

Date: 20071023

Docket: T-1492-04

Citation: 2007 FC 1099

BETWEEN:

**CHIEF ROBERT SAM,
COUNCILLOR NICK ALBANY,
COUNCILLOR NORMAN GEORGE,
COUNCILLOR FRANK E. GEORGE,
COUNCILLOR JOHN R. RICE on their own behalf as
COUNCIL OF THE SONGHEES INDIAN BAND
and on behalf of the SONGHEES INDIAN BAND**

Applicants

and

**THE MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT, THE SUPERINTENDENT
FOR THE SONGHEES INDIAN BAND, SYLVIA ANN JOSEPH,
ALICE LARGE, ESTATE OF IRENE COOPER by her
Administrators HARVEY GEORGE, CHARLOTTE THOMPSON
AND WILLIAM GOSSE and HARVEY GEORGE,
CHARLOTTE THOMPSON AND WILLIAM GOSSE**

Respondents

ASSESSMENT OF COSTS - REASONS

**Charles E. Stinson
Assessment Officer**

[1] The Court dismissed with costs this application for judicial review of a decision of the Minister of Indian Affairs and Northern Development (the Respondent Minister) approving the sale of nine lots in the New Songhees Indian Reserve No. 1A. I issued a timetable for written disposition

of the assessment of the bill of costs of the Estate of Irene Cooper et al. (the Estate Respondents).

The Applicants conceded the disbursements claimed at \$269.33.

[2] The Applicants' materials presumed that an assessment officer can exercise jurisdiction under Rule 400(5) which provides that the Court can specify a Column in Tariff B to use for costs. The Applicants argued that, as the judgment did not specify which Column to use, the assessment officer should apply Rule 400(3)(c) (importance and complexity of the issues), (d) (apportionment of liability), (g) (amount of work) and (h) (public interest) to set low Column II amounts for counsel fees. The Estate Respondents correctly pointed out that Rule 407 specifies Column III unless the Court directs otherwise. I have therefore considered the Applicants' materials as an argument for minimum Column III amounts.

I. The Parties' Respective Positions

[3] As the Estate Respondents claimed minimum units (\$120.00 per unit) for several counsel fee items for which entitlement was not an issue, I allow them as presented. I discounted the Applicants' argument that the hours allowable under item 14(a) (attendance at hearing) should be limited to the actual time counsel for the Estate Respondents spent in making his oral submissions (the Applicants conceded the six hours claimed for the first day, but argued that only one-half hour of the six hours claimed for the second day should be allowed). I find that counsel for the Estate Respondents had to be present throughout to intervene in his professional discretion to preserve the interests of his clients. That left in issue only fee items 7 (discovery of documents/available range = 2 to 5 units) claimed at 3 units; 13(a) (preparation for first day of hearing/available range =

2 to 5 units) claimed at 3 units and 26 (assessment of costs/available range = 2 to 6 units) claimed at 4 units.

[4] The Estate Respondents argued that the considerable amount of sale proceeds payable to them; the fact that the obligations of the Respondent Minister in a sale of this type had not previously been addressed in a judicial review; the number of individual interests involved (five discrete parties); the need for counsel for the Estate Respondents to assimilate instructions from three individual clients and attend all hearings; complexity causing this judicial review process to extend beyond the normal one year contemplated by the Rules, i.e. two amendments (one contested and including an appeal) to the application; the circumstances of the Respondent Minister obtaining an injunction against the Estate Respondents; several case conferences arising out of the special case management process and the Applicants' attempt to introduce evidence that was extrinsic to the record before the Respondent Minister when the original decision was made; the interest of the Estate Respondents differing from that of the Respondent Minister; the need for counsel to independently review all materials despite general reliance on the position of the Respondent Minister; several attempts at settlement and several thousand pages of records and cases to review as part of case preparation all warrant the amounts claimed.

[5] The Applicants argued that only minimal allowances are warranted because this judicial review process did not require a defence, reply or counterclaim; the Estate Respondents did not lead independent records and although this case had important elements of precedent for all Indian people, the interests of the Estate Respondents, i.e. hardship as a result of delayed access to the sale

proceeds, were simple and fact-based and did not require any significant reliance on legal principles. The case preparation and hearing were not complicated for the Estate Respondents as they relied upon the position of the Respondent Minister.

II. Assessment

[6] I concluded at para. 7 in *Starlight v. Canada*, [2001] F.C.J. No. 1376 (A.O.) that the same point in the ranges throughout the Tariff need not be used as each item for the services of counsel is discrete and must be considered in its own circumstances. As well, broad distinctions may be required between an upper versus lower allowance from available ranges.

[7] The Court's decision identified certain issues of duty relative to the *Indian Act*, s. 50(4), i.e. whether the Respondent Minister had to verify the validity of the Certificates of Possession prior to approving possession and obtain a band council allotment prior to approving possession, owed a fiduciary responsibility to the band in the conduct of a sale and breached procedural fairness by denying the band an opportunity to make submissions on the sale. The Applicants brought a motion resulting in the order dated November 8, 2004, adding the Estate Respondents as parties to this proceeding. The grounds advanced in support were that the Estate Respondents had expressed a wish to be joined and that they were necessary parties because any judgment would affect their interests, and because their presence would assist the Court in its disposition of the issues.

[8] The assertions in the Memorandum of Fact and Law of the Applicants concerning the Respondent Minister's actions put in jeopardy the interests of the Estate Respondents.

The Respondent Minister's Memorandum of Fact and Law was lengthy and difficult to prepare. Counsel for the Estate Respondents adopted both its Statement of Facts and its Submissions and added about four and one-half pages of succinct submissions of particular relevance for the interests of his clients. The participation by the Estate Respondents was not frivolous and their interests were substantial, i.e. paragraph 18 of the decision dated December 15, 2004, addressing the unusual circumstances of an injunction sought by one respondent (the Respondent Minister) against another respondent (the Estate Respondents), but granting it to restrain the latter from demanding the sale proceeds until after the judicial review, acknowledged the financial difficulties of the Estate Respondents.

[9] Paragraphs 11, 17 to 18 and 190 to 241 of *Halford v. Seed Hawk Inc.*, [2006] F.C.J. No. 629 (A.O.) [*Halford*] disclose considerations for a co-litigant adopting the position of another. The circumstances of the Estate Respondents here certainly do not approximate those of Simplot Canada Limited in *Halford* above, but paragraphs 11, 199 and 206 do indicate possible hazards of a passive watching brief relative to the interests of one's clients. I find that the remaining counsel fee claims are reasonable in these circumstances. The bill of the Estate Respondents is assessed and allowed as presented at \$7,320.53

"Charles E. Stinson"
Assessment Officer

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1492-04

STYLE OF CAUSE: CHIEF ROBERT SAM et al. v.
THE MINISTER OF INDIAN AFFAIRS AND NORTHERN
DEVELOPMENT et al.

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS: CHARLES E. STINSON

DATED: October 23, 2007

WRITTEN REPRESENTATIONS:

Mr. B. Rory B. Morahan FOR THE APPLICANTS

Mr. Michael J. Lomax FOR THE RESPONDENTS Estate of Irene Cooper by
her Administrators Harvey George, Charlotte Thompson
and William Gosse and Harvey George,
Charlotte Thompson and William Gosse

SOLICITORS OF RECORD:

Morahan & Company FOR THE APPLICANTS
Victoria, BC

John H. Sims, Q.C. FOR THE RESPONDENTS The Minister of
Deputy Attorney General of Canada Indian Affairs and Northern Development and the
Superintendent for the Songhees Indian Band)

Jawl & Bundon FOR THE RESPONDENT Sylvia Ann Joseph
Victoria, BC

McMicken & Bennett FOR THE RESPONDENT Alice Large
Victoria, BC

Milton, Johnson FOR THE RESPONDENTS Estate of Irene Cooper by
Victoria, BC her Administrators Harvey George, Charlotte Thompson
and William Gosse and Harvey George,
Charlotte Thompson and William Gosse