# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Loke v. British Columbia (Minister of Advanced Education)*, 2015 BCSC 413

Date: 20150318
Docket: S142908
Registry: Vancouver Registry

Between:

**Trevor Loke**

Petitioner

And

**Minister of Advanced Education of British Columbia and Trinity Western University**

Respondents

Before: The Honourable Chief Justice Hinkson

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioner: | C. Ruby, G. Chan, K. Brooks and E. Sigurdson |
| Counsel for the Respondent, Minister of Advanced Education of British Columbia | K. Horsman, Q.C. and K. Wolfe |
| Counsel for the Respondent, Trinity Western University | K.L. Boonstra, A. Delmonico, and J. Maryniuk |
| Place and Date of Trial/Hearing: | Vancouver, B.C. February 24–25, 2015 |
| Place and Date of Judgment: | Vancouver, B.C. March 18, 2015 |

[1] On December 17, 2013, the respondent Trinity Western University ("TWU") obtained the conditional consent of the respondent Minister of Advanced Education of British Columbia ("the Minister") to establish a faculty of law and grant Juris Doctor ("JD") degrees to graduates of that faculty pursuant to the *Degree Authorization Act*, S.B.C. 2002, c. 24 [*DAA*].

[2] The petitioner Trevor Loke ("Mr. Loke") commenced these proceedings on April 14, 2014, seeking a declaration that the Minister's decision to permit TWU to grant JD degrees under the *DAA* was unconstitutional on the basis that it violated ss. 2(a) and 15 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution* Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[3] On December 11, 2014, the Minister revoked his approval of the proposed faculty of law at TWU.

[4] The Minister now applies for an order dismissing the petition herein on the ground that it has become moot.

[5] The petitioner opposes the Minister's application, but in the event that the Minister's application is granted, seeks his costs against the Minister.

[6] The respondent TWU is one of two petitioners in litigation wherein the Law Society of British Columbia ("LSBC") is the respondent. The LSBC has applied for either party or intervenor standing in these proceedings as well as for orders that this action be heard together with the action in which it is the respondent, that the issues raised by the petition in these proceedings be determined prior to or at the same time as the issues in the action in which it is a respondent, and that the evidence in each action be evidence in the other action.

[7] The LSBC did not pursue its application for an order that the evidence in each action be evidence in the other action before me and I will not therefore address that application.

## Background

[8] TWU describes its history as follows:

> The university was founded in 1962 as a junior college. In 1969, TWU was created by the B.C. Legislature as Trinity Junior College. In 1979 TWU was given the privilege to grant degrees and in 1984, was accepted as a member of the Association of Universities and Colleges of Canada. In 1985, the B.C. Legislature changed the name of the college to Trinity Western University and granted the university the authority under its amended charter to offer graduate degrees. The university celebrated its 50th anniversary in 2012.
>
> TWU is now the largest privately-funded Christian university in Canada. It offers over 40 undergraduate majors and 16 graduate programs. It has a current student body of approximately 3,600 students with over 22,000 alumni. Many of the 3,600 students are enrolled in TWU's professional programs including Business (M.B.A., B.B.A., B.A.- Business), Leadership (M.A. - Leadership), Nursing (M.Sc.N.) and Education (B.A. - Education). TWU's sports teams have excelled in Canadian Interuniversity Sport athletes winning national championships in soccer and volleyball. TWU has a renowned choir which performs regularly with the Vancouver Symphony orchestra.

[9] The *DAA* was brought into force on November 7, 2003. It requires all private and out-of-province post-secondary institutions to obtain the Minister's consent before offering a new degree program. Sections 4(1), (2) and (3) of the *DAA* provide as follows:

> 4. (1) The minister may give an applicant consent to do things described in section 3(1) or (2) [grant, confer, or advertise a degree] if the minister is satisfied that the applicant has undergone a quality assessment process and been found to meet the criteria established under subsection (2) of this section.
>
> (2) The minister must establish and publish the criteria that will apply for the purposes of giving or refusing consent, or attaching terms and conditions to consent, under this section.
>
> (3) The minister may attach to a consent the terms and conditions that the minister considers appropriate to give effect to the criteria established and published under subsection (2), including a termination date after which the consent will cease to be effective unless renewed by the minister.

[10] To fulfill the statutory requirement under the *DAA* for a quality assessment process, the Minister established and appointed the Degree Quality Assessment Board ("the Board"). The Board conducts quality assessment reviews for new

program proposals in order to determine whether the published criteria are met. The Board provides recommendations to the Minister on whether to consent to new degree programs.

[11] As required under s. 4(2) of the *DAA,* the Minister also established and published criteria for the purposes of giving or refusing consent, or attaching terms and conditions to consent. Those criteria are in the form of the Degree Program Review Criteria and Guidelines (the "Criteria and Guidelines").The Criteria and Guidelines include the following standard for "credential recognition":

> The institution must demonstrate that the program's learning outcomes and standards are sufficiently clear and at a level that will facilitate recognition of the credential by other post-secondary institutions, professional and licensing bodies and employers.

[12] The criteria to be used in assessing whether the standard of credential recognition is met include:

> Evidence that employers, relevant occupational and professional groups, regulatory bodies and other post-secondary institutions will recognize the credential and their assessment of whether the credential will contribute to the professional advancement of the graduate.

[13] An institution may apply for "exempt status" under the *DAA*. Although institutions with exempt status still require the Minister to approve a new degree program the process is expedited by exempting the institution's degree program proposal from a review by the Board. However, the Minister retains the discretion to require any institution with exempt status to have its degree program proposal reviewed by the Board. TWU received exempt status on April 21, 2004.

[14] On June 15, 2012, TWU submitted an application to the Minister for approval of a law school to offer a JD degree. The Minister referred the proposal to the Board, which appointed an external expert review panel for the purpose of the review. At a meeting on June 10, 2013, the Board recommended that the Minister grant consent to the JD program at TWU on certain conditions; in particular, that TWU implement

the conditions in the expert review panel's report, hire qualified faculty, and that TWU confirm the LSBC's approval of the program prior to admitting students.

[15] The Board's recommendation was referred to the Minister on July 23, 2013. The Minister declined to exercise his discretion under s. 4 of the *DAA* at that time because a decision on whether to approve the law program had not yet been made by the Federation of Law Societies of Canada ("the Federation").

[16] A December 2013 report of the Federation titled "Report on Trinity Western University's Proposed School of Law Program" described TWU in the following manner:

> 20. Located in Langley, British Columbia, TWU was established in 1962 and was recognized by the government of British Columbia as a degree-granting institution in 1979. It has a student body of approximately 4,000 students. TWU currently offers more than 40 undergraduate and 16 graduate programs, including professional programs in nursing (B,SC.N., M. Sc.N.), education (BA - Education), and business (M.B.A., B.B.A., B.A. - Leadership).
>
> 21. TWU is an evangelical Christian university that requires all students, faculty and staff to abide by a Community Covenant that sets out behavioural expectations. In addition to detailing expected behaviour, the Community Covenant contains a list of prohibited behaviour, the most controversial of which has been the requirement to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman." The Community Covenant distinguishes between faculty and staff on the one hand and students on the other in terms of the precise commitment required. For faculty and staff "[s]incerely embracing every part of the covenant is a requirement for employment." While students are required to abide by the expectations contained in the Community Covenant, it is recognized that "not all affirm" the university's theological views. A copy of the Community Covenant is attached as Appendix "E".
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> 22. TWU's proposal describes a comprehensive law school program that "will focus on training students interested in practising law in small to medium sized firms outside of the major B.C. urban areas." The proposal contemplates a first year class of 60 students, with the student body growing to 170 by the third year of operation. The focus of the proposed curriculum is on the development of the core competencies required for the practise of law. To that end the program has a strong emphasis on the development of practical skills. Two of the mandatory courses - Introduction to Practice Skills and the Practice of Law, and Practice Management - focus on the development of practical skills and knowledge, and assignments in upper year courses will address issues or problems encountered in the practice of law. In addition, students will be required to complete three practica during the program to "integrate the real-world practice of law with the theoretical study of law."

...

24. TWU's proposal met with strong reaction. The Approval Committee reviewed the many letters and emails sent to the Federation from individuals and organizations both opposed to and supportive of approval of the proposed law school. The views of both the opponents and supporters were clearly heartfelt and strongly held.

25. TWU's requirement that all students, faculty and staff abide by its Community Covenant is the source of much of the opposition to approval of its proposed law school program. Many contacting the Federation argued that the Community Covenant discriminates against lesbian, gay, bisexual and transgendered ("LGBT") individuals. Some suggested that TWU effectively bans LGBT students and such students would thus have access to fewer law school places than other students if the TWU proposal is approved.

26. TWU's intention to teach law from a Christian worldview caused some to question the university's ability to ensure that graduates of the proposed law school would acquire the required understanding of professionalism and legal ethics, and the substantive knowledge competencies related to the *Canadian Charter of Rights and Freedoms* and human rights law. Concerns were also raised about academic freedom at the university and the potential impact on the critical thinking skills of those who would attend the proposed school.

[17] The "Community Covenant Agreement" that students attending TWU must sign contains the following paragraph which is in issue in this case:

> In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:
>
> - communication that is destructive to TWU community life and inter-personal relationship, including gossip, slander, vulgar/obscene language, and prejudice [Colossians 3:8; Ephesians 4:31.]
> - harassment or any form of verbal or physical intimidation, including hazing
> - lying, cheating, or other forms of dishonesty including plagiarism
> - stealing, misusing or destroying property belonging to others [Exodus 20:15; Ephesians 4:28]
> - sexual intimacy that violates the sacredness of marriage between a man and a woman [Romans 1:26-27; Proverbs 6:23-35]
> - the use of materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent, including, but not limited to pornography

- drunkenness, under-age consumption of alcohol, the use or possession of illegal drugs, and the misuse or abuse of substances including prescribed drugs
- the use or possession of alcohol on campus, or at any TWU sponsored event, and the use of tobacco on campus or at any TWU sponsored event.

[18] On December 16, 2013, the Federation's Approval Committee granted preliminary approval of the JD program at TWU. The Special Advisory Committee concluded there was no public interest bar to approval of TWU's proposed law school or to admission of its future graduates to the bar admission programs of Canadian law societies.

[19] On December 17, 2013, the Minister exercised his discretion under the *DAA*.

[20] Among the terms and conditions that the Minister attached to his consent was a requirement that the program have students enrolled within three years of the date of his consent.

[21] Notwithstanding the position of the Federation, the LSBC takes the position that it retains the authority to regulate the legal profession in British Columbia and to determine who can and cannot practice law in the province of British Columbia.

[22] LSBC Rule 2 – 27 provides in part that:

> (1) An applicant for enrolment in the admission program may apply for enrolment at any time.
>
> ...
>
> (3) An applicant may make an application under subrule (1) by delivering to the Executive Director the following:
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> > (a) a completed application for enrolment in a form approved by the Credentials Committee, including a written consent for the release of relevant information to the Society;
> >
> > (b) proof of academic qualification under subrule (4);
> >
> > ...
>
> (4) Each of the following constitutes academic qualification under this Rule:
>
> > (a) successful completion of the requirements for a bachelor of laws or the equivalent degree from an approved common law faculty of law in a Canadian university;

...

> (4.1) For the purposes of this Rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.

[23] On April 11, 2014, the Benchers of the LSBC voted against a motion to declare that TWU's proposed law school was not approved. Three days later the petitioner filed his petition herein.

[24] On June 10, 2014, the LSBC's members passed a non-binding resolution directing the Benchers to declare that TWU was not an approved law school.

[25] On July 11, 2014, the Minister sent a letter to TWU's President, Robert Kuhn, informing him that the Minister was aware that the Benchers were reconsidering whether TWU's proposed law school should be approved for the purpose of bar admission requirements in British Columbia. The Minister further stated that if TWU graduates were not eligible to practice law in British Columbia that would constitute a substantive change to the program that may require further consideration of the Minister's consent under the *DAA*. The Minister directed TWU to ensure that developments in respect of regulatory body approvals were reported to the Minister.

[26] The Minister did not advise the petitioner or his counsel of the position that was communicated to Mr. Kuhn in the letter of July 11, 2014.

[27] On September 26, 2014, the Benchers of the LSBC passed a motion requiring a referendum on the non-binding resolution. After the results of the referendum were received by the Benchers, they reversed their earlier approval of the law school and refused its approval on October 31, 2014.

[28] In a letter dated October 31, 2014, Mr. Kuhn advised the Minister of the decision of the Benchers to reverse their earlier approval, and advised that TWU anticipated proceeding under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 to ask this Court to set aside this decision of the Benchers.

[29] In a letter dated November 17, 2014, the Minister advised Mr. Kuhn that he was considering revoking his consent. The Minister's letter noted the existence of legal challenges by TWU to the decisions of the Law Society of Upper Canada and the Law Society of Nova Scotia not to approve a law faculty at TWU. The Minister indicated that he was considering revoking his consent given the unlikelihood that such challenges would be finally resolved before expiry date of TWU's consent under the *DAA* in December 2016. The Minister invited written submissions from TWU in relation to the likely expiry of the Minister's consent before the resolution of the impending challenge to the LSBC's decision. He further advised that if he decided to revoke his consent after considering TWU's submissions, TWU would, of course, be welcome to resubmit a further application in the future, when the legal issues had been determined.

[30] TWU provided a written submission to the Minister on November 28, 2014. On December 11, 2014, the Minister advised TWU of his decision to revoke the December 17, 2013, consent. The Minister's letter states in part:

> In this case, the reversal by the benchers of the Law Society of British Columbia (subject to TWU's anticipated legal challenge) represents a substantive change to the conditions of the program. Subsequent to my original consent, there have also been decisions of the law societies in Ontario, Nova Scotia and New Brunswick that TWU is not an approved law faculty in those jurisdictions. I appreciate that TWU disagrees with these decisions, is presently challenging the decisions in Ontario and Nova Scotia, and plans to bring a challenge to the decision of the Law Society of BC. However, I consider that it is properly within my mandate under the *DAA* to take steps to protect the interests of students until TWU's legal challenges are finally resolved. There is currently nothing in the terms and conditions of consent to prevent TWU from enrolling students in the proposed law program before the law society challenges are resolved. I do not believe this would be in the interests of students given the current level of legal uncertainty.

[31] The Minister's letter of December 11, 2014, reiterated that it was open to TWU to resubmit its application for consent once there is "certainty and finality" as to the status of regulatory body approval for the law program.

[32] On December 18, 2014, TWU filed an application for judicial review of the October 31, 2014, decision of the Benchers of the LSBC. The Minister is not a party to that proceeding.

## Discussion

### a) The LSBC's applications

[33] The LSBC is a self-governing body created and authorized by the *Legal Profession Act*, S.B.C. 1998, c. 9 [*LPA*]. The object and duty of the LSBC is set out in s. 3 of the *LPA*:

> 3. It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
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> > (a) preserving and protecting the rights and freedoms of all persons,
> >
> > (b) ensuring the independence, integrity, honour and competence of lawyers,
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> > (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
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> > (d) regulating the practice of law, and
> >
> > (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[34] The LSBC contends that it should be granted party standing in this action pursuant to Rule 6 – 2(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which provides:

> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
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> > (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
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> > (b) order that a person be added or substituted as a party if
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> > > (i) that person ought to have been joined as a party, or
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> > > (ii) that person's participation in the proceeding is necessary to ensure that all

> matters in the proceeding may be effectually adjudicated on, and
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> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
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> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[35] The LSBC's application to be added as a party to this action is supported by the petitioner but opposed by TWU.

[36] In *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562, Madam Justice Saunders considered the application of Rule 15(5), the predecessor to Rule 6 – 2(7). At para. 35 she wrote:

> Rule 15(5)(a)(iii) applies where there may be between the party seeking to be added and any party to the litigation, a question or issue related to "relief claimed in the proceeding" or "the subject matter of the proceeding". That is, Rule 15(5)(a)(iii) encompasses both tests referred to by *Calvert*, an interest in the object and an interest in the subject of the litigation, such that either is sufficient to require joinder, provided it is just and convenient to determine the question or issue between that party and one already joined in the proceeding.

[37] The LSBC contends that it will be directly affected by the outcome of the petitioner's action, and thus should be added as a party to the petition. I am unable to agree.

[38] The history of this proceeding makes it clear that the Minister relied upon first, the April 11, 2014, decision of the Benchers to vote against a motion declaring that TWU's proposed law school was not approved, and second upon the Benchers' later decision of October 31, 2014, to reverse their earlier approval of the law school.

[39] The petition herein was not filed until after the Benchers' initial decision of April 11, 2014.

[40] The LSBC contends that it has a direct interest in this proceeding because the result will have "a direct effect on the Law Society's exercise of its statutory

powers and ability to fulfil its statutory mandate". I do not accept that such an interest is a direct one. In *Canadian Labour Congress v. Bhindi* (1985), 61 B.C.L.R. 85 at 94, Mr. Justice Anderson, in reference to the Rule's predecessor, said:

> In my opinion, R. 15 of the Supreme Court Rules is not applicable to the case on appeal. It is only applicable to cases where the party sought to be added has a direct interest in the outcome of the particular action between the particular parties. It is not intended to cover cases where a person can be granted standing on the basis of being affected by the answer to the legal question in dispute, rather than being affected by the precise outcome between the parties.
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> [Emphasis added.]

[41] In my opinion, the LSBC is not a necessary party to the petition in this case. Unless the Minister reconsiders a request to approve the proposed law school at TWU, the litigation between TWU and the LSBC will have to be determined before the issues raised by the petitioner need to be considered.

[42] The legislative scheme within the *DAA* makes it clear that as a precondition of the Minister's approval an institution seeking degree-granting credentials must demonstrate that its program's learning outcomes and standards are sufficiently clear and at a level that will facilitate recognition of the credential by professional and licensing bodies. One criterion to be used in assessing whether the standard of credential recognition is met includes evidence that professional groups and regulatory bodies will recognize the credential.

[43] I reject the LSBC's submission that if the Minister does not grant consent for the proposed law school, the LSBC does not need to deal with the matter, as the public interest in the administration of justice will have been protected. If that were so, then the LSBC would not have made the decisions that it has already made. The argument is, in my view, no more than an attempt to bootstrap the LSBC's position at the inconvenience of the Minister. I dismiss the LSBC's application to be added as a party in this proceeding.

[44] As indicated above, the LSBC applies, in the alternative, for an order that this action be consolidated or heard at the same time as the action in which it is the respondent. Those applications are also opposed by TWU.

[45] Rule 22 – 5(8) provides:

> Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

[46] One factor to be considered in the application of Rule 22 – 5(8) is whether consolidation will result in a saving of time and expense. Consolidation of the action against the LSBC with this petition will not save time or money; to the contrary, it would prolong the proceedings. If the proceedings were consolidated now, then both time and expense would be wasted unless TWU prevailed on its petition and the Minister agreed to reconsider an application to approve the proposed law school.

[47] Finally, intervenor standing for the LSBC would only be possible if the petition were to continue. As the petitioner concedes, the issues raised in his petition have been rendered moot. Unless the petitioner can persuade me that I should exercise my discretion to permit the petition to continue, there is no *lis* or live controversy in which to join or intervene. As I will explain below, I am not prepared to exercise my discretion to permit the continuation of the petition that has been rendered moot.

[48] I therefore dismiss the LSBC's application for intervenor standing.

[49] As the petitioner sided with the LSBC I decline to award him his costs for those applications. The LSBC is ordered to pay the costs of its applications to the Minister and to TWU at Scale B.

**b) Mootness**

[50] The petition does not challenge the legislation upon which the Minister relied in the exercise of his discretion. Instead, it seeks orders to quash the Minister's decision or to set it aside and remit the matter back to the Minister for reconsideration. As the Minister has revoked his consent, neither remedy would any longer be appropriate.

[51] The test for mootness was discussed by Mr. Justice Sopinka, for the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*]. In that case, Mr. Borowski attacked the validity of subsections of the *Criminal Code* relating to abortion on the ground that they contravened the life, security, and equality rights of the foetus, as a person, protected by ss. 7 and 15 of the *Charter*.

[52] As a result of the decision in *R. v. Morgentaler (No. 2)*, [1988] 1 S.C.R. 30, all of the impugned sections were struck down subsequent to the Court of Appeal's decision but before the appeal reached the Supreme Court of Canada. In the result, a serious issue existed at the commencement of the appeal to the Supreme Court of Canada as to whether Mr. Borowski's appeal was moot.

[53] At p. 353, Sopinka J. wrote:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[54] Insofar as the first step of the mootness analysis is concerned, I accept the submission of the Minister and the concession of the petitioner that the *lis* hinged on the Minister's decision to consent to the proposed TWU law school, and that with the revocation of that consent, the *lis* no longer exists. In the result, there is no remedy sought in the petition that is capable of having a "practical effect" on the petitioner. The matter is now, in my opinion, moot.

[55] Turning then to the Court's discretion to elect to address a moot issue if circumstances warrant such an election, Sopinka J. identified a non-exhaustive list of three underlying *rationalia* to be considered in the exercise of the Court's discretion to depart from the usual practice of declining to determine a matter that is or has become moot at p. 358:

> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context.

[56] This rationale as it pertains to C*harter* litigation was explained by Sopinka J. in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1099–1100:

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack. For example, in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 767-68, this Court declined to hold that the *Retail Business Holidays Act*, R.S.O. 1980, c. 453, infringed the s. 2(a) *Charter* rights of Hindus or Moslems in the absence of evidence about the details of their respective religious observance. Similarly, in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 83, this Court declined to consider a s. 2(b) *Charter* challenge to certain provisions of the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, in the absence of evidence on the nature of the conduct that was claimed to constitute "expression" within the meaning of s. 2(b).
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> It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation",

> in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis's words, "who did what, where, when, how and with what motive or intent ...." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements: see e.g., *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, *per* Laskin C.J., at p. 391; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, *per* Dickson J. (as he then was), at p. 723; and *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, *per* McIntyre J., at p. 318.
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> ...
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> In the time between the granting of leave to appeal in this matter and the hearing of the appeal, this Court heard and decided *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, a case concerning an action for a declaration that certain provisions of *The Elections Finances Act*, S.M. 1982-83-84, c. 45, violated the guarantee of freedom of expression contained in s. 2(b) of the *Charter*. Cory J., speaking for a unanimous Court, stated, at pp. 361-62:
>
> > *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. ... *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.
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> Later, Cory J. stated, at p. 366:
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> > A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the Charter but its effects. If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position.

[57] The basis for the rationale was reiterated in *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 38:

> 38 This Court has often stressed the importance of a factual basis in *Charter* cases. See, for example, *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 762 and 767-68, *per* Dickson C.J.; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 83; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099; *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 452; *DeSousa, supra*, at p. 954; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 15.

[58] If the petition in this action was not moot at its outset, due to the fact that the petitioner had not even applied for, let alone been offered admission to the proposed law school which would arguably oblige him to sign the Community Covenant, a matter upon which I need not and do not comment, the Minister's withdrawal of his consent for the proposed law school clearly leaves a factual void within which to consider the basis upon which consent might or might not be granted in the future.

[59] Although the decision challenged by the petitioner is no longer extant, he contends that this Court should resolve the *Charter* issues raised by the Minister's original decision. The petitioner says that resolving those issues now would likely be determinative if TWU decides to reapply to the Minister for a law program. However, the facts that will be relevant to the Minister's ultimate decision are, at this point, unknown, and the petitioner is asking me to speculate about what might or might not happen in the future. If I hear the petition now and circumstances change, my decision might not be relevant to a future decision of the Minister. I find, therefore, that the first underlying *rationalia* in *Borowski* does not favour the exercise of my discretion to hear a matter that has become moot.

[60] Mr. Justice Sopinka addressed the second of his stated *rationalia* in *Borowski* at 360:

> The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", *Charter Litigation*.) It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

[61] The petition in this case has not yet been argued, let alone argued with the "zeal and dedication" that had been found in *Borowski*. As I have determined above, there is nothing in the petitioner's case that commends the use of judicial resources to resolve the moot point.

[62] Mr. Justice Sopinka's third stated *rationalia* in *Borowski* was discussed at p. 362 of his reasons for judgment:

> The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, and Tribe, *American Constitutional Law, supra* at p. 67.)

[63] At para. 47 in *Borowski*, Sopinka J. explained:

> ... One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the *Canadian Charter of Rights and Freedoms* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference.

[64] Given the revocation of the Minister's approval, these views are equally apposite to the petition.

[65] While the petition raises a question of public importance, this is not a case in which it is in the public interest to address the merits of the petition in order to settle the state of the law. Any pronouncement regarding the status of the petitioner's s.2(a) and s.15 *Charter* rights if the Minister were to approve TWU's proposed law school would decide the issue out of its proper context.

[66] In the result I dismiss the petition herein.

**c) Costs**

[67] The petitioner filed his petition on April 14, 2014. He filed supporting affidavits for his petition on May 30, 2014.

[68] The parties appeared at a case management conference on June 2, 2014.

[69] The petitioner filed his written submissions with respect to his petition on November 3, 2014.

[70] The parties appeared in chambers on November 21, 2014, and attended a further case management conference on January 5, 2015.

[71] The petitioner filed his written submissions seeking costs on January 16, 2015.

[72] The petitioner contends that he should be awarded his costs for the following reasons:

a) He was the successful party;

b) The Minister's conduct prejudiced him by putting him to unnecessary work; and

c) The public interest nature of his petition.

[73] The Minister opposes an order for costs on the bases raised by the petitioner.

**i) The Successful Party**

[74] The petitioner contends that he should receive costs on a party and party basis except for the period from July 11, 2014, to November 17, 2014. The petitioner contends he should be awarded special costs for this approximately four month period.

[75] I am unable to find that the petitioner is a successful party. The claims made in his petition have not been determined on their merits as they were rendered moot. and he contended that the Minister's decision should be reviewed as it was not made for the reasons he contends that it should have been made.

### ii) Prejudice to the Petitioner from the Minister's Conduct

[76] The petitioner's second basis for seeking special costs is inconsistent with his position that his petition should not be dismissed as moot. Notwithstanding that the Minister has withdrawn his consent to the proposed law school, the petitioner continues to urge the adjudication of his petition.

[77] I conclude that even if the Minister had advised the petitioner of the possibility that he might reconsider his consent in July 2014, the petitioner would have taken the position that he has taken before me, and therefore he has not been prejudiced by having his counsel perform unnecessary work due to a lack of advice from the Minister. I am also prepared to infer that the petitioner would have continued with his petition in any case, as the Minister withdrew his consent for reasons not argued by Mr. Loke.

[78] On December 11, 2014, the Minister revoked his consent. In my opinion, the Minister reacted to the changes affecting his approval within a reasonable time. I am not persuaded that the Minister's change of his decision or the timing of his revocation warrants an award of costs against him.

### iii) Public Interest

[79] I am prepared to accept that the petitioner is a public interest litigant, warranting special consideration with respect to his costs.

[80] The Supreme Court of Canada recently revisited the entitlement to costs of a public interest litigant in *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter*]. The Court in *Carter* rejected the previous test found in *Victoria (City) v. Adams*, 2009 BCCA 563 as too low a threshold, holding at paras. 136–137:

> [136] The appellants argue that special costs, while exceptional, are appropriate in a case such as this, where the litigation raises a constitutional issue of high public interest, is beyond the plaintiffs' means, and was not conducted in an abusive or vexatious manner. Without such awards, they argue, plaintiffs will not be able to bring vital issues of importance to all

> Canadians before the courts, to the detriment of justice and other affected Canadians.
>
> [137] Against this, we must weigh the caution that "[c]ourts should not seek on their own to bring an alternative and extensive legal aid system into being": *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at para. 44. With this concern in mind, we are of the view that *Adams* sets the threshold for an award of special costs too low. This Court has previously emphasized that special costs are only available in "exceptional" circumstances: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 48. The test set out in *Adams* would permit an award of special costs in cases that do not fit that description. Almost all constitutional litigation concerns "matters of public importance". Further, the criterion that asks whether the unsuccessful party has a superior capacity to bear the cost of the proceedings will always favour an award against the government. Without more, special costs awards may become routine in public interest litigation.

[81] The Court in *Carter* based the new test on *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 [*Okanagan*], a case which sets out the requirements for litigants seeking an award of advance costs. The test from *Carter* requires a court to consider:

> [140] ...First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

[82] I find that the petitioner raised an issue that fits within the first step of the test enunciated in *Carter*. The petitioner attempted to raise an exceptional issue by challenging the covenant he perceives as discriminatory and which is required of potential students at TWU.

[83] Under the *Carter* test the petitioner must also demonstrate that he has no proprietary, personal, or pecuniary interest which would justify the proceedings on economic grounds. The Minister argued that because the petitioner was interested in

law school for, in part, the stability of career and income, that he was not without personal interest on economic grounds. The test outlined in *Carter* is meant to prevent a designation as a public interest litigant where the true motivation for the claim is not in the public interest. A merely peripheral benefit to the petitioner is acceptable. Without any personal interest in the litigation, no qualifying plaintiff would be interested in making the relevant arguments.

[84] Instead, the petitioner advanced his petition on the basis that his own *Charter* rights were or would be infringed, but I accept that he perceived himself as representative of others who were offended by or took issue with TWU's Community Covenant.

[85] This brings me to the second step of the test outlined in *Carter*: would it not have been possible to effectively pursue the litigation with private funding?

[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.

[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.

[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.*

### iv) Immunity from Costs

[89] The Minister contends that he should enjoy the same immunity from costs as would a tribunal. He points to the definition of "tribunal" in s. 1 of the *Judicial Review*

*Procedure Act*, R.S.B.C. 1996, c. 241, "tribunal means one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred".

[90] He contends that as he acted as a quasi-judicial body he should be immune from an award of costs on judicial review: *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 [*Lang*]; and *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 [*Thibeau*].

[91] I do not accept that the Minister can shield himself from an order for costs when he makes a decision *qua* his Ministerial capacity.

[92] The cases cited by the Minister are distinguishable on the facts. The policy reasons for granting immunity to a delegated decision maker such as those discussed in *Lang* and *Thibeau* do not apply to a decision made the Minister himself.

[93] The Minister's position that he is immune from an award of costs in this case is also inconsistent with the decision of the Supreme Court of Canada in *Okanagan*, where the Minister of Forests was ordered to pay interim costs to the Band.

### v) Nature and Scale of Costs

[94] In my view, the real issue to be decided is the nature and the scale of the costs to be awarded to the petitioner. I adopt the following reasoning of Mr. Justice Blair in *Wall v. Ontario (Independent Police Review Office Director)*, 2014 ONCA 884 at paras. 75–76:

> [75] As the Divisional Court said, at para. 88:
>
> Mr. Wall is a private citizen. The law firm of Ruby Shiller Chan Hasan has acted for Mr. Wall in this matter on a *pro bono* basis, with their only chance of any recovery being a cost award in the discretion of the court. The issues involved in this proceeding are complex. Mr. Wall would not have been able to present his case effectively without the able assistance of his counsel. It is of considerable benefit to the public and to this court that public interest issues of this nature be brought forward. Unless firms such as this one are

> prepared to assist, many issues of importance to the public generally and also to specific individuals simply could not proceed. This is an access to justice issue. In my view, the law firm should be entitled to recover costs in the normal course, on the same basis as is granted to counsel for clients with significant corporate interests every day in our courts.
>
> [76] There is no basis for interfering with that conclusion.

[95] I am unable to elevate the petitioner's case to the exceptional standard discussed in *Carter* which resulted in an award of special costs, but I do consider that the circumstances that have resulted in the dismissal of his claim are such that he should not be entirely deprived of costs. I have concluded that fairness justifies an award of costs to the petitioner by the Minister at Scale B of Appendix B to the *Supreme Court Civil Rules*.

[96] As I have indicated above, the petitioner was successful in some fundraising efforts. I have concluded that it would be inappropriate for me to interfere in the administration or designation of any of the funds that the petitioner was able to raise by donations.

[97] While I have dismissed Mr. Loke's petition, the money was donated to Mr. Loke for the entirety of his legal challenge of the Minister's decision. As the Minister has left open the possibility of revisiting his decision in future, Mr. Loke's challenge has not necessarily concluded.

**Conclusion**

[98] As the petitioner sided with the LSBC I decline to award him his costs for those applications. The LSBC is ordered to pay the costs of its applications in this action to the Minister and to TWU at Scale B.

[99] The petition is dismissed as moot.

[100] The petitioner will recover party and party costs from the Minister at Scale B.

"The Honourable Chief Justice Hinkson"