Enge, et al v. *North Slave Metis Alliance*, 2003 NWTSC 13

Date: 2003 03 11
Docket: CV08431

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WILLIAM A. ENGE, ROBERT SHOLTO DOUGLAS, and WILLIAM A. ENGE, as a representative of that class of individuals who were expelled from membership in the Defendant, North Slave Metis Alliance

Plaintiffs

- and -

NORTH SLAVE METIS ALLIANCE

Defendant

MEMORANDUM OF JUDGMENT

[1] In the within proceeding the plaintiff Enge asserts that his membership in the defendant organization was wrongfully cancelled, contrary to the constitution and by-laws of the defendant organization. Also, the plaintiff Enge brings a representative claim on behalf of 87 other individuals each of whom, he asserts, similarly had his or her membership wrongfully cancelled in September 1998. In December 1999 the defendant sought to have the representative claim struck out. Vertes J. dismissed the defendant's application.

[2] The defendant now applies for leave to conduct an examination for discovery of 42 of the individuals in the representative class. For the reasons which follow I find that the proposed discovery of the individual class members is unreasonable and not necessary for the fair and efficient determination of the representative claim.

[3] As stated by Vertes J. on the earlier ruling, the representative claim is based on wrongful expulsion from membership, not denial of membership. He stated: "The

principal issues of fact and law are the same: Were the claimants members? Were they wrongfully expelled from membership?"

[4] These principal issues are in dispute. The respective positions of the parties on these principal issues are readily discernible from the pleadings and from material filed on the present application.

[5] In support of their position the plaintiffs initially point to the provisions of Article 1 and Article 3 of the defendant organization's by-laws:

> ARTICLE 1 MEMBERSHIP
>
> (1) Membership in the Alliance shall be restricted to those individuals who are affiliated under Article 3 of these By-Laws (hereinafter referred to as "Members") who apply for membership in the Alliance.
>
> (2) There shall be no membership fees charge by the Alliance and each membership shall be deemed to be automatically renewed unless such membership has been cancelled by a special general meeting or the member has withdrawn pursuant to the provisions of Article 4.
>
> ARTICLE 3 MEMBERSHIP
>
> (1) The following individuals are eligible as members of the Alliance.
>
> (a) a person who is descended from Aboriginal people who resided in, or used and occupied, the North Slave Region prior to January 1, 1921.

[6] The parties agree that the defendant organization was incorporated in November 1996, and that general meetings were held in December 1996, August 1997, August 1998 and September 1998.

[7] The plaintiffs' position is that an individual obtained membership by completing a Declaration Form (presumably including information on eligibility under Article 3(1)(a)) and submitting it to the defendant organization. No further action was required, according to the plaintiffs' position.

[8] The defendant organization, on the other hand, takes the position that a person seeking membership in its organization had to apply for membership, and did not become a member until such time as the application for membership was accepted by the defendant organization. The defendant organization points to the existence of a

Membership Committee which held its first meeting in August or September of 1998. The defendant says that the Membership Committee reviewed all of the Declaration Forms and submitted a list of names to the Board of Directors that the Membership Committee recommended for membership. The Board of Directors accepted the Committee's recommendation. And thus, according to the defendant's position, a membership list was created for the first time in September 1998. The name of the plaintiff Enge, and the names of the members of the representative class, were not on the list.

[9] Thus, in the representative claim (there are other claims and aspects of the within Court action that are not relevant on this interlocutory application), the positions of the parties are quite clear and defined. To reiterate, the common issues are: Were the claimants members? Were they wrongly expelled from membership? The plaintiff Enge and the members of the class say "We were members once we signed and submitted a Declaration Form, and you wrongly cancelled our membership in September 1998". The defendant organization says "You were never members at any time." At trial, if Mr. Enge succeeds on the issue, the members of the class will succeed. If Mr. Enge loses, all the class members lose as well. This was one of the reasons why Vertes J. held that the requirements for a representative action were present in this proceeding.

[10] As underlined recently by the Supreme Court of Canada, one of the important advantages of the representative action or class action is the judicial economy that is achieved by "avoiding unnecessary duplication in fact-finding and legal analysis". See *Western Canadian Shopping Centres Inc.* v. *Dutton*, 2001 SCC 46 at para.27. This advantage would be defeated if there was to be individual discovery of the members of the class.

[11] Indeed, in the *Western Canadian Shopping Centres Inc.* case, Chief Justice M^{c}Lachlin stated:

> One of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule . . .
>
> . . . examination of other class members should be available only by order of the Court, upon the defendants showing reasonable necessity." At para.59-60.
>
> (emphasis added)

[12] On the present application the defendant organization has not shown that individual discovery of the 46 named members of the class is reasonably necessary.

[13] On this application the defendant organization provides some details of questions it seeks to ask individual class members at discovery — e.g., a) what was the person's involvement with the defendant organization's affairs prior to the September 1998 meeting, b) what the person observed and/or said or did at the August 1998 meeting, c) what did the person observe at the time of the September 1998 meeting, d) whether the person attended the May 1999 meeting. With respect, answers to these questions will not assist in advancing or refuting either the position of the plaintiff Enge or the position of the defendant organization as those positions are set forth in the pleadings and on this application, i.e., on the "representative" claim.

[14] The common issue is how membership in the defendant organization is achieved. The determination of that common issue does not require the particulars of each person's conduct *qua* member or *qua* applicant for membership. Resolution of this common issue at trial will advance this litigation in a material way. It may be that, following resolution of this common issue, further inquiry will have to be made in individual cases, but that is unlikely. I note, for example, that no damages are sought for individual members of the class. It will be open to the trial judge in his/her discretion to direct such further inquiry — the Court retains control over the conduct of its proceedings.

[15] In my view the request for individual discoveries is unreasonable and unnecessary in these circumstances. To allow these individual discoveries would result in undue expense and delay in the litigation.

[16] There is no prejudice to the defendant in the Court's denial of this request for individual discoveries. The common issue, as stated earlier, is fairly discrete. The common issue has been extensively explored by the defendant in its conduct of examination for discovery of the plaintiff Enge. In addition, I note that the plaintiffs acceded to the defendant's request that a two-page questionnaire (17 questions) drafted by defendant's counsel be completed by each class member. The completed questionnaires have been made available to the defendant. On the hearing of this application, plaintiffs' counsel agreed that the completed questionnaires could be treated as written answers to interrogatories under the *Rules of Court*, including use at trial.

[17] For these reasons the main application before the Court must be denied.

[18] A further application sought in the defendant's notice of motion is for an order "granting leave to the defendant to examine Raymond Harrold for discovery, pursuant to Rule 270."

[19] Rule 270 reads as follows:

> 270(1) The Court may grant leave, on such terms respecting costs and other matters as it considers just, to examine for discovery any person not a party to the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation, where the Court determines there is reason to believe the person has information relevant to a material issue in the action.
>
> (2) An order under subrule (1) shall not be made unless the Court is satisfied that
>
> (a) the applicant has been unable to obtain the information from any other person who the applicant is entitled to examine for discovery, or from the person he or she seeks to examine;
>
> (b) it would be unfair to require the applicant to proceed to trial without having the opportunity to examine the person; and
>
> (c) the examination will not
>
> (i) unduly delay the commencement of the trial of the action,
>
> (ii) entail unreasonable expense for other parties, or
>
> (iii) result in unfairness to the person who the applicant seeks to examine.
>
> (3) A party who examines a person orally under this rule shall, unless the Court orders otherwise, serve every other party with a copy of a transcript of the evidence free of charge.
>
> (4) A party who examines a person by way of interrogatories under this rule shall, unless the Court orders otherwise, serve every other party with a copy of the written questions and answers received free of charge.
>
> (5) The evidence of a person examined under this rule may not be read into evidence at trial except for the purpose of impeaching the testimony of the person where he or she testifies at trial and, in that respect, it may be used in the same manner as any previous inconsistent statement by that witness.

[20] Raymond Harrold is not a member of the class and is not a party to the action. The defendant states, in support of this application, that Mr. Harrold "appears to have been involved in soliciting the interest of persons in British Columbia. He attended the August 1998 Assembly. He apparently had dealings with Bill Enge and Sholto Douglas. He may have continued to be active amongst the British Columbia people after he attended the Assembly."

[21] The defendant has not satisfied the test under Rule 270(2). Also, there is insufficient foundation for a belief that Mr. Harrold has information relevant to a material issue in this action.

[22] For these reasons the defendant's application is denied. The plaintiffs shall have their costs of the application in any event of the cause.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT this
11th day of March 2003

Counsel for the Plaintiffs: Charles F. McGee
Counsel for the Defendant: Austin F. Marshall

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THE HONOURABLE JUSTICE J.E. RICHARD