Date: 20071102

Docket: T-567-06

Citation: 2007 FC 1136

Ottawa, Ontario, this 2nd day of November, 2007

PRESENT: The Honourable Barry Strayer, Deputy Judge

BETWEEN:

TERRY RANDOLPH THOMPSON

Applicant

and

LEQ'A:MEL FIRST NATION COUNCIL

Respondent

FURTHER REASONS AND JUDGMENT

[1] I issued Reasons in this matter on July 5, 2007 and directed the parties to make their submissions on costs in a motion in writing. This they have now done. Matters have been delayed by the unfortunate death on July 3, 2007 of counsel for the Respondent.

[2] The Applicant who succeeded on the merits has submitted a bill of costs based on Column III of Tariff B. I believe that is a reasonable classification of the matter. Although not factually complex, the case involved important issues of constitutional law. The only error, I believe, is in the claim by the Applicant under item 15 of Tariff B for "preparation of written argument." I am

unaware that any written argument was prepared or filed in this matter, other than the Memorandum of Fact and Law which of course is covered under another item. I would therefore deduct the seven units claimed under Article 15, making a total of permitted units of 58.5.

[3] The Respondent, however, asserts that the Applicant should be disentitled to costs and in fact should have costs assessed against him. The Respondent asserts that the Applicant rejected a settlement, and the proceeding was conducted in a manner which unnecessarily increased the costs of both parties.

[4] First, with respect to the settlement issue, the Respondent invokes paragraph 420(2)(*a*) of the Rules which says that:

> …if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to double such costs, excluding disbursements, from that date to the date of judgment….

The Respondent relies on an offer made in a letter of May 15, 2006 to counsel for the Applicant. It thereby proposed a settlement whereby the parties would seek an order of the Court which would require the Respondent to try to amend the election regulations, section 4, by deleting the requirement that a voter "reside in the Canadian traditional Sto:ló territory." The offer contemplated that there would be wide consultation among members of the Leq'á:mel First Nation in which the Applicant himself would participate. A draft of new election regulations would then be submitted to a referendum which would pass if 50% plus 1 of all Leq'á:mel First Nation members, regardless of their place of residence, voted in favour. The Respondent quickly rejected this offer. In my view,

such an offer would not have been more favourable to the Applicant than the judgment which I will issue. Given the requirements of the existing election regulations, I fail to see how those regulations could be amended by a majority of 50% plus 1 of all members, regardless of their place of residence. As we have seen above, section 24.3 of those regulations requires for amendments to the election regulations a majority of 60% of the eligible electorate. Section 4 of those regulations also prohibits non-residents of the CTST from voting. The mere agreement of the parties that the regulations could be amended without compliance with section 24.3, the existing law, would have had no effect. Nor could a Court direct such a result unless the Court were first to make a finding of invalidity of the regulations as they now stand, including the invalidity of section 24.3. So legally the offer was meaningless or would have, in any event, required a court hearing and determination of both the invalidity of section 4 and section 24. On the other hand, the judgment to be now issued is based on a finding of invalidity of sections 3 and 4 in respect of the residency requirement, and contemplates that if the band has not succeeded in amending its regulations properly, those regulations will become void as of August 1, 2008. So in spite of the empty promise of a change to the regulations as contemplated by the offer to settle, the Applicant by persisting with the court case has achieved the certainty of ultimate success in having the regulations set aside. In the meantime, of course, the Respondent can make its best efforts to have the regulations properly amended in accordance with their existing requirements. The Respondent suggests that because in my reasons I did not accord some of the remedies requested by the Applicant, the Applicant did not fully succeed. The central issue for the Applicant was having the regulations found constitutionally invalid, and that he will have achieved. The fact that I declined some discretionary remedies such as

setting aside the past election or ordering the band to legislate does not detract from the substantive victory of the Applicant.

[5] The Respondent also complains of various actions on the part of counsel for the Applicant which caused unnecessary delays. These mostly consisted of refusals to consent to late filing by the Respondent or in one case, a futile attempt by the Applicant to file further documents shortly before the hearing. In my view, these late filing materials were for the most part of no help to the Court in the resolution of the case. If either party had a grievance upon the hearing of the orders for late filings made necessary by refusals to consent, they should have asked the presiding judge or Prothonotary for an order as to costs on those occasions.

[6] The one serious complaint of the Respondent, in my view, pertains to the request by counsel for the Applicant for an adjournment one day before the hearing date long established for the hearing of the application. On September 20, 2006 the Court had ordered that this application be set down for a hearing in Vancouver on December 19 and 20, 2006. On December 18, 2006, counsel for the Applicant sent a fax to the Court and to counsel for the Respondent advising that she had taken ill suddenly and would not be able to attend the above noted hearing. Among other things she said in her letter were the following:

> In August 2006 I became very ill and I've been under my physicians care since then…I regret any inconvenience caused by this situation but my health is such that I can have many productive weeks only to fall ill again suddenly, as occurred last week…

Sympathetic as one may be for counsel suffering such illness, the letter itself suggests that she had ample warning that she would probably not be able to conduct the argument on the appointed days. She indicates that she had been ill since August and under her physician's care. She refers to having "fallen ill again suddenly…last week." In those circumstances, it is either incumbent on counsel to find other counsel to replace them or give the Court and opposing counsel as much warning as possible. It does not appear to me that she did this. Nor has her version of events been supported in any way by affidavit, either at the time of the adjournment or in response to the Respondent's written submission on this motion. On the face of her own letter, it appears that she failed to alert the Court and opposing counsel in a timely manner that she could not proceed.

[7] In the exercise of my discretion I will for this reason reduce the number of units billable by the Applicant to 50.

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED THAT:

(1) Paragraphs 3.1(b) and 4.1(b) of the Leq'á:mel First Nation election regulations and procedures be declared invalid, effective August 1, 2008; and

(2) The Applicant be awarded costs on the basis of 50 units of counsel fees with taxes calculated thereon, and the disbursements as set out in its Bill of Costs filed on September 28, 2007 as part of its motion record in this matter.

"Barry L. Strayer"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-567-06
STYLE OF CAUSE:	TERRY RANDOLPH THOMPSON v. LEQ'A:MEL FIRST NATION COUNCIL
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	May 2, 2007
REASONS FOR ORDER:	STRAYER J.
DATED:	November 2, 2007

APPEARANCES:

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Ms. Sarah Rauch	
Ms. Alisa Noda	FOR THE RESPONDENT

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