

Date: 20071116

Docket: T-320-06

Citation: 2007 FC 1202

Ottawa, Ontario, this 16th day of November, 2007

PRESENT: The Honourable Justice Barry L. Strayer, D.J.

BETWEEN:

**GAIL ESTENSEN, EXECUTRIX OF THE
LATE RALPH ESTENSEN**

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT and JUDGMENT

INTRODUCTION

[1] The moving party in this motion, Gail Estensen (hereafter the new Applicant) in her capacity as executrix of the Applicant asks that she be substituted as Applicant and that the Style of Cause be amended accordingly and I have so ordered. She also asks that the original application for judicial review in this matter be stayed and that there be an extraordinary award for costs to her either on a solicitor-client basis or on an otherwise elevated basis under Tariff B.

FACTS

[2] The original application herein was filed on February 21, 2006, seeking judicial review of a decision of the Canadian Food Inspection Agency (CFIA) dated February 3, 2006, whereby the CFIA cancelled the Applicant's accredited veterinarian agreement with the CFIA. This was an agreement whereby the Applicant was employed by the CFIA to inspect cattle being shipped to the United States, in order to certify that the cattle were qualified for import into that country. The CFIA, in its notice of cancellation, concluded that the Applicant had certified an inspection on an export slaughter cattle certificate to the United States of America "which was false". By letter of April 3, 2006, however, the CFIA advised the Applicant that it had revoked the cancellation of his agreement. It is common ground that the CFIA, upon reviewing the procedure which it had followed in making the decision of February 3, 2006, in the light of the subsequent application for judicial review, concluded that there had been irregularities and a lack of fairness which had probably rendered that decision a nullity. On the same day as the revocation of the cancellation, it also notified the Applicant that it had suspended his accreditation again and gave him notice that there would be a full hearing with a view to permanent cancellation. The grounds were identical to those stated with respect to the first suspension and cancellation.

[3] The Applicant then commenced a new application for judicial review which became case number T-740-06. On October 12, 2006, a Prothonotary issued an order staying the first application, T-320-06, pending the outcome of judicial review T-740-06.

[4] I heard the application for judicial review in T-740-06 and on May 22, 2007, I issued reasons indicating that I would allow it. I did not issue judgment because the Applicant wished to make special submissions on costs depending on the outcome of T-740-06. While in my reasons I asked counsel to make written submissions on costs, this procedure was delayed by the untimely death of the Applicant on June 16, 2007. His wife, Gail Estensen, has been appointed Executrix of his estate and she now brings a motion for costs in T-740-06 as well as this motion for disposal of T-320-06. Both motions were submitted to me.

[5] With respect to a stay in the proceedings in T-320-06 which is requested, I believe the appropriate remedy is to terminate the proceedings as the order whose judicial review was sought in the original application no longer exists. I will therefore simply dismiss the application for judicial review but with costs to the Applicant.

[6] The new Applicant essentially asserts that there should be some extraordinary provision for costs because the Applicant was unnecessarily put to the cost of bringing a judicial review application against the decision, which by reason of the CFIA's own conduct, was indefensible. I accept that argument. The new Applicant, however, says that solicitor-client costs would be justified because the CFIA acted in a "high-handed and arrogant manner". While the new Applicant cited the case of *Young v. Young*, [1993] 4 SCR 3, paras. 65-66, where it was said that "solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties", it is clear from the context that the Supreme Court was making there the usual distinction that solicitor-client costs are generally given only where there has been

misconduct in the conduct of the litigation itself. They are not justified simply because one party, as here, would have had no arguable case if the judicial review had gone to a hearing.

[7] I do believe, however, that while I cannot compensate through costs the Applicant or his executrix for his loss of income and harm to his reputation caused by the spurious first order of cancellation, the subject of this judicial review, I can try to reduce his out-of-pocket costs for having been forced to bring this abortive application. I have also kept in mind that the CFIA, in its decision of February 3, 2006, the one in issue here, stated that the Applicant had issued a certificate “which was false”, a serious slur on the Applicant’s reputation pronounced as a conclusion in an admittedly invalid proceeding forcing the Applicant to contest it.

[8] On the basis of the limited information before me to support the request for a lump sum award, I will in the interest of speed and economy fix an appropriate amount. It appears to me that counsel for the Applicant and the new Applicant would have taken three significant steps in this matter: the preparation and filing of originating documents and an application record, the making of submissions in response to a status notice on September 13, 2006, and this motion for termination of the proceedings and costs. On that basis, I will fix costs including counsel fees of \$6,000.00 together with \$100.00 disbursements and applicable taxes.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

1. This application for judicial review be dismissed with costs to the new Applicant;
2. The new Applicant be awarded counsel fees in the lump sum of \$6,000.00, together with \$100.00 disbursements, plus the relevant taxes.

"B.L. Strayer"
Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-320-06

STYLE OF CAUSE: **Gail Estensen, Executrix of the Late Ralph Estensen
v. AGC**

PLACE OF HEARING: Vancouver

DATE OF HEARING: May 8, 2007

REASONS FOR ORDER: STRAYER, J.

DATED: November 16, 2007

APPEARANCES:

Mr. R.A.Wattie
Mr. David Letkemann

FOR THE APPLICANT

Ms. Melanie Chartier

FOR THE RESPONDENT

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