Court of King's Bench of Alberta

Citation: Daniels Sharpsmart Canada Ltd. o/a Daniels Health v Alberta Health Services, 2024 ABKB 418

Date: 20240709
Docket: 2401 06293
Registry: Calgary

Between:

Daniels Sharpsmart Canada Ltd. o/a Daniels Health

Applicant

- and -

Alberta Health Services

Respondent

Ruling on Costs
of the
Honourable Justice R.W. Armstrong

Introduction

[1] The Applicant, Daniels Sharpsmart Canada Ltd. o/a Daniels Health ("Daniels"), responded to a Request for Proposals (the "RFP") issued by the Respondent, Alberta Health Services ("AHS"). The RFP was for a contract with AHS to provide medical waste management and disposal services. Daniels was not the successful responder and, upon learning it was not going to get the contract, it brought an injunction application to halt the negotiations between AHS and the successful responder, Stericycle ULC.

[2] I rendered a decision on May 16, 2024, dismissing the injunction application: ***Daniels Sharpsmart Canada Ltd. o/a Daniels Health v Alberta Health Services***, 2024 ABKB 282. The parties failed to resolve the issue of costs as between them and they now seek a ruling on the costs payable in respect of the injunction application.

Issue

[3] The issue for determination is what a fair and reasonable costs award is for the injunction application as between AHS as the successful party and Daniels as the unsuccessful party. Included in the determination is an assessment of whether AHS is entitled to solicitor-client costs against Daniels.

Applicable Legal Principles in Awarding Costs

[4] The general rule is that a successful party in a proceeding is entitled to a costs award against the unsuccessful party or parties. Courts have a broad discretion pursuant to Rule 10.31 of the Alberta *Rules of Court* when awarding costs. Rule 10.33(1) sets out factors that may assist the court in the exercise of that discretion. Those factors are:

> (a) the result of the action and the degree of success of each party;
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> (b) the amount claimed and the amount recovered;
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> (c) the importance of the issues;
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> (d) the complexity of the action;
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> (e) the apportionment of liability;
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> (f) the conduct of a party that tended to shorten the action; and
>
> (g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

[5] In addition to the factors set out in rule 10.33(1), the court may also consider the conduct of the parties, including whether any party's conduct unnecessarily delayed or lengthened the action, whether any party took unnecessary steps or contravened the Rules or a court order or otherwise engaged in misconduct. The Court may also consider the existence of any offers of settlement: Rule 10.33(2).

[6] When making a costs award, the court may, but is not required to, have reference to Schedule C of the Alberta *Rules of Court* which sets out a tariff of recoverable fees. It assigns a certain dollar value to each significant step taken in typical litigation; however, it does not provide any guidance on what an appropriate total costs award ought to be in any specific matter. A formulaic application of Schedule C may not result in a costs award that is reasonable and proper. Accordingly, when relying on Schedule C, the court must still satisfy itself that the total costs payable pursuant to the Schedule are reasonable and proper: ***McAllister* v *Calgary (City)***, 2021 ABCA 25 at para 25.

[7] When determining what a fair and reasonable costs award is, the court ought to also consider the proportionality of the costs award to the issues and amounts involved in the litigation.

[8] A party may claim costs pursuant to Schedule C, including claims that the column amounts ought to be subject to a multiplier to account for the complexity of a matter or otherwise ensure an overall fair and reasonable costs award. A party may also claim costs based on a proportion of the fees incurred in respect of the matter. If a party makes a claim for costs based on actual fees incurred, they must provide information about the fees incurred in the form of accounts or other information that would permit the court to assess whether the amounts claimed are reasonable and proper. In the absence of such information, Schedule C will apply as the default means of determining the costs award: ***Kantor v Kantor***, 2023 ABCA 329 at para 14.

Positions of the Parties

[9] As the successful party, AHS is seeking solicitor-client costs against Daniels. AHS alleges the injunction application was motivated by malice against Daniels' competitor, Stericycle. It points out that Daniels was unsuccessful on all three branches of the test for an injunction and claims that Daniels' conduct throughout the litigation complicated the application, resulting in greater expense. Finally, AHS relies on an offer to resolve the matter. On May 3, 2024, AHS offered to accept a consent discontinuance of the application in exchange for Daniels paying its Schedule C costs. Daniels rejected the offer.

[10] Daniels concedes that costs are payable to AHS as the successful party; however, Daniels' position is that AHS is only entitled 2x column 1 of Schedule C costs. Daniels argues that solicitor-client costs ought to be awarded only in rare and exceptional circumstances where the conduct of a party has been "reprehensible, scandalous or outrageous": ***Secure 2013 Group Inc v Tiger Calcium Services Inc.***, 2018 ABCA 110 at para 15.

Decision

[11] AHS is entitled to its costs in the amount of $14,175.00, based on 2x column 1 of Schedule C of the Alberta *Rules of Court* with an additional multiplier of 1.5x to account for the offer to settle made by AHS and rejected by Daniels.

[12] While AHS has not provided a proposed Bill of Costs showing disbursements and other charges incurred, I allow reasonable disbursements and other charges in addition to the Schedule C amounts for fees. If the parties cannot agree on the reasonable disbursements and other charges, they may have the disbursements and other charges assessed by a Review Officer.

Reasons for Decision

[13] AHS has not established that Daniels was guilty of the kind of litigation misconduct that would warrant solicitor-client costs. While AHS correctly points out that Daniels' injunction application was determined to be wholly without merit, that is not sufficient to impose an enhanced costs award against Daniels. Nor is the fact that Daniels made unsuccessful arguments at the application. A win, even a big win, does not, without more, generally entitle the successful party to solicitor-client costs.

[14] Daniels viewed the matter as urgent and took steps to obtain an early hearing date. AHS is critical of this fact and suggests that it is a factor that ought to be considered in awarding solicitor-client costs. The evidence contained in the affidavit of Andrea Gaspar filed by AHS in

support of it claim for costs demonstrates that counsel for Daniels acted reasonably in attempting to secure early dates for the hearing.

[15] Counsel communicated their intention to bring an urgent application and solicited dates from counsel for AHS. Unfiled copies of materials were provided when they were available, followed by filed copies of the materials. Correspondence between the parties appeared to be courteous, timely and responsive.

[16] While Daniels initially incorrectly used a form meant to schedule urgent family matters to obtain an urgent hearing date, this minor procedural defect does not amount to litigation misconduct. I see no basis, either in the individual acts complained of or in the aggregate conduct of Daniels, for a finding of litigation misconduct in this matter.

[17] AHS suggests that Daniels' injunction application was motivated by improper purposes, including retaliation against a competitor and disruption of AHS's operations. As a disappointed responder to the RFP, Daniels of course had a financial interest in obtaining the injunction pending a determination of whether the successful responder's bid was compliant with the RFP; however, that does not amount to an improper purpose. The other motives ascribed to Daniels by AHS are not supported by any evidence of improper purpose or malice and therefore those allegations cannot be the basis for the imposition of solicitor-client costs.

[18] Despite being specifically instructed to provide a proposed bill of costs based on Schedule C of the Alberta *Rules of Court* and a summary of costs that were actually incurred in respect of the matter, AHS did not comply. They provided neither a proposed bill of costs pursuant to Schedule C or a summary of costs actually incurred. I have no basis upon which to assess whether costs over and above Schedule C would be warranted to ensure a fair and reasonable overall award. Absent any information about costs incurred, the costs award can only be assessed with regard to Schedule C.

[19] Column 1 of Schedule C applies in matters that do not involve monetary amounts such as injunction applications.

[20] Both parties agree that the matter was complex and involved serious and important issues. Daniels concedes that the complexity, timing, and seriousness of the matter warrants a multiplier of 2x column 1, and I agree with that assessment.

[21] The items to be included in the costs award from Column 1 of Schedule C are items 1(1) (commencement documents, affidavits etc.), 5(2) (half day of questioning), 5(3) (second half day of questioning), 8(1) (application requiring written brief). In addition to these amounts, I allow $675 for second counsel fees pursuant to item 20(b) (which is allowed by the Rules for complex matters). The total costs are therefore $4,725.00. Applying the 2x multiplier to account for the complexity of the matter brings the costs award to $9,450.00.

[22] The last factor for me to consider is the effect of the offer of settlement made by AHS prior to the hearing of the application. I accept that the offer made by AHS was a genuine attempt to compromise and resolve the matter. While the offer required Daniels to pay Schedule C costs, neither the questioning nor the hearing had yet taken place. Had Daniels accepted the offer, the Schedule C costs payable at that time would have been significantly less than the costs incurred following the hearing of the matter.

[23] An informal offer to settle does not necessarily carry with it the same cost consequences as a formal offer made pursuant to the Alberta *Rules of Court.* While a party that meets or beats a

formal offer is typically entitled to double costs, the effect of an informal offer is a matter of discretion for the Court: ***Holizki v Alberta (Public Trustee)***, 2009 ABQB 260 at para 45; cited with approval in ***Horizon Resource Management Ltd. v Blaze Energy Ltd.***, 2013 ABCA 139 at para 96.

[24] Considering the nature of the offer being a discontinuance with payment of costs, the timing of the offer occurring prior to the start of questioning and the overall lack of merit in the injunction application, AHS shall have 1.5 x its costs for all steps taken in the litigation. I am applying the multiplier to all steps in the litigation given the very truncated timeline wherein all formal steps were completed between about May 1, 2024, and the date of the hearing on May 14, 2024.

[25] Applying the multiplier to the costs resulting from the offer to settle results in a final costs award of $14,175.00 plus reasonable disbursements and other charges (to either be agreed upon by the parties or assessed by a Review Officer).

Heard on the 14th day of May 2024.
Dated at the City of Calgary, Alberta this 09th day of July 2024.

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

Appearances:

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

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