Court of King's Bench of Alberta

Citation: Daniels Sharpsmart Canada Ltd. o/a Daniels Health v Alberta Health Services, 2024 ABKB 282

Date: 20240516
Docket: 2401 06293
Registry: Calgary

Between:

Daniels Sharpsmart Canada Ltd. o/a Daniels Health

Applicant

- and -

Alberta Health Services

Respondent

Reasons for Decision
of the
Honourable Justice R.W. Armstrong

Introduction and Background

[1] Ensuring the proper disposal of medical waste generated at its facilities is one of the many essential functions performed by Alberta Health Services (AHS). Medical waste, which includes such things as used needles, used bandages, used personal protective equipment and other materials that may be contaminated with bodily fluids or infectious agents, poses a unique risk to the health and safety of health care workers, the public and the environment. The proper disposal of such materials is therefore of the utmost importance, requiring specialized knowledge and equipment to carry it out safely. To ensure that medical waste generated throughout AHS is properly managed and disposed of, AHS contracts for the provision of specialized medical waste disposal services.

[2] The contract for medical waste management and disposal with AHS's current service provider expires on July 31, 2024, with no further extensions available. In anticipation of the need to contract with a new service provider, on April 23, 2023, AHS issued a Request for Proposals (the "RFP") for the provision of medical waste management services for specified AHS facilities.

[3] The Applicant, Daniels Sharpsmart Canada Ltd., operating as Daniels Health, submitted a proposal in response to the RFP. On April 18, 2024, Daniels Health was advised that it was not the successful proponent in the RFP process. AHS commenced negotiations with another proponent, Stericycle ULC, although to date no contract has been finalized between Stericycle and AHS.

[4] Daniels Health seeks to halt the negotiations between Stericycle and AHS. It commenced this application on an urgent basis by way of Originating Notice filed May 6, 2024.

[5] In its Originating Notice of Application, Daniels Health seeks the following relief against AHS:

1. Injunctive relief preventing AHS from continuing to negotiate or enter into a Services Agreement with Stericycle;
2. A declaration that Stericycle's response to the RFP issued by AHS is non-compliant with the terms and conditions of the RFP; and
3. An order requiring AHS to produce all communications and documents relating to the decision-making process they engaged in when they chose Stericycle as its selected proponent.

[6] At the hearing of its application, Daniels Health focused its request for relief on the injunctive relief to halt negotiations between AHS and Stericycle.

[7] AHS opposes the application. It argues that Daniels Health did not file the application in the correct form for an originating application and that interim injunctive relief is not available to Daniels Health because there is no action or application for judicial review pending. Daniels Health has not filed a statement of claim or originating application for judicial review. AHS further argues that Daniels Health has not satisfied the tripartite test for an injunction.

Issues

[8] The relief sought by Daniels Health is an interim injunction preventing AHS from continuing its negotiations with Stericycle and preventing AHS from contracting with Stericycle for medical waste management and disposal services.

[9] The test for an interim injunction or stay is articulated in ***RJR-MacDonald Inc. v Canada (Attorney General)***, [1994] 1 SCR 311 (SCC) and more recently affirmed in ***Google Inc. v Equustek Solutions Inc***, 2017 SCC 34 at para 25. There are three issues to address in an application for an interim injunction:

1. Is there a serious issue to be tried?

2. Will the party seeking the injunction suffer irreparable harm if the injunction is not granted? and

3. Does the balance of convenience favor the granting of the injunction?

Summary of Decision

[10] The application for an injunction is dismissed.

[11] In the circumstances of this case, Daniels Health is required to show more than a serious issue to be tried. Given the nature and timing of the relief sought, the relief, if granted, would have the same effect as a final determination of the issues. Accordingly, Daniels Health is required to demonstrate that it has a strong *prima facie* case. The evidence adduced on behalf of Daniels Health was primarily based on hearsay, speculation and opinion and it was insufficient to demonstrate a strong *prima facie* case.

[12] Daniels Health did not establish, on balance, that it would suffer irreparable harm if the injunction were not granted. It fairly conceded a complete absence of any evidence of reputational harm or harm associated with loss of market share. Any damages associated with the loss of the contract or losses associated with the preparation of its unsuccessful bid can be quantified in monetary damages and therefore are not, by their nature, irreparable.

[13] The balance of convenience favors dismissal of the application for an injunction. The public health implications and the need for AHS to have a medical waste management and disposal service in place by the end of July 2024 outweigh any interest Daniels Health has in preserving a right to contract with AHS or otherwise dispute the RFP process. Dismissal of the injunction will not preclude Daniels Health from pursuing any available remedies in due course.

[14] Considering all the circumstances of this case, it would not be just and equitable to grant the requested injunction.

Analysis

Serious Issue to be Tried

[15] In most cases, the threshold for establishing there is a serious issue to be tried is low. An applicant need not establish that it is likely to succeed at trial; rather, an applicant must only establish that the case is neither vexatious nor frivolous: ***RJR MacDonald Inc. v Canada (Attorney General)***, [1994] 1 SCR 311; 1994 CarswellQue 120 at para 55.

[16] There is an exception to the general rule that applies when the result of an interlocutory motion will, in effect, result in a final determination of the action. In such cases, the judge hearing the interlocutory injunction application must conduct a more extensive review of the merits and be satisfied that the applicant has a strong *prima facie* case: ***RJR MacDonald*** at para 56; ***Questor Technology Inc. v Stagg***, 2020 ABQB 3 at paras 17-22.

[17] Recognizing that cases where the higher standard will apply are rare, I am satisfied that it ought to apply in this case. The determination of this interim injunction application will have the effect of a final decision. I say that for two reasons.

[18] First, if I grant the injunction, AHS will be precluded from pursuing a contract for medical waste management services with its proponent of choice, Stericycle. Given that AHS requires a new service provider in place by the end of July 2024, an injunction preventing it from negotiating with Stericycle will force it to pursue a contract with another provider – not its preferred provider. It will be too late to revisit Stericycle's proposal once an action has been determined fully on its merits.

[19] Second, Daniels Health has not filed a statement of claim or originating notice seeking judicial review. In the absence of a statement of claim or originating notice for judicial review, the injunction application is not interlocutory or interim to anything. This leads me to the conclusion that the injunction is the endgame for Daniels Health. If it is successful, because of the timing constraints on AHS, it will have knocked one of its competitors out of the process for good.

[20] Having determined that Daniels Health must show a strong *prima facie* case to satisfy the first branch of the tripartite test for an injunction, I turn now to the issue raised by Daniels Health.

[21] Daniels Health asserts its application is about maintaining the integrity of a tendering process. It relies on the decisions in ***R v Ron Engineering & Construction (Eastern) Ltd.***, [1981] 1 SCR 111 and ***Elan Construction Ltd. v South Creek Recreation Assn.***, 2016 ABCA 215 for the proposition that an attack on the credibility or integrity of a bidding process raises a serious issue. At para 18 of the ***Elan*** decision, the Court of Appeal of Alberta said:

> The right to evaluate whether a bidder has met a bid requirement in an owners "sole and unfettered discretion" does not confer on the owner the right to ignore, alter or delete the bid criteria as they please.

[22] In ***Martel Building Ltd. V Canada***, [2000] 2 SCR 860 at pp 894-895 the Supreme Court of Canada indicated that it was appropriate to imply a term in a tendering process that all bidders would be treated fairly and consistently. Implying such a term is consistent with the goal of protecting and promoting the integrity of the bidding process.

[23] While the ***Ron Engineering, Elan Construction*** and ***Martel Building*** cases all deal with a formal tendering process and the resulting contract A and contract B which is not the same as the AHS RFP process, I do accept for the purposes of this application that there is a duty on AHS to act fairly, to treat all responders to its RFP consistently and not to ignore, alter or delete RFP criteria as they please except in accordance with the terms of the RFP.

[24] Daniels Health argues that Stericycle's bid does not meet the technical requirements set out in the RFP and that by proceeding to negotiate with Stericycle, AHS has unilaterally and unfairly changed the terms of the RFP to the detriment of Daniels Health.

[25] The allegations made by Daniels Health include that Stericycle's medical waste management equipment suffers from design flaws that could result in containers being overfilled and a risk of needle sticks. They further allege the design of Stericycle's containers could allow someone to reach inside a container containing hazardous medical waste and that containers could leak if dropped or topple over and spill their contents. Daniels Health also alleges that the labelling and color coding of the containers provided by Stericycle do not meet required standards.

[26] The evidence that Daniels Health relies on to substantiate its allegations is contained in the affidavits affirmed by Dean McPhee, the Chief Financial Officer of Daniels Health. At paragraph 23 of his affidavit affirmed on April 29, 2024, Mr. McPhee claims that it is his "understanding" that Stericycle's containers do not meet CSA and ISO requirements, among other things, and they therefore do not meet the standards required by the RFP.

[27] Mr. McPhee does not disclose the basis for his understanding. He does refer to a Stericycle brochure attached as Exhibit I to his April 29, 2024 Affidavit; however, that brochure clearly states that Stericycle's containers are "designed to meet the most recent CSA and ISO standards on reusable sharps containers."

[28] In his affidavit affirmed on May 13, 2024, Mr. McPhee indicates that during the week of April 29, 2024, Daniels Health was decommissioning its services at a hospital in Burlington Ontario. His evidence is that some undisclosed person acting on behalf of Daniels Health observed Stericycle containers being delivered to the hospital. Mr. McPhee further refers to an undisclosed individual assessing and inspecting a Stericycle container provided by an anonymous client. Based on those undisclosed sources, Mr. McPhee formed the opinion that the Stericycle containers are deficient, and he set out his understanding of the deficiencies at paragraph 10 of his May 13, 2024 affidavit.

[29] AHS takes issue with the evidence adduced on behalf of Daniels Health, particularly the evidence contained in paragraphs 8 through 12 of the May 13, 2024 affidavit. AHS says the evidence is largely hearsay with no information as to the source of the evidence. AHS also claims much of the evidence is irrelevant as there is nothing beyond bald speculation linking containers seen in Ontario with the Stericycle containers and equipment that will be installed in Alberta if Stericycle eventually contracts to provide services to AHS. Finally, AHS argues that Mr. McPhee is providing opinion evidence without the necessary qualification as an expert.

[30] I agree with the concerns raised by AHS. Much of Mr. McPhee's evidence is hearsay with no information as to from whom Mr. McPhee obtained the information or on what basis I may consider the information to be reliable.

[31] Mr. McPhee is the Chief Financial Officer of Daniels Health. There is nothing in his evidence that would suggest he has the training, knowledge, or experience to be evaluating equipment utilized by a competitor or opining on whether such equipment may be compliant with various technical standards.

[32] The most that can be said of the evidence proffered is that Daniels Health has some concerns about whether Stericycle's response to the RFP is compliant with its stated requirements. It is important to note that the RFP only require a proponent to certify compliance with the mandatory requirements. It does not require third party verification of the stated compliance. Stericycle did certify compliance with all the mandatory requirements in its response to the RFP. Daniels Health's stated concerns, based primarily on hearsay and speculation are, in these circumstances, insufficient to establish that it has a strong *prima facie* case against AHS for being unfair in the conduct of its RFP process.

[33] The RFP is clear with respect to the information required from proponents. Section 1.2 of Appendix 2.1 to the RFP sets out the mandatory requirements that all proponents must meet. These mandatory requirements include compliance with Canadian Standards Approvals and compliance with all municipal, provincial, and federal legislation for medical waste disposal.

[34] The RFP requires proponents to confirm compliance. If a proponent does not confirm compliance, then it will be disqualified from participating further in the process. Stericycle confirmed compliance with every one of the mandatory requirements set out in the RFP.

[35] Daniels Health has been unable to establish any basis whatsoever for their claim that AHS has acted unfairly, treated the responders to its RFP unequally or inconsistently or ignored, altered, or deleted any criteria in the RFP to the detriment of any proponents. The RFP required confirmation that mandatory requirements would be met by the proponent and Stericycle fulfilled that requirement in its response to the RFP.

[36] It is Daniels Health, not AHS, that is, in effect, attempting to alter the RFP process by suggesting there should be some form of third-party verification of information provided by proponents in the RFP process. Daniels Health has no basis to do so.

[37] Even if Daniels Health is concerned that equipment Stericycle has used in other provinces or for other customers is not sufficient to meet the mandatory requirements set out in the RFP, that does not give Daniels Health the right to demand the RFP process be changed to assuage its concerns. This is particularly so where there is no evidence connecting the equipment used in another province or by other customers to the equipment that Stericycle may supply to AHS in the event Stericycle and AHS come to an agreement.

[38] AHS is entitled to determine how it will evaluate the responses to its RFP and Daniels Health has no basis to interfere with that where AHS is following the process set out in the RFP. Accordingly, Daniels Health has failed to establish it has a strong *prima facie* case.

[39] While a failure at this stage of the test for an injunction is fatal to the application, I will go on to consider the other branches of the test in the event I am wrong in my conclusion on the first branch of the test.

Irreparable Harm

[40] Irreparable harm is harm which either cannot be quantified in monetary terms, or which cannot be cured because, for example, one party cannot collect damages from the other: ***RJR MacDonald*** at para 64.

[41] Daniels Health claims it will suffer irreparable harm if the injunction is denied because there is a meaningful risk that it will suffer a loss of market share and a loss of reputation, neither of which can be adequately compensated with an award of damages.

[42] During the hearing of the application, counsel for Daniels Health quite rightly conceded a complete lack of evidence regarding a potential loss of market share or harm to reputation. In the absence of any such evidence, I am unable to find that there is any risk, meaningful or otherwise, that Daniel Health will suffer a loss of market share or a loss of reputation if the injunction is not granted.

[43] Counsel for Daniels Health raised a third form of irreparable harm that it says may arise if its application for an injunction is denied. This third claim of irreparable harm arises from clause 4.8 of the RFP which is a limitation of liability clause. It states:

> Notwithstanding Section 4.7, in the event that AHS is found to be liable in any respect under this RFP or with respect to the related procurement process, the Proponent agrees that AHS' liability to the Proponent and the aggregate amount of the damages recoverable against AHS for any liability of AHS related to or arising out of this procurement process whether based upon an action or claim in contract, warranty, equity, negligence, intended conduct, or otherwise, including any action or claim arising from the acts or omissions, negligent or otherwise, of AHS, shall be the lesser of:
>
> (a) The Proposal preparation costs that the Proponent seeking damages from AHS can demonstrate; or
>
> (b) Five Thousand Dollars ($5,000.00)

[44] According to Daniels Health, if the injunction is denied, there is a strong likelihood that it would suffer harm due to the loss of the contract to a non-compliant responder. While Daniels Health concedes that the losses associated with not getting the contract with AHS can be readily calculated and compensable in damages, it maintains that the harm is irreparable due to the limitation of liability clause in the RFP. According to Daniels Health, the harm to it is irreparable in the sense that it could never collect more than the lesser of its costs of preparing its response to the RFP or $5,000 even though the losses associated with not being the successful proponent would far exceed those amounts.

[45] This argument cannot succeed. It ignores the fundamental premise that when considering irreparable harm, the term "irreparable" refers to the nature of the harm suffered rather than its magnitude: ***RJR MacDonald*** at para 64; ***Sobeys West Inc v Alberta College of Pharmacists***, 2014 ABQB 333 at para 32.

[46] Daniels Health claims it will suffer irreparable harm if it unfairly loses the AHS medical waste services contract to a non-compliant responder. If Daniels Health were ultimately successful in proving that allegation, its losses would be quantifiable and compensable in damages. No evidence exists that calls into question the ability of Daniels Health to collect on a judgment against AHS. Accordingly, the nature of the harm is not irreparable. The limitation of liability clause in the RFP affects only the magnitude of the damages recoverable, not their nature. The limitation of liability clause does not, therefore, give rise to the prospect of irreparable damages.

[47] In addition to the fact that the limitation of liability clause only affects the magnitude of potential damages and not the nature of those damages, there is also a sound policy reason for rejecting Daniels Health's argument that the limitation of liability clause in the RFP gives rise to a claim of irreparable harm. Daniels Health was fully aware of the existence of the limitation of liability clause in the RFP when it decided to submit a response. Having accepted that limitation of liability clause by engaging in the process, it cannot now convert its acceptance of that clause into a claim of irreparable harm. To allow it to do so would undermine the integrity of the RFP process and create significant uncertainty in the process for a party issuing or engaging in a request for proposals process.

[48] Daniels Health has failed to establish it will suffer irreparable harm if the injunction is denied. The application for the injunction must therefore be dismissed. However, in the event I am wrong in concluding that Daniels Health has failed to establish irreparable harm, I will go on to consider the balance of convenience.

Balance of Convenience

[49] Assessing the balance of convenience involves a determination of which of the parties will suffer the greater harm if the injunction is granted or refused: ***RJR MacDonald*** at para 67.

[50] Daniels Health argues the balance of convenience favors the granting of the injunction because AHS will suffer no hardship as it can contract with a proponent other than Stericycle. Further, the health and safety of health care workers and the public will be better protected if Stericycle is prevented from going further in the process until it can prove its equipment is compliant with the mandatory requirements set out in the RFP. Finally, Daniels Health argues that it will suffer substantial harm to its customer base, market share, and reputation if the injunction is not granted.

[51] AHS argues the balance of convenience favors dismissal of the application for an injunction. AHS requires a new medical waste management and disposal services provider by July 31, 2024. It has already commenced the process of negotiating that services agreement with Stericycle. An injunction at this stage would delay the contracting process and would deprive AHS of the ability to negotiate a contract with its preferred provider based on the responses received to its RFP.

[52] I am satisfied that the balance of convenience favors dismissal of the application for the stay.

[53] With respect to the harm claimed by Daniels Health, I have already determined there is a lack of evidence with respect to any potential harm to its customer base, market share or reputation. The evidence adduced on behalf of Daniels Health is insufficient to establish that permitting AHS and Stericycle to continue their negotiations would somehow put health care workers or the public at risk.

[54] Even if I do not grant the injunction, Daniels Health can pursue a claim against AHS for any damages it alleges it suffered because of AHS engaging in allegedly unfair practices. It will not be prejudiced in that regard in any way if the injunction is not granted.

[55] AHS is, on the other hand, the agency ultimately responsible for the health and safety of its workers and the public in its facilities and with regard to the management of its medical waste. The actions taken by AHS to discharge its obligations to its workers and the public, including engaging an RFP process and commencing negotiations for a new medical waste management and disposal services contract is very much in the public interest. I can assume harm to the public if AHS's actions in this regard are restrained: ***360 Ads Inc v Okotoks (Town)***, 2018 ABCA 319 at para 13.

[56] I am satisfied that any delay at this stage in AHS's process to replace its medical waste management and disposal services would be detrimental to AHS and potentially to its workers and the public. AHS, having engaged in an RFP process, ought to be able to conclude that process to ensure there is no interruption in the handling and disposal of the medical waste generated at its facilities. Daniels Health has failed to adduce any convincing evidence that the RFP process AHS engaged in was unfair to it or any of the other parties responding to the RFP. Based on the evidence

before me, including the terms of the RFP and the response provided by Stericycle, Stericycle properly confirmed its compliance with the mandatory requirements of the RFP.

[57] Considering the totality of these circumstances, the balance of convenience weighs clearly in favor of dismissing the application for an injunction. I am not satisfied that it would be fair and just to grant an injunction in the circumstances of this case, and I therefore decline to do so.

Conclusion

[58] The application for an injunction is dismissed.

[59] Daniels Health also sought in its application a declaration that Stericycle's bid is non-compliant with the terms and conditions of the RFP and for an order requiring AHS to provide Daniels Health with all communication and documents relating to the decision-making process when choosing Stericycle as its selected proponent. As Daniels Health did not pursue these remedies at the hearing of the matter and as there is no basis upon which to grant the relief sought, the application for these remedies is also dismissed.

[60] If the parties are unable to agree on the costs of this application, they may apply to me for a determination of costs in accordance with the following process.

[61] Within 30 days of this decision, any party may file and serve on all the other parties their written submissions with respect to costs. The submissions shall not exceed five pages and shall include: (a) their position with respect to the factors set out in rule 10.33; (b) any formal offers of settlement or other settlement proposals they wish to have considered; (c) a proposed bill of costs pursuant to Schedule C of the Rules of Court; and (d) a summary of the reasonable and proper costs that party actually incurred in respect of this action. The five-page limit does not include the proposed bill of costs pursuant to Schedule C or the summary of reasonable and proper costs.

[62] Within 15 days of receiving another party's submissions on costs, any party may file and serve a brief reply, not to exceed 2 pages, responding to matters raised in any other party's submissions.

[63] All submissions and reply submissions should be sent to me via email through my judicial assistant in addition to being filed.

[64] If submissions are not received pursuant to this direction, there shall be no order as to costs and Rule 10.29(1) of the *Rules of Court* shall apply.

Heard on the 14th day of May 2024.
Dated at the City of Calgary, Alberta this 16th day of May 2024.

R.W. Armstrong
J.C.K.B.A.

Appearances:

Joshua Sadovnick / Miranda Sharpe / Jenine Urquhart
Norton Rose Fulbright Canada LLP
for the Applicant

Frank Tosto / Marin Leci / Matthew Schneider / Sabrina Chehade
Borden Ladner Gervais LLP
for the Respondent