaffiliation from that organization's agenda. In my opinion, I find that the activities of YMCA Colchester since that date showed a lack of good faith. It suggested that it was having difficulty in finding an accountant who could perform an audit. While this may be the case, at the very least it should have informed YMCA Canada of its efforts particularly when the date by which it agreed to submit audited statements was approaching. What is further striking is that in March 2000, it informed YMCA Canada that its chosen

accountant could not complete the audit until May. I concede that accountants are most busy from January through April but here there is no evidence as to what the applicant actually did from June 1999 to March 2000 to ensure a completed audit was ready. A period of 13 months for the applicant to complete an audit that was clearly expected far earlier indicates a lack of effort that cannot be excused without some evidence to indicate the contrary.

[26] Were I to grant an injunction, there is no reason why the YMCA Colchester would not continue in its failure to meet the obligations of membership and further distort its relationship with YMCA Canada. I recognize that a volunteer charitable organization may have great difficulties in finding funds for such expenses as audits, but it is not my place to review the conditions of continued membership in YMCA Canada. That is for the various affiliate organizations in Canada. They would know far better than I the difficulties a member might have in meeting such obligations including the provision of financial statements. They could appropriately determine whether a member should be disaffiliated or not for such a failure. Based on the evidence before me I have not found not found any procedural irregularity with the voting process.

[27] Finally, I am particularly hesitant to interfere with the internal governance of a national federation where claims about procedural unfairness in such governance have not been alleged nor, indeed, are evident. This is particularly the case when that organization has already shown forbearance in not pursuing a previous disaffiliation proceeding and agreeing to a second chance.

I would find that this is a case in which I should exercise my discretion not to grant the injunction sought.

Conclusion

[28] I come to my conclusion not without some regret knowing the role that the Colchester YMCA has played in the area for over 100 years. The possible disaffiliation may be very unpleasant to the community and to the volunteers. However, I am unable to find that the applicant has met the standard required for the granting of an interim injunction. The application is therefore dismissed. The respondent may therefore release and implement the vote held on May 28, 2000 dealing with the Colchester YMCA.

[29] As a result, as well, the interim order dated May 26, 2000 is no longer in effect.

[30] Costs shall be in the cause.

J.