

CANADA / JUDGMENT

Leaf v. Langley (Township)

2018 BCSC 2265

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 2265 Leaf v. Langley (Township)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leaf v. Langley (Township),

2018 BCSC 2265

Date: 20180907

Docket: S181991

Registry: New Westminster

Between:

Doug Leaf, doing business as T.O.P. Dog Training Corps.

Petitioner

And

Township of Langley

Respondent

Before: The Honourable Mr. Justice Armstrong

Oral Ruling Re Application for Costs of Summary Hearing

In Chambers

Appearing on his own Behalf:

D. Leaf

Counsel for the Respondent:

S. McCalla

Place and Date of Hearing:

New Westminster, B.C.

September 7, 2018

Place and Date of Ruling:

New Westminster, B.C.

September 7, 2018

- [1] THE COURT: After operating a dog kennel business in South Langley for many years, the petitioner was charged under the respondent's animal control bylaw, being Township of Langley, by-law No. 4440, Animal Control Bylaw (27 June 2005) [ACB], in April 2016 and fined \$200 for each of two offences. He was unsuccessful in disputing the offence notices.
- [2] Following a hearing under the respondent's Bylaw Notice Enforcement Regulations, B.C. Reg. 175/2004 [BNER], the adjudicator found that the dogs on the petitioner's property had disturbed the peace and quiet of neighbours. She concluded the offences had been proved and the petitioner was subject to the fine prescribed by the bylaw.
- [3] In reasons indexed at *Leaf v. Langley (Township)*, 2018 BCSC 335, I concluded that the adjudicator had failed to take into account the petitioner's due diligence defence. I rejected the petitioner's arguments that the bylaw was void for uncertainty and unenforceable because it constituted an undue restriction on his business activities.
- [4] Under the provision of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA], I referred the question of the petitioner's due diligence defence back to the adjudicator. I understand that a hearing on this point is now set for November 2018.
- [5] This is the petitioner's application for costs of the summary hearing in the petition for judicial review concerning the two offences under the respondent's ACB.

The Issue Considered on this Judicial Review

- [6] The petitioner raised several issues in seeking judicial review of the adjudicator's findings. He alleged that there was insufficient evidence at the hearing to prove that his dogs were the source of the noise that disturbed the peace of the neighbourhood.
- [7] He said he had taken reasonable steps that were evidence of his due diligence in attempting to conform to the bylaw and could not be convicted of the offence because of those efforts.

- [8] The petitioner also argued that the bylaw should be found void because of vagueness and uncertainty in its terms. He also raised a question concerning undue restriction on his business of operating a dog kennel, which had been licensed under the same bylaw by the Township of Langley.
- [9] In the course of the hearing of the petition, the respondent made an application to tender additional affidavit evidence that had not been before the adjudicator in the original hearing. That application was dismissed.

Legal Principles

- [10] There is no question that the usual rule set out in Rule 14-1(9) of the Supreme Court Civil Rules is that a substantially successful party is entitled to costs. Substantial success is usually interpreted as a party being 75% successful on the matters at issue viewed globally and taking into account the weight of those issues: see *Kakavelakis v. Boutsakis*, 2017 BCCA 396 at para. 94.
- [11] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 [Fotheringham], Bouck J. articulated the four-part inquiry to be used when awarding costs pursuant to the then Rule 57 at para. 46 as follows:
1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.
- [12] In his discussion about substantial success in *Gagne v. Sharpe*, 2015 BCSC 154 [Gagne], MacKenzie J. addressed the specific problem of judicial review proceedings involving multiple issues. He said at para. 26:
- [26] However, I am not persuaded these cases completely reject the notion of substantial success under Rule 14-1(9). Rather, in my view, they properly clarify that the notion of substantial success is most useful in cases where a party may not necessarily succeed on all matters in dispute, but less useful in cases where a clear winner or loser may be readily determined by the nature of the dispute itself: See *Nicholls*, at para. 17. In my view, the present case, a judicial review with a variety of issues litigated and a spectrum of remedies sought, falls into the former, rather than the latter, category.

- [13] The petitioner relied on *Rattenbury v. Rattenbury*, 2001 BCSC 593 as support for the principle that he was the substantially successful party, insofar as the finding of guilt under the bylaw was not upheld by the Court and the ultimate question was referred for additional consideration by an adjudicator.
- [14] The respondent contends that the petitioner was unsuccessful on his attempt to obtain declarations that the ACB was void for vagueness or uncertainty and that the ACB constituted an unreasonable interference with his right to carry on his licensed business as a dog kennel. In the result, the respondent argues, it was substantially successful in this judicial review but does not seek an order for costs in its favour.
- [15] In *Fotheringham* at paras. 45 and 60, Bouck J. said the question of substantial success is generally meant to reflect an outcome of 75% success or better of the matters in dispute.
- [16] On this application the only question is whether the petitioner's success in achieving an order directing the adjudicator to reconsider her decision after taking into account the due diligence defence should be construed as "substantial success" entitling him to costs of the judicial review.

Analysis

- [17] It is beyond question that the respondent was deeply concerned with the challenge to its bylaw as being vague and uncertain. An adverse finding on this point against the respondent would have had serious implications for the management of dogs and noise in the municipality. In his notice of application, the petitioner applied for orders cancelling the bylaws and declarations that the ACB was "invalid and is void for uncertainty and vagueness and is unreasonably restrictive". If the bylaw had been declared void for uncertainty or vagueness or if the conflict between a business licence and the ACB justified immunity for the petitioner from prosecution under the ACB, the municipality's animal noise management within its boundaries would have been seriously compromised.
- [18] On these two closely connected issues, the petitioner was unsuccessful.
- [19] Nonetheless the petitioner was successful on his challenge to the finding that he was guilty of the offence. In the result the matter was sent back to the adjudicator to reconsider evidence concerning the petitioner's due diligence.
- [20] It is understandable why the petitioner pleads he has achieved substantial success on this matter because the offences have not yet been proven. I take his argument to be that on any one of the three issues raised he was simply making alternative arguments and that his succeeding on any one of those arguments meant he substantially succeeded in the petition.

- [21] As was noted in *Aschenbrenner v. Yahemech*, 2010 BCSC 1541 at para. 17, a substantial success is not determined by counting up the number of issues and allocating success on each or by comparing dollar amounts. Substantial success means success on matters globally taking into account the weight of the issues set out in the pleadings or raised on the application and their importance to the parties.
- [22] Neither party had cited *Gagne*, the decision of MacKenzie J., to the Court in argument but have dealt with that case this morning. This case assists the Court in its analysis.
- [23] *Gagne* involved a judicial review application wherein the petitioner had been denied standing at an Environmental Appeal Board hearing under the Environmental Management Act, S.B.C. 2003, c. 53. The chambers judge set aside the decision denying the petitioner's standing and referred the matter back to the Board for reconsideration. The petitioner failed in the reconsideration of its standing claim but insisted that it should be entitled to costs of the first application because of the success in the first judicial review.
- [24] MacKenzie J. outlined the issue and concluded that the petitioner's partial success did not constitute substantial success. At paras. 36 and 37 he said:
- [36] Again, without descending into a meticulous examination of the various issues, it is fair to note that the petitioners' unsuccessful arguments did occupy significant court time and were relatively complex, including comprehensive submissions on the appropriate standard of review. Conversely, the issue of the Board not applying its *prima facie* burden of proof on the issue of standing, one of the specific errors of law the petitioners had outlined in their petition, was straightforward and, in my opinion, relatively uncontroversial. The basis for the relief granted to the petitioners was that the Board had misapplied its own well-settled test of a *prima facie* burden of proof, and failed to comply with one of its own prescribed procedures, two relatively clear and obvious errors in my view.
- [37] Consequently, even though the petitioners obtained a reconsideration, they were unsuccessful in obtaining standing to appeal the permit amendment. In this regard, I am of the view that the petitioners overstate their position when they say they were "awarded the remedy they sought." Regarding the multiple errors of law and issues that were litigated in this judicial review, the petitioners say they needed to advance all of their arguments, complex and straightforward, novel and well-settled, in order to properly address all their concerns and positions. It is not for me to say how the petitioners should conduct their litigation. However, when they are unsuccessful on a number of significant issues and do not achieve their primary remedy, I am not persuaded they can be deemed to have been substantially successful.
- [25] In this case I am satisfied that the validity and enforceability of the ACB was a vitally important issue to the respondent. It was also important to the respondent for the Court to find no inconsistency or contradiction between the petitioner's responsibilities under the ACB and its rights under the business licence bylaw.

- [26] On the other hand, the petitioner was successful, setting aside the finding of guilt pending reconsideration by the adjudicator. That was an important issue to the petitioner, and in fact, the essential part of his claim. I accept that the questions of enforceability of the bylaw, vagueness and uncertainty, and the strength of the evidence or matters that were decided against him had long-term implications for his ongoing business. He had argued that due to the longstanding presence of his dog kennel in this neighbourhood, properly licensed as such, he could not reasonably be expected to suppress the noise of dogs to the level necessary to protect neighbours from any level of noise or disturbance as set out in the ACB. In essence he did not feel that a properly licensed dog kennel could reasonably be subject to a bylaw preventing dogs from making noise that disturbed neighbours.
- [27] In this case a considerable portion of the argument was focused on the enforceability of Langley's bylaws due to vagueness, uncertainty and whether the bylaws were overbroad. Additionally there was a challenge to the ACB because of conflicts with the petitioner's business licence. On those points the petitioner was not successful.
- [28] On considering the costs issues in this application, I am reminded that the courts are discouraged from descending into meticulous examinations of the issues, save and except to consider the amount of court time and complexity of issues raised on the judicial review. The court performs its global analysis on the factors set out in *Fotheringham* in exercising its discretion on questions concerning costs.
- [29] In further argument, the petitioner suggested that the decisions of *Gagne* and *Buss v. Meichsner*, 2015 BCSC 1914 [Buss], are supportive of his position. First, he argued that in *Gagne*, the petitioners achieved no success on the principal issue of standing.
- [30] Mr. Leaf contrasts that with his case. Mr. Leaf had no choice in this case to avoid conviction but to apply for judicial review and was successful. In *Buss* the court awarded costs because the petition had succeeded on the primary issue, albeit not as pleaded: see *Buss* at paras. 31 and 32:

31 This form of alternate relief can be distinguished from the outcome in *Gagne* where the petitioners there were granted an alternate form of relief that for all practical purposes was much different than the primary relief they were seeking, and as such were found not to have achieved substantial success. In the present circumstances however, I agree with the plaintiffs that the injunction granted here has the same practical effect as if the easement had actually been modified.

32 As a result, I find the plaintiffs were substantially successful on all matters of dispute between the parties. The relief granted, for all practical purposes, was as requested by the plaintiffs, while the defendant was unsuccessful in opposing the claims made by the plaintiffs and in pursuing his counterclaim.

- [31] The respondent says that the distinction between Buss and Gagne are significant to this application and that no costs should be awarded. Counsel indicated that under the old system of bylaw prosecutions in the Provincial Court, no costs would have been ordered. Under the new system costs can be ordered on a substantial-success basis because those decisions are now reviewable under the JRPA and are not dealt with by way of an appeal from a decision of a Provincial Court judge. She reiterates that in this circumstance the Fotheringham test should be adopted and should engage the type of analysis performed by MacKenzie J. in Gagne.
- [32] On this basis the respondent says that the petitioner's choice to include challenges to the bylaw as a basis for avoiding the finding of guilt was overbroad and resulted in substantial time and effort in argument and that because the petition was unsuccessful on those points, costs should not be awarded to him. She said the petitioner decided to make this case about the validity of the municipality's bylaws in addition to the challenge of the guilty finding and thus cannot claim substantial success without taking into account all of the issues he raised.
- [33] None of the cases referred to by counsel or Mr. Leaf, nor any of the cases that I was able to locate, in my reviews, involved judicial reviews of prosecution decisions.
- [34] In *Brinkworthy Properties Ltd. v. North Salt Spring Waterworks District*, 2017 BCSC 1930 [Brinkworthy], Greyell J. addressed a challenge to a public bylaw. The court had granted relief to the petitioner and ordered the respondent to reconsider some tax hikes that had been imposed on certain categories of properties including petitioner's Salt Spring Island property. In doing so the court said this is at paras. 1 and 2:
- [1] In reasons issued on June 7, 2017, indexed as *Brinkworthy Properties Ltd. v. North Salt Spring Waterworks District*, 2017 BCSC 951, I granted relief sought by the petitioner, *Brinkworthy Properties Ltd.* ("Brinkworthy"), and ordered the respondent, *North Salt Spring Waterworks District* (the "District") to "reconsider the tax rates imposed on the Commercial Residential 3 - Modular Home Parks classification", the classification in which the petitioner's property on Salt Spring Island was categorized for tax purposes. In doing so, I ordered the respondent to take into account the contents of a report prepared by an economist, Mr. Szekely. I did not accept the petitioner's submissions that the bylaws in issue were ultra vires the powers of the District.
- [2] These reasons concern the costs to be awarded arising from the petitioner's application. The petitioner seeks costs; the respondent says each party should bear their own costs based on divided success on the issues.
- [35] The court then addressed the question of costs with reference to a number of authorities involving municipalities where the court had ordered the parties to bear their own costs when success was divided on judicial review applications including *338186 B.C. Limited v. City of Vancouver*, 2011 BCSC 336, at para. 90; *Abbotsford (City) v. Shantz*, 2016 BCSC 2437, at para. 99; *Gagne* at paras. 26-29; and *Jordan v. City of Vancouver*, 2016 BCSC 167. Greyell J. also considered cases where costs had been awarded against municipalities notwithstanding

divided success including 667895 B.C. Ltd v. Corporation of Delta, 2016 BCSC 2356 and Pucci v. North Vancouver (City), 2010 BCSC 743. He said at para. 11 in that case:

- [11] Applying these factors to the facts of this case, I award Brinkworthy its costs of this application. While the District was successful on the issue of whether the bylaws were intra vires its powers, an undoubtedly important issue to the District, Brinkworthy was successful on the main issue of striking down the part of Bylaw 279 that imposed the tax rate on them.

[Emphasis added.]

- [36] The question is whether or not the challenge to the bylaw that was based on the due diligence defence, as well as the other assertions, merit a finding by the Court that the petitioner was substantially successful and that costs should be awarded to him.
- [37] What separates this case from others is the prosecutorial nature of the process. It was the finding of guilt without regard to his due diligence defence the petitioner challenged and was successful in the outcome. He challenged that finding and engaged all of the potential grounds under which the finding could have been attacked, notwithstanding his failure on the two challenges to the validity enforceability of the bylaw.
- [38] In my view, the issues in Gagne are not entirely similar to those in the present case. In Gagne the petitioner achieved a procedural victory in that the administrative body was required to consider the standing question. On that point the petitioner achieved limited success but failed in the end to establish their entitlement or standing to argue the essential point in the challenge. In this case Mr. Leaf achieved a substantive remedy on an essential point of the challenge which was the reconsideration of the decision of the adjudicator to address the due diligence defence.
- [39] He was not successful in achieving the cancellation of the bylaw defence notices of obtaining declarations regarding invalidity of s. 32 of the ACB. Further, his argument that there was a practical conflict between the ACB and the business licence that should have been construed as permitting him to keep dogs that might bark was not successful. Although the petitioner maintained an overall interest in striking down the ACB because of the potential to interfere with his kennel business, his chief goal was an attack on the finding he was guilty of the offences.
- [40] The specific issue before the adjudicator and before the Court on this judicial review was whether or not he had been properly convicted or found guilty of the offence in the absence of a consideration and finding on his due diligence defence.

- [41] Nevertheless, the respondent argues that the petitioner overstated his success when he claims a substantial success on the petition. The narrow legal error that was found on this review was whether the adjudicator had properly found the offence to have occurred, and to the extent that Mr. Leaf attacked the bylaws to achieve a success on this reconsideration was in my view a significant difference between the factual circumstances set out in Buss, in Gagne and in Brinkworthy.
- [42] The questions of quashing the bylaw and challenging the evidentiary burdens were more complex, and conflicts between the ACB and Mr. Leaf's business licence occupied a considerable amount of time. It was convenient and appropriate for the petitioner to present an expanded argument on this review. I do not accept the respondent's argument that the comments made by MacKenzie J. in refusing costs to the petitioner in Gagne are apposite to this case.
- [43] In Gagne, the court said that although it may have been convenient for the petitioner to raise multiple issues in their challenge, it was not for the court to say how the petitioners should have conducted their litigation; but they were responsible for their unsuccessful strategies.
- [44] However, in Buss the addressed the question as follows:
- 15 Moreover, a party need not succeed on all issues, nor must the party be awarded the full quantum of relief sought to be considered substantially successful: Gagne at paras. 27 and 29. For example, a party may be considered successful despite an award of damages less than what had been asked for (see Nicholls v. Columbia Taping Tools Ltd., 2014 BCSC 1428 (B.C. S.C.)) and therefore still be entitled to costs.
- 16 In determining substantial success, the judge may also consider alternate forms of relief granted and the extent to which such alternate relief mirrors the actual relief sought by the plaintiff.
- 17 Success on a particular matter, therefore, should not be approached in an "all or nothing" manner by questioning whether or not the party achieves all of the precise relief sought.
- [45] Although the bylaw challenge and the business licence issue were not necessary for him to properly address his concerns about the due diligence defence, the petitioner succeeded in avoiding the penalties assessed until his defence was properly adjudicated. Although the petitioner was unsuccessful on a number of those issues, I am persuaded that his challenge to the adjudicator's finding was successful overall and should be entitled to some of his costs.

- [46] I am satisfied that because the petitioner had no alternative to challenge the finding of guilt under the bylaw that his decision to include other attacks to the bylaws do not warrant a finding that in his lack of success, he was not substantially successful on the petition. He was successful in having the matter referred back. He is entitled to essentially a new hearing or a partial new hearing and in that result, he was successful in the main issue.
- [47] However, I take the respondent's point that in advancing those issues challenging the bylaw he expanded the basis of his judicial review beyond what was necessary in order to achieve the result he achieved.
- [48] In the result I am will exercise my discretion and allow the petitioner his costs but, I exercise my discretion under Rule 14-1(15) to limit the costs awarded the petitioner 40% of his costs, representing what is, in in my view a reasonable estimate of time and effort directed to the issues on which the petitioner was successful. As a result, the matter will then be referred to the registrar for a determination and assessment of the petitioner's costs that equal to 40% of the bill approved by the registrar.

DISCUSSION WITH COUNSEL AND MR. LEAF

- [49] Mr. LEAF: Yes, Your Honour, regarding costs for today. If I am -- do I get costs for today's application or is that the same 40%?
- [50] THE COURT: I think, Mr. Leaf, certainly to the extent that the application costs are a distinct event and not part of the trial process, I conclude that success has been divided and that neither party will have costs of today's hearing.

"Armstrong J."

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