

Date: 20071116

Docket: T-740-06

Citation: 2007 FC 1203

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

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

BETWEEN:

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

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

FURTHER REASONS FOR JUDGMENT AND JUDGMENT

[1] On May 22, 2007, I issued reasons in this matter and indicated that I would set aside the suspension of the Applicant's accreditation, issued on April 3, 2006, by the CFIA and terminate any further proceedings in respect of cancellation pursuant to that notice. At the end of argument of this application, counsel for the Applicant asked that I not dispose of costs until counsel had had an opportunity to see my reasons. I therefore did not issue judgment but directed in my reasons that if counsel could not agree within 30 days on costs, the Applicant should bring a motion in writing in respect of costs. Unfortunately, prior to the lapse of those 30 days, the Applicant died, on June 16, 2007. This sad development has delayed the motion in respect of costs.

[2] In the present motion, Gail Estensen (hereafter the new Applicant), the Executrix of the estate of the original Applicant, Ralph Estensen, asks that she be substituted as Applicant and be so indicated in the Style of Cause. I have so directed.

[3] The new Applicant asks that the Court order higher than normal costs, mainly for two reasons. First it is argued that the CFIA acted wrongly in revoking its first cancellation of the Applicant's accreditation and then immediately suspending his accreditation in a commencement of new cancellation proceedings. As I indicated in paragraph 16 of my reasons, based on authoritative jurisprudence, an administrative body in these circumstances is not precluded from treating its first decision as a nullity and is not *functus officio* so as to be unable to commence a new proceeding. I therefore am not able to attribute fault in this respect to the CFIA which could have an effect on costs. I have dealt with the costs consequences of that revocation in my judgment in T-320-06, the application for judicial review of that first decision.

[4] The new Applicant also stresses the significance of the date, November 2, 2006 on which the *Tebrinke* decision was issued. In my reasons I concluded that after that decision was taken the CFIA was bound by issue estoppel and could not relitigate the question of whether the OTM head ever bore a tag issued by the Applicant. After a careful hearing on that matter, a Review Tribunal had concluded that it was not possible to find that the offending head ever belonged to any of the cattle shipped by Mr. Trebenke to the United States and previously approved by the Applicant. The new Applicant takes the position that once the November 2 decision was released, the CFIA had no

legitimate basis upon which it could oppose the Applicant's second application for judicial review. I disagree. There was certainly an arguable position for the CFIA to take in this case that neither issue estoppel, *res judicata*, or abuse of process would apply in this situation. While I found that issue estoppel did apply it was certainly not a foregone conclusion. In exercising my discretion as to costs, therefore, I do not fault the Respondent for having waited to make its legal arguments at the hearing of this application for judicial review.

[5] I also note that the Applicant caused some delays for having wrongly named certain persons and the CFIA as Respondents. Also troubling was the long delay in the Applicant seeking to file in the Court the *Tebrinke* decision together with a new argument based on *functus officio*, issue estoppel, and abuse of process, and certain authorities in support. I noted in my reasons at paragraph 12 that this delay of over five months posed difficulties for the Respondent and for the Court and I will take this into account as well in the exercise of my discretion. I believe these matters all fall within paragraph 400(3)(i) and (k) of the Rules of Court as proper subjects for my discretion.

[6] I do not have sufficient information in front of me to make a meaningful assessment of costs on a lump sum basis. I will therefore give directions as to the taxation of the costs. Taxation will be directed on the basis that the new Applicant is entitled to costs, with counsel fees fixed under Tariff B at the maximum number of units allowed under Column III including costs of a second counsel at the hearing as provided by paragraph 14(b) of Tariff B, plus disbursements and applicable taxes.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

1. The suspension of the Applicant's accreditation ordered by the CFIA on April 3, 2006 be terminated as of November 2, 2006;
2. All further proceedings as notified to the Applicant by the CFIA's letter of April 3, 2006 in respect of the animal bearing the CCIA eartag 271 629 357 be terminated;
3. Costs be awarded to the Applicant and taxed on the basis that counsel fees be allowed under Tariff B with the maximum number of units permitted under Column III thereof, including a fee for second counsel at the hearing pursuant to paragraph 14(b) of the table under Tariff B; plus disbursements and applicable taxes.

"B.L. Strayer"

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-740-06

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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