IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Loke v. British Columbia (Minister of Advanced Education of British Columbia),* 2016 BCSC 259

Date: 20160219
Docket: S-142908
Registry: Vancouver

Between:

Trevor James Loke

Petitioner

And:

Minister of Advanced Education of British Columbia and Trinity Western University

Respondents

Before: Master Bouck

(Sitting as Registrar)

Reasons for Decision

Counsel for the Petitioner:	C. Evans
Counsel for the Respondent, Minister of Advanced Education of British Columbia:	K. Evans
Place and Date of Hearing:	Vancouver, B.C. January 19, 2016
Place and Date of Decision:	Vancouver, B.C. February 19, 2016

Introduction

[1] On March 18, 2015, the court dismissed this proceeding and awarded party/party costs to the petitioner as a public interest litigant: *Loke v. British Columbia (Minister of Advanced Education)*, 2015 BCSC 413. The parties impacted by the costs order have reached consensus on most of the items claimed in the petitioner's bill. This assessment concerns a few remaining disputed disbursements.

Background

[2] The factual background to this proceeding is well known, at least in legal circles, and is fully described in the court's reasons for judgment. In his affidavit of justification, the petitioner describes that background as this:

> 8. The Petition concerns the Minister's decision to grant consent to TWU to provide, advertise and grant law degrees. Mr. Loke's petition raised issues about the effect of the Minister's decision to grant consent on his equality rights and the rights of other LGBTQ people and how the Minister was required to take these issues into account when he made his decision. The Petition asserted that the Minister had erred in law in his decision-making in a number of respects.
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> 9. The Petition raised complex matters of constitutional and administrative law, and their intersections. It raised the potential conflict of rights between different-rights holders. It was a matter of significant public interest and was advanced at the same time as challenges were proceeding on related matters in both Ontario and Nova Scotia. As such, it required the dedication of significant legal resources, including *pro bono* counsel from two firms with expertise in constitutional litigation. It also required the commitment of significant resources toward disbursements to allow the proceeding to be filed and to be prepared for hearing.

[3] In bringing this petition, Mr. Loke was represented by two sets of counsel: a group of three lawyers from the Vancouver-based JFK Law Corporation ("JFKL"), and Clayton Ruby and Gerald Chan of (then) Ruby Schiller Hasan Chan, a firm based in Toronto, Ontario. All counsel provided their services to Mr. Loke on a *pro bono* basis. Mr. Loke used on-line fundraising tools to collect monies to pay for disbursements related to the petition.

[4] The hearing of the petition was scheduled to proceed for five days commencing December 1, 2014. The material filed with respect to the petition is

voluminous. The petitioner filed a total of 16 affidavits. TWU filed 24 affidavits of its own, while the Minister intended to rely on an affidavit which is 538 pages in length. The petitioner's affidavit material included those from five expert witnesses.

[5] In late November 2014, the parties attended a case planning conference. At or sometime before that conference, the Minister informed the other parties that the conditional consent provided to the TWU for the granting of JD degrees was being reconsidered. Accordingly, the December hearing was adjourned by consent. The Minister did in fact revoke the consent effective January 5, 2015. From the Minister's perspective, this revocation rendered the hearing of the petition as moot. The petitioner did not agree.

[6] As a result of this disagreement, the parties proceeded to the hearing before Hinkson, C.J. The matters to be decided by the court at the February 2015 hearing were the application by the Minister to dismiss the petition, and the costs consequences that might follow from that result, as well as an application by the Law Society of British Columbia for intervenor status in the proceeding. As noted above, the court dismissed the petition and awarded Mr. Loke costs against the Minister. The Law Society's application was also dismissed. In addressing the issue of costs, the court says this [in part]:

> 86] Although the evidence adduced by the petitioner is sparse, I am satisfied that even with fundraising, the petitioner lacks the financial resources to properly litigate the issue that he raised.
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> [87] The petitioner has made it clear that his counsel in this case acted *pro bono publico*. The petitioner also had the advantage of fundraising efforts organized on his behalf to fund his legal expenses.
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> [88] In the result, he is not out of pocket for his legal expenses, but I accept that it is unlikely that he could have pursued his petition without such an arrangement with his counsel and the assistance of donors. I am, therefore, satisfied that the petitioner is a public interest litigant, so long as the Minister is not immune from an award of costs in this case, the petitioner is entitled to recover his costs against the Minister based upon the principles set out in *Carter.*

[7] The evidence before the court with respect to costs includes an affidavit in which Mr. Loke deposes, on information and belief, that his counsel had together

incurred disbursements of $15,778.88 relating to the petition. In his bill of costs, Mr. Loke claims a total of $38,731.14 in taxable and non-taxable disbursements. The difference between the two figures is largely made up of experts' charges. That is because not all of the experts' charges had been invoiced by February 25, 2015. In that regard, counsel for the petitioner deposes that:

> 26. The Petitioner did not have the means to pay the disbursements for expert witness fees immediately. However, as this case raised very important public interest issues, the expert witnesses provided their services on the basis that payment of their invoices would not be required immediately, and could be negotiated following a determination on the issue of costs in the proceeding.

[8] Four of the petitioner's expert witnesses have now issued invoices. The fifth expert provided evidence but chose not to issue an invoice for those services.

[9] The order of Hinkson C.J. as entered does not restrict the petitioner's costs as to amount or a specific time frame.

Discussion

[10] The disbursements remaining in issue are as follows:

1. expert fees totalling: $26,250;

2. cancellation fees of Toronto-based counsel relating to the adjourned December petition hearing: $423.75;

3. photocopying charges: $6,500;

4. legal research: $2,155.

[11] In terms of general legal principles to be applied on this assessment, the parties rely on different common law authorities. All of these authorities are consistent with the principles set out in the seminal decision of *Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178 (C.A.).

[12] I will first address the contentious expert fees. Counsel for the Minister argues that such fees were either not incurred or should never have been incurred by the petitioner and thus must be disallowed. This objection goes to whether the expert fees were necessary or proper in the conduct of the proceeding: Rule 14-1(5)(a) of the *Supreme Court Civil Rules.* The Minister did not specifically challenge the reasonableness of the experts' charges.

[13] The petitioner's affidavit addresses the nature and purpose of the opinion evidence. The affidavits prepared by the experts for the petition hearing are also before me on this assessment.

[14] The Minister's primary argument for disallowing the experts' charges is that this type of evidence would not have been admissible if the petition had proceeded to hearing. Specifically, it is argued that the opinion evidence could not be used to attack the Minister's decision as such evidence was not part of the record before the Minister in the decision making process: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* 2014 BCSC 568 at paras. 113-118, 134, 140, aff'd 2015 BCCA 352. There are two bases on which this objection will be rejected. First, disbursements or charges of experts can be considered necessary or proper even if the resulting evidence is ruled inadmissible at the eventual trial or hearing: *Trotter v. Neilson,* 2013 BCSC 1011. Second, to accede to the Minister's submission would require the registrar to essentially step into the shoes of a judge hearing the petition and decide evidentiary issues on a matter that was never adjudicated. In my respectful view, the question of whether any charges related to experts should be allowed to the petitioner should have been raised before Hinkson, C.J. in February 2015.

[15] The secondary argument made by the Minister in attacking these experts' charges is that the petitioner is either not liable for the charges or could have negotiated the experts' services as *pro bono*. I do not read the petitioner's evidence as stating that Mr. Loke is not liable for the experts' charges. Rather, I understand that evidence to say that the experts were willing to negotiate the amount or level of

their respective charges depending on the outcome of the petition. The registrar is in no position to decide whether the petitioner and the experts made a good or bad bargain in arriving at the amounts charged: *Dosanjh v. Martin*, 2001 BCSC 1759 at para. 50. The experts do not need to have been paid for their services in order for the disbursement to be allowed: *Barlee v. Capozzi,* [1976] B.C.J. No. 1201 at para. 37. Finally, there is no evidentiary or other bases on which the reasonableness of these charges could be challenged: *Vincent v. Foster*, [1993] B.C.J. No. 455 at para. 17.

[16] The petitioner's affidavit evidence justifies the propriety of the expert charges. The charges are allowed as presented.

[17] All of the remaining disputed disbursements relate to some degree to the involvement of the petitioner's Toronto-based counsel. While the registrar may take judicial notice of the excellent reputation enjoyed by that particular counsel, this finding alone does not mean that the costs associated with the use of out-of-town counsel ought to be visited upon the Minister: *Milkovich v. Bucan*, 2010 BCSC 1582 at paras. 31 to 41. The question here is whether, on the evidence, it was reasonable for the petitioner to retain Toronto counsel *in addition to* clearly competent local counsel. The petitioner's evidence is very slim indeed on this question. In my view, the importance of the issues raised in the proceeding does not in and of itself justify the involvement of Messrs. Ruby and Chan. On the evidence, I am not persuaded that the involvement of Toronto counsel was either necessary or proper to conduct of the proceeding. Accordingly, the travel cancellation fee is disallowed. It follows that the photocopying charges will be reduced as some charges are due to the Toronto counsel's involvement. Those charges relate to not only the copying performed at the offices of Toronto-based counsel, but also for the copying done by JFKL to convenience their co-counsel. The photocopying charges are reduced to $3,000 in accordance with the rough and ready exercise promoted in *Sovani v. Jin*, 2006 BCSC 855.

[18] That leaves for consideration the necessity, propriety and reasonableness of the charges for on-line legal research. The on-line charges of Messrs. Ruby and Chan are disallowed for the reasons described above. The charges incurred by JFKL are allowed in the sum of $1,080. I am persuaded by the affidavit of justification together with counsel's submissions that these costs were necessary given the complexity of law involved and the unavailability of that law on free publicly accessible on-line resources.

[19] Given that some items on the bill have been negotiated, it is appropriate that the parties perform the arithmetic which flows from these reasons and the agreed to amounts, with liberty to apply. In addition, the parties are granted leave to deliver written submissions on or before March 18, 2016, if the results of that arithmetic exercise might invoke costs consequences under s. 8 of the Tariff.

"C.P. Bouck"
Master C.P. Bouck