

SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Interpreting Services Society v. Nova Scotia Health Authority*, 2019 NSSC 383

Date: 2019 12 19

Docket: Hfx No. 483838

Registry: Halifax

Between:

Nova Scotia Interpreting Services Society

Plaintiff

and

Nova Scotia Health Authority, IWK Health Centre, Arabesque Translation
Incorporated and Rafah DiCostanzo

Defendant

**Decision on
Interim Injunction**

Judge: The Honourable Justice Gerald R.P. Moir

Heard: February 13, 2019, in Halifax, Nova Scotia

Decision: February 20, 2019

Transcription: December 18, 2019

Counsel: Robert Pineo & Jennifer Singh, for the Plaintiff, Nova Scotia
Interpreting Services Society
Rory Rogers, Q.C. & Daniel MacKenzie, for the Defendants,
Nova Scotia Health Authority and IWK Health Centre
Peter Rogers, Q.C. and Jillian D'Alessio, for the Defendant,
Arabesque Translation Incorporated
Kent Noseworthy, for the Defendant, Rafah DiCostanzo

Moir, J. (orally):

[1] Nova Scotia Interpreting Services Society moves for an interim injunction that would read:

The Nova Scotia Health Authority and IWK Health Centre are enjoined from transferring services from Nova Scotia Interpreting Services Society to Arabesque Translation Incorporated until a motion for an interlocutory injunction can be heard.

[2] The statement of claim alleges that the society has been providing translation services for the Health Authority and the IWK Hospital for twenty years, that in 2018 the authority and the hospital put out tenders for the translation services, and that the authority and the hospital acted in bad faith regarding the society's tender and colluded with the other defendants to deprive the society of the benefits of its tender. Each defendant denies bad faith and collusion.

[3] The society filed an affidavit of Nivin Nabeel and she appeared for cross-examination by video conference. Ms. DiCostanzo filed her own affidavit and she was cross-examined. Arabesque filed an affidavit of Ms. Bassima Jurdak O'Brien, and I heard her cross-examination. The hospital filed affidavits of Jane Palmer and Sarah MacDonald. Ms. MacDonald was cross-examined. The authority filed affidavits of Gaston Saulnier, Geoff Piers and David Appleby. Mr. Appleby was cross-examined and he corrected an exhibit to his affidavit when he took the stand.

[4] Although an interim injunction requires proof of an additional element of urgency (see Rule 41.04(2) and *Sharpe on Injunctions and Specific Performance*, 2018 loose leaf para 2.55), the parties were content to argue the motion on the three principles in *RJR MacDonald Inc. v. Canada*, [1994] S.C.J. 19 concerning strength of the moving party's case, irreparable harm, and the balance of inconvenience.

[5] Arabesque refers me to the decision of my colleague, Justice Muisse, in *Richards v. Richards*, 2013 NSSC 163, for the proposition that the usual standard for assessing the strength of the moving party's case, proof of a serious issue to be tried, gives way in some circumstances to the stricter standard, proof of a strong *prima facie* case. It argues that the stricter standard should apply on what amounts to a motion for a mandatory injunction, especially where the injunction would do more for the plaintiff than maintaining the *status quo*.

[6] That question aside, the motion is to be determined on the well known American Cyanamid/RJR MacDonald principles. The principles set up cumulative and hierarchical stages. We start with a preliminary assessment of the case for a final injunction.

[7] The market for interpretation services (translating the spoken word, usually face to face) in the Halifax area expanded much in recent years because of increases in immigration, including refugees. The demands for translation services (written word) and interpretation services (oral) are various. The biggest interpretation clients are hospitals and the courts.

[8] Nova Scotia Interpreting Services Society describes itself as a “not-for-profit” organization. Customers contract for the interpretation services and the society has a membership of interpreters from whom it assigns interpreters to discharge specific contracts. The member contractors are paid according to a rate and hours worked performing the specific contract, what is sometimes called “piecework”.

[9] Arabesque and its predecessors have been in the translation and interpretation business in the Halifax area for about twelve years. It too retains contractors to perform interpretation contracts.

[10] Until the tender at issue in this proceeding, the society and Arabesque were not much in competition with each other. It appears the society was not much involved in translating the written word. As for interpreting speech, the Court Services Division of the Department of Justice was a client of Arabesque and its predecessors and the Health Authority and the IWK were the major clients of Nova Scotia Interpreting Services Society. Thus, one needed to have contractors familiar with legal terminology and the register of the legal profession and the other with medical terminology and the register of the health professions.

[11] On April 20, 2018 the Province of Nova Scotia, acting through the Minister of Internal Services, issued a request for proposals for face to face interpretation as required by the Health Authority, which operates most hospitals, and the IWK, which operates the Killam children’s hospital. I refer to the requested proposals as tenders.

[12] Ms. Nabeel was not forewarned of the request for proposals, although the Health Authority and the IWK had been customers of her organization for over

twenty years. She found out about it from an email sent to her by a government employee a few days after the request had been posted. Ms. Nabeel was surprised.

[13] The Nova Scotia Interpreting Services Society and Arabesque both delivered tenders. Ms. Nabeel alleges the Arabesque tender did not comply with the terms in the request for proposals. Respectfully, her position confuses terms for the tender and performance of the resulting contract. There is no question on the former. On the latter, it remains to be seen whether Ms. Nabeel's assessment of the abilities of her competitors will prove out.

[14] Whether the society's cause has merit will turn on three remaining components sworn to by Ms. Nabeel. American Cyanamid and RJR MacDonald caution against closely evaluating the merits at the first stage of assessing a claim for an interlocutory injunction. Those cases were decided when a trial was seen as the only genuine way to ascertain facts. A different view may be emerging today. See *Sharpe* at paras. 2.180 to 2.280.

[15] At the very least, I have to examine evidence on the merits to determine whether there is a serious issue to be tried in the sense that the society's cause is not frivolous.

[16] Ms. Nabeel says that the closing date for tenders was May 18, 2018 but it was extended to May 25th and May 29th. She says that the anticipated date for executing a contract was also extended. It went from June 15, 2018 to June 22nd. The society delivered its proposal on May 24th, before the extension to May 29th.

[17] Mr. David Appleby managed the tender process for the Procurement Division of Internal Services. Ms. Nabeel made inquiries in July 2018, and Mr. Appleby wrote to her on July 31st:

At this point, the process is still in the evaluation phase. We are unable to provide any further information as to how the process is progressing. When we are able, we will forward information. We thank you for your patience.

[18] Four months later, on December 6, 2018, Mr. Appleby informed Ms. Nabeel that the contract had been awarded to Arabesque.

[19] In addition to the extensions and the delay, Ms. Nabeel is concerned about the record of when the contract was awarded to Arabesque. The government posts a statement titled "Tender Details" and adds information to it from time to time. Ms. Nabeel consulted the "Tender Details" statement on the Health Authority IWK

tender from time to time. She says the part for “Awarded date” remained blank until December, 2018. Then the province added July 4, 2018 as the date of the award.

[20] Mr. Appleby provided explanations that are not contradicted by any evidence and that remained unshaken by his cross-examination. The procurement system seeks to maintain a distance between the bidders and those who decide on supply and to maintain an open record of the communications. Software called “Ariba” allows the government to post requests for proposals, amendments to the requests, and tender information for all to see. It also allows bidders to address questions to Mr. Appleby in confidence. The request prohibits communications with “any employees, officers, agents, elected or appointed officials or other representatives of the province or the NSHA-IWK” except Mr. Appleby or his delegate.

[21] Five addendums were published. The first answered questions posed by potential bidders without revealing their identities. The second answered numerous questions and extended the deadline for more questions. However, Mr. Appleby advised the Health Authority and the IWK that the quantity and type of questions being asked would require an extension of the deadline for delivering the tenders.

[22] The third addendum answered numerous questions and extended the deadline for questions and for delivery of tenders. This created the deadline met by the Nova Scotia Interpreting Services Society, May 25, 2018.

[23] Ms. Nabeel is concerned about the fourth addendum, which extended the deadline from May 25th to May 29th, 2018. The fifth and last answered numerous questions and confirms the May 29th deadline.

[24] Ms. Nabeel ought not to be concerned. First, the addendums, themselves, show serious questions and deliberate answers within time frames that necessitated extensions. Second, the request for proposals allowed the society to amend its tender, and Ms. Nabeel says there was no need for it to do so. Thirdly, the request for proposals states that the deadlines are tentative and may be changed by the government. Fourthly, everything went through the Ariba software. Potential bidders could not influence the ultimate decision makers because Ariba ensured that Mr. Appleby stood between them.

[25] As regards delay, the request for proposals provides that the best bidder is not the “successful proponent” until “finalization of the Agreements with NSHA and IWK”. Other proponents are notified “[o]nce an agreement is finalized and executed by NSHA – IWK with the [successful] proponent”.

[26] Separately, the Health Authority and the IWK Hospital went through an evaluation process mandated by the request for proposals, and selected Arabesque. That happened on June 22, 2018. The Department of Internal Services approved the selection on June 29, 2018. There was a long delay in getting agreements finalized. This is explained in the affidavits of Ms. MacDonald, Mr. Piers, and Ms. Jurdak-O’Brien. That is why Ms. Nabeel was only notified on December 6, 2018.

[27] As I said, the concerns of Ms. Nabeel have another component after amendments and deadlines and delay between approval and announcement. This has to do with Ms. Nabeel’s interpretation of a conversation she had with the defendant, Ms. DiCostanzo, shortly after the award was announced in December, 2018.

[28] Ms. Rafah DiCostanzo is a member of the Legislative Assembly who sits with the government. She is also an interpreter. She was Ms. Nabeel’s predecessor as president of the Nova Scotia Interpreting Services Society.

[29] Ms. Nabeel swears that the society held a board meeting on December 7, 2018 as a result of losing the tender competition. She says Ms. DiCostanzo attended the meeting “in her capacity as a former interpreter with NSIS”. According to Ms. Nabeel, Ms. DiCostanzo spoke positively about the work of Arabesque’s president, Ms. Jurdak-O’Brien.

[30] Ms. Nabeel then swears:

24. Further, during the board meeting, Ms. DiCostanzo asked me to resign as President of NSIS, citing concerns that the board was not united and did not want me as their leader. Following her statement, Ms. DiCostanzo pulled me aside outside of the board room and told me that there are influential people in the government that do not like me. As a result of their dislike, she said that when they see my name on any proposal they ensure that NSIS will not get business.

25. I asked Ms. DiCostanzo who in government she was referring to. I am informed by Ms. DiCostanzo and do verily believe the individual she was referring to is Peter James (“Mr. James”). It is my understanding that Mr. James represents the Department

of Justice. Ms. DiCostanzo indicated to me that Mr. James dislikes me and that he is influential, as he is on many government committees. She indicated to me, and I do verily believe, that NSIS lost the RFP because my name was on the Proposal.

26. Based upon my above interactions, I do verily believe that there has been political interference in the RFP process.

[31] Ms. DiCostanzo described the meeting of December 7, 2018 as she recalled it. She says that she requested an interruption to speak privately with Ms. Nabeel, as the meeting was not going well under Ms. Nabeel's leadership. Ms. DiCostanzo says she reminded Ms. Nabeel "that she had told me in the past that she did not get along with many of her co-workers, including her former manager, Peter James, when she worked at the Nova Scotia Department of Justice in Halifax". The purpose of that reminder was to motivate Ms. Nabeel to allow another officer of the society to deal with the tender failure.

[32] It is not for me to determine credibility on a motion for an interim injunction. Taking Ms. Nabeel's evidence on its face, it does not provide a rational basis for concluding that there was political interference in the tender process.

[33] During cross-examination it emerged that Ms. Nabeel had been an employee of the Department of Justice for years, knew Mr. James more than any other witness, and had had an acrimonious relationship with him.

[34] Mr. James is a middle manager in the Department of Justice, far removed from the Department of Internal Services, the Health Authority, or the IWK hospital. Ms. Nabeel's evidence does not contradict Mr. Appleby's:

31. I also confirm that I did not at any time speak with an individual by the name of Peter James ("Mr. James") in relation to the RFP process.

32. To my knowledge, Mr. James had no involvement or influence in the RFP process or in the decision of the Evaluation Team to select Arabesque as the successful proponent.

33. To my knowledge, there were no external influences or involvement of anyone outside of the Evaluation Team in coming to the decision to award the contract to Arabesque.

[35] Mr. James was named as a reference in the Arabesque tender. The Department of Justice is their biggest client. There is nothing surprising about the reference.

[36] Otherwise, the members of the evaluation team at the Health Authority, Geoff Piers, Kolten MacDonnell, and Gaston Saulnier, and the members of the evaluation team at the IWK, Sarah MacDonald and James Palmer, all swore that no one calling themselves Peter James spoke with them.

[37] At this stage, the only information suggesting outside influence is hearsay attributed by Ms. Nabeel to Ms. DiCostanzo, who had nothing to do with the tender process and who denies the attributed hearsay.

[38] There is no evidence of any breach of the insulation of decision makers and bidders in the procurement process managed by Internal Services, even if Ms. Nabeel's version of the conversation with Ms. DiCostanzo is to be accepted.

[39] The components of the case against the Health Authority and the IWK are Arabesque's failure to comply with tender terms, improper extensions of deadlines, undue delay in announcing Arabesque's success and political influence. The evidence supporting each of these components is so superficial that, alone or together, they do not raise a serious issue for trial.

[40] Arabesque argues for a higher standard on the basis that the plaintiff seeks what amounts to a mandatory injunction and provides the plaintiff with more than the *status quo*. As discussed, there are cases for a higher standard to be applied at the first stage in some circumstances. The evidence on the first issue is so superficial as to preclude a genuine alternate assessment at a higher standard.

[41] For the same reason, I will not offer alternate reasoning on the second or third stages. They may have to be determined over again by another judge on another motion. The plaintiff failed to prove a serious issue for trial. Therefore, the motion is dismissed.

[Submissions heard on costs]

[42] I am satisfied that respecting all participants in the failed motion for an interim injunction, the tariff amount would not approach the principle of a substantial contribution towards costs. I am weighing against that the large amounts of money that could be faced by Nova Scotia Interpreting Services Society if I were to award half of estimated costs or thereabouts.

[43] The society will pay costs of seven thousand dollars each to the IWK and the Health Authority, seven thousand dollars to Arabesque, which in my estimation

was compelled to fully participate in this motion because it would have been deprived of its contract with the IWK and Health Authority, and three thousand dollars to Ms. DiCostanzo.

[44] I recognize that is a large sum of money for a “not for profit” organization, but it begins to approach a substantial contribution. In the circumstances of this case, the costs must be payable forthwith.

J.