Date: 2009 05 15
Docket: S-0001-CV-2008000165

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GREG MCMEEKIN

Plaintiff

- and -

NORTHWEST TERRITORIES
LIQUOR COMMISSION

Defendant

MEMORANDUM OF JUDGMENT

[1] These reasons address the following issues raised in motions brought by the plaintiff and the defendant:

(a) an application by the plaintiff for production of documents by the defendant;
(b) an application by the plaintiff for production of specific documents for which the defendant has claimed confidentiality;
(c) an application by the plaintiff to compel the defendant to provide further and better particulars; and,
(d) an application by the defendant for an order requiring the plaintiff to post security for costs.

[2] The plaintiff filed two separate motions but the relief claimed overlaps and they are summarized above.

Background:

[3] The factual background to this litigation was extensively reviewed in two previous judgments of this court: *McMeekin* v. *Northwest Territories Liquor Commission*, 2008 NWTSC 67 (a decision of Schuler J. issued on August 25, 2008), and *McMeekin* v. *Northwest Territories Liquor Commission*, 2008 NWTSC 87 (a decision of Charbonneau J. issued on November 4, 2008). Since then I have assumed *de facto* case management of this proceeding.

[4] I will briefly summarize the facts underlying this litigation. In 2006, the Department of Finance for the Government of the Northwest Territories, being the department responsible for the operation of the defendant Commission, issued a Request for Proposals (the "RFP") for the operation of a retail liquor outlet in Hay River. Four proposals were received: two from Hay River Liquor Retailers (1999) Ltd., one from Jameson Holdings Ltd., and one from the plaintiff. The proposals were evaluated according to predetermined rating criteria set out in the RFP. Prior to the closing date of the RFP, the plaintiff wrote to the Commission complaining about the process and alleging a conflict of interest on the part of Hay River Liquor Retailers.

[5] The successful proponent was Hay River Liquor Retailers. The plaintiff's proposal was rated last of the four received. His proposal, it is alleged by the defendant, did not even meet minimum criteria for consideration.

[6] Prior to the announcement that Hay River Liquor Retailers was the successful proponent, the defendant took steps to investigate the plaintiff's complaint of a conflict of interest. It found none.

[7] Subsequent to the announcement, Hay River Liquor Retailers encountered difficulties with respect to property zoning. As a result no contract was ever entered into between that company and the Commission. In July, 2008, the Commission announced to those who had submitted proposals in response to the RFP that the RFP was cancelled.

[8] The plaintiff then filed an Originating Notice seeking a review of the RFP, an order awarding the contract to him, and various other items of relief, all of which were struck out by Schuler J. in her judgment. She also held, however, that the

plaintiff may have a cause of action for damages but that it should be pursued through a normal civil action by way of a Statement of Claim. The plaintiff then filed his Statement of Claim which was the subject of the proceedings before Charbonneau J. There she ordered that the plaintiff file a fresh Statement of Claim that met the requirements of the Rules of Court.

[9] It should be noted that neither Schuler J. nor Charbonneau J. assessed the relative merits of the plaintiff's action. They merely directed compliance with the *Rules of Court* so that the cause of action, if any, is properly pleaded.

[10] It should also be noted that throughout these proceedings the plaintiff has represented himself. He has received a great deal of assistance from the court's registry staff so that he does not get bogged down with procedural irregularities. It is evident that he has familiarized himself with the rules. I say evident because, since the exchange of pleadings, this case has become bogged down with motions of one sort or another.

Production of Documents:

[11] The plaintiff seeks an order for the production of all documents relating to the RFP. The defendant has filed a Statement as to Documents, as well as a Supplementary Statement, which lists with specificity all of the documents the defence says are in its possession. Those Statements also provided information to the plaintiff as to when and where he could inspect those documents (as required by the *Rules of Court*). The plaintiff has not chosen to do so.

[12] The defendant has met its obligations under the rules. The documents have been "produced". There is no requirement for the defendant to deliver copies of the documents to the plaintiff. If he chooses not to inspect them then there is no basis for an application to the court.

[13] The plaintiff made repeated references to minutes, transcripts and other documents relating to the evaluation process. The defence has provided evidence under oath that all documents have been produced (other than the proposals themselves). The plaintiff says there must be more records. But he provides no evidence to support this allegation. In the absence of such evidence, the evidence of the defendant stands uncontradicted.

[14] This aspect of the application is therefore dismissed.

Confidentiality of Documents:

[15] Among the documents listed in the defendant's Statement as to Documents are the four proposals submitted in response to the RFP. The plaintiff seeks their production. The defence resists production on the ground that they are privileged, being documents impressed with confidentiality as a result of the RFP process.

[16] The defence says these proposals were submitted in confidence to the Commission and the practice of the Commission has always been to hold such documents in confidence since they contain private financial information. One of the defendant's officers swore in an affidavit as follows:

> 10. Maintaining confidentiality, from a government procurement perspective, is crucial, in order to preserve the veracity and integrity of the RFP process. Production could have significant negative repercussions with respect to future government procurement processes. The release of the Proposals may deter a Proponent in future RFP processes from providing a level of detail in its Proposal which would enable government contracting authorities to make informed and fair decisions with respect to government procurement processes.

[17] There is evidence that the Commission treats information received from proposers as confidential. There is also evidence that proposers expect it to be treated confidentially. Counsel for the Hay River Liquor Retailers communicated to defendant's counsel her client's opposition to any production of the proposals. In my view it is reasonable for proposers to think that any information communicated in this context would be kept confidential, especially in a situation as this where no contract was eventually executed.

[18] I recognize, however, that merely saying something is confidential does not make it so. As I noted in another context, whether information is confidential depends on its content, its purpose, and the circumstances in which it was supplied: *Canadian Broadcasting Corp.* v. *Northwest Territories*, [1999] N.W.T.J. No. 117 (S.C.), at para. 49.

[19] Rule 226(2) provides that the court may examine in private any document where there is a disputed privilege claim. But, in this case, the plaintiff has failed to make even a threshold case for such an examination.

[20] First, the third party proposers have not been served with notice of this application. Since it is presumably their private information that is contained in these documents, they should have an opportunity to respond to this demand for production.

[21] Second, I am not at all sure how production is necessary for the plaintiff to make its case. The plaintiff's case is premised on three arguments: (a)the defendant mismanaged the RFP; (b) the successful proposer was in a conflict of interest; and, (c) the plaintiff should have been awarded the contract. I fail to see how the other proposals assist him in this. The plaintiff was made aware of how his proposal was graded. He even met with Commission officials about that. The allegations of conflict of interest have nothing to do with the proposals themselves.

[22] For these reasons, this application is dismissed.

Further Particulars:

[23] There have already been exchanges of demands for particulars and replies. Most recently, on March 2, 2009, the plaintiff filed a demand for particulars listing 104 items. The defendant responded on March 23 giving further information to most items. From my review it seems to me that most of this, both the demands and replies, are matters that could and should have been left for trial. But the plaintiff wants better answers.

[24] The fundamental purpose of particulars is to enable the party to plead. They are meant to define the issues, to prevent surprise at trial, and to facilitate the trial. A good explanation was provided by Epstein J., of the Ontario Superior Court of Justice, in *Obonsawin* v. *Canada*, [2001] O.J. No. 369 (at para. 30), when she talked about the Ontario rule (Rule 25) which is similar to the Northwest Territories rule (Rule 119):

> Rule 25.06(1) and the cases decided under it establish that material facts, but not evidence, must be pleaded. Somewhere in the spectrum between "material facts" and "evidence" is the concept of "particulars". In *Copland* v.

> *Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586, Master Sandler referred to particulars as "additional bits of information, or data, or detail, that flesh out the material facts, but they are not so detailed as to amount to "evidence". These additional bits of information, known as "particulars", can be obtained by a party under new Rule 25.10, if the party swears an affidavit showing that the particulars are necessary to enable him to plead to the attacked pleading, and the "particulars" are not within the knowledge of the party asking for them".

[25] In this case the defendant has filed an extensive and detailed Statement of Defence. It has answered most of the particulars demanded by the plaintiff. The pleadings are set. I see no need for further particulars.

[26] This application is dismissed.

Security for Costs:

[27] The defendant seeks an order requiring the plaintiff to post security for costs. The basis for such an application is found in Rules 633(1) and 634 of the *Rules of Court*:

> 633(1) The Court, on the application of a defendant in a proceeding, may make such order for security for costs as it considers just where it appears that
>
> (a) the plaintiff is ordinarily resident outside the Territories;
> (b) the plaintiff has another proceeding for the same relief pending;
> (c) the plaintiff has failed to pay costs as ordered in the same or another proceeding;
> (d) the plaintiff brings the proceeding on behalf of a class or an association, or is a nominal plaintiff, and there is good reason to believe that the plaintiff has insufficient assets in the Territories to pay costs;
> (e) there is good reason to believe that the proceeding is frivolous or vexatious and that the plaintiff has insufficient assets in the Territories to pay costs; or
> (f) a statute entitles the defendant to security for costs.
>
> . . .

> 634 The Court may refuse to order security for costs where
>
> (a) it appears on the application that the plaintiff is possessed of sufficient assets within the jurisdiction that will be available for the defendant's costs; or
> (b) the application for security is not made within a reasonable time.

[28] Case law has held that even though one of the grounds listed in Rule 633(1) is met, the order for security is still a discretionary one. As stated by de Weerdt J., when describing the purpose of a security for costs order, in *Drywall Services Grand Centre Ltd.* v. *PCL Northern Constructors Inc.*, [1991] N.W.T.R. 210 (S.C.), at 212:

> Security for a defendant's anticipated costs is intended to offset the disadvantage, and avoid the potential injustice, which can accrue to a defendant when successful in defeating the claims of a plaintiff who is in effect beyond the court's reach for purposes of enforcing an award of costs in favour of the defendant. It being a question of what may or may not be just in the circumstances, since the security is to be given before judgment is rendered or the outcome of the case is known, the grant must be left to judicial discretion. As I held in *Lowe* v. *Inuvik*, [1984] N.W.T.R. 278 at 279 (S.C.): "Our *Rules of Court* empower me to grant such security in a proper case. It remains a matter of judicial discretion in each case, depending on the particular circumstances of the case".

[29] In this case, the defendant relies on three grounds.

[30] First, the defendant relies on Rule 633(1)(b): "the plaintiff has another proceeding for the same relief". By this the defendant refers to the appeal brought by the plaintiff from Justice Schuler's judgment of last August. That appeal is currently pending before the Court of Appeal. The word "proceeding" is not defined in the *Rules of Court*. It is broad enough to encompass any action. But in my opinion, the appeal proceedings are part of this proceeding. There is only one action. Much of the relief claimed originally was struck but it is nevertheless the same because the plaintiff seeks to restore it. I would not give effect to this ground.

[31] Second, the defendant relies on Rule 633(1)(c): "the plaintiff has failed to pay costs as ordered in the same or another proceeding". This does apply. On February 23, 2009, in the Court of Appeal proceeding, between the same parties,

and after a contested motion, an order was made requiring the plaintiff to pay costs to the defendant "in any event of the cause". The defendant taxed its costs in the sum of $1,050.00 and demanded payment. No payment has been made to date.

[32] Third, the defendant relies on Rule 633(1)(e): "there is good reason to believe that the proceeding is frivolous or vexatious and that the plaintiff has insufficient assets in the Territories to pay costs".

[33] This rule is two-pronged. The first prong ("good reason to believe that the proceeding is frivolous or vexatious") requires an examination of the merits. The words "frivolous or vexatious" are usually equated with being devoid of merit. But that is too high a standard. As noted by the Ontario Court of Appeal in *Schmidt* v. *Toronto-Dominion Bank*, [1995] O.J. No. 1604, the words "good reason to believe" qualify the words "frivolous and vexatious" and indicate a finding short of an actual determination that the appeal is "frivolous and vexatious". In other words there may be good reason to believe that an action is devoid of merit without being satisfied that the action is definitively devoid of merit.

[34] The defendant claims that the plaintiff's case is doomed to fail. As previously noted, the plaintiff's case rests on his perception that the process conducted by the defendant with respect to the RFP was flawed and he should have been awarded the contract. This perception, however, must confront the terms of the RFP, some of which may very well prove fatal to the plaintiff's claim. I refer specifically to the following:

> 6. This is not a Request for Tenders or otherwise an offer. The NWTLC is not bound to accept the proposal that provides for the lowest cost or price to the NWTLC nor any proposal of those submitted.
>
> . . .
>
> 9. Notice in writing to a proponent and the subsequent execution of a written agreement shall constitute the making of a contract. No proponent shall acquire any legal or equitable rights or privileges whatever until the contract is signed.
>
> . . .
>
> 12. The NWTLC has the right to cancel this Request for Proposals at any time and to reissue it for any reason whatsoever without incurring any liability and no proponent will have any claim against the NWTLC as a consequence.

. . .

> 14. The NWTLC is not liable for any costs of preparation or presentation of proposals.
>
> 15. An evaluation committee will review each proposal. The NWTLC reserves the exclusive right to determine the qualitative aspects of all proposals relative to the evaluation criteria.

[35] These terms make clear that the submission of a proposal does not create any contractual obligations and that the Commission is not required to accept any proposal. The pertinent jurisprudence has held that, in the absence of some special circumstance, these types of privilege clauses will govern: see *M.J.B. Enterprises Ltd.* v. *Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martselos Services Ltd.* v. *Arctic College*, [1994] N.W.T.J. No. 4 (C.A.), leave to appeal to S.C.C. denied: [1994] S.C.C.A. No. 130.

[36] These clauses show that the defendant was not to be contractually bound simply as a result of the RFP process. There can be no contractual breach because no contract could have been formed until an actual contract was signed. Since the defendant was not obliged to award a contract to anyone, the plaintiff has no claim for any loss or damages as a result of the conduct of the Commission. At the very least, this is a strong argument that there is "good reason to believe" that this action will fail.

[37] With respect to insufficient assets, the second prong of the test under Rule 633(1)(e), one of the defendant's officers states the following:

> 45. The Defendant is concerned that even if the NWTLC is ultimately successful in this lawsuit, that it will not be able to recover its costs from the Plaintiff, as it is reasonable to conclude that he has no assets or property in the Northwest Territories which could be used to satisfy such a cost award, which may be in the nature of $10-15,000.00.
>
> 46. My reasoning in this respect is based on my knowledge of the Plaintiff from 36 years of living in Hay River, and 25 years of personal knowledge about the Plaintiff. To the best of my knowledge, he has no steady employment, owns no property, lives in an apartment building, and does not own a telephone or a computer. By his own admission, he utilizes the computer at the Hay River Public Library to prepare all of the pleadings and email correspondence which he uses in these proceedings.

[38] The defence has submitted a draft bill of costs estimating costs through trial in excess of $15,000.00.

[39] The plaintiff did not file any evidence as to his assets. In court he informed me that he has none, other than a car.

[40] In my view the requirements of Rule 633(1)(e) have been met. The plaintiff, however, made the plea, quite understandably, that "one's financial status should not determine whether one receives a fair trial". That is true. But fairness has to apply to all parties before the courts. Just because the plaintiff is representing himself, or he has no assets, does not mean that he is not subject to the same law, whether substantive or procedural.

[41] The plaintiff claims that the imposition of a security order would adversely impact his rights as a citizen to come to court for redress. This argument was addressed in a comprehensive fashion by the Alberta Court of Appeal in *Crothers* v. *Simpson Sears Ltd.*, [1988] A.J. No. 408. There the court noted: "Security for costs is designed to protect a defendant from a plaintiff who wants to gamble and collect if he wins, but not pay if he loses. Indeed, such a plaintiff acts more unfairly than that for by his groundless suit he inflicts serious expenses on the defendant."

[42] The defendant has made out its case for security for costs. I therefore order as follows:

> 1. The plaintiff shall furnish security for costs by depositing with the Clerk of the Court cash or bond (in a form satisfactory to the defendant) in the amount of $15,000.00.
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> 2. The security shall be deposited within 60 days of the entry of this order.
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> 3. All further proceedings are stayed until the security is furnished.
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> 4. In default of the security being furnished within the time limited therefor, this action shall stand dismissed with costs against the plaintiff, without further application or order.

[43] I direct that defendant's counsel prepare the formal order for my review (without the necessity of obtaining the plaintiff's approval as to form and content). Costs of and incidental to these applications shall be costs in the cause.

J.Z. Vertes
J.S.C.

Dated this 15th day of May, 2009.

To: Greg McMeekin
(representing himself)

William M. Rouse
Counsel for the Defendant

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MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE J.Z. VERTES
