BOUGHTON

The Emerging Role of the University

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A university conjures up different images for different generations of Canadians. Students who attended universities before the Second World War generally experienced a traditional institution with relatively small, culturally homogeneous classes and few areas of study that fed directly into the private sector.

In contrast, baby boomers and others who passed through universities in the decades after the Second World War witnessed and encouraged an institution in tremendous flux, where students and faculty began pushing the ivory tower to the ground floor and doors expanded to welcome a popularization of post-secondary education.

The current generation of Canadian graduates appreciates universities as institutions that reflect their diverse needs, concerns and identities. The ivory tower still remains, but it has become largely intermingled with the private sector. As well, universities no longer simply produce educated students – they are employers, businesses and landowners in their own right of considerable scope and sophistication.

Governments have generally responded to these changes with encouragement. Courts, in turn, have attempted to interpret and apply the laws applicable to universities in a manner that reflects their emerging role in society. Several recent court decisions in British Columbia highlight the modern nature and powers of universities and demonstrate the legal doctrines and principles that will apply to actors in the campus community.

1. Property Tax Exemption

Universities, particularly in British Columbia, own land of considerable value. However, unlike private landowners, a university's interest in real property is generally exempt from local property taxes. Section 54 of the *University Act* (British Columbia) provides:

> (1) Unless otherwise provided in an Act, <u>the property vested in a university and held or used for university purposes is exempt from taxation</u> under the Community Charter, the Local Government Act, the School Act, the Vancouver Charter and the Taxation (Rural Area) Act.
> (2) If land vested in a university is disposed of by lease to a college affiliated with the university, so long as it is held for college purposes, the land continues to be entitled to the exemption from taxation provided in this section. [Emphasis added.]

A determination of the scope of this exemption requires an interpretation of the phrase "university purposes".

In *Assessors of Areas #1 and #10 v. University of Victoria,* 2010 BCSC 133, Madam Justice Ballance of the British Columbia Supreme Court held that portions of student union buildings owned by a university but leased to commercial tenants were held for "university purposes" and thus exempt from taxation.

Like many Canadian campuses, the University of Victoria (UVIC) and Simon Fraser University (SFU) had arranged for student unions – generally non-profit societies incorporated to protect student interests – to occupy certain buildings on campus. The Assessors had maintained that portions of those buildings leased to private businesses, such as travel agencies, fast food outlets, and medical and dental clinics, were not held or used for "university purposes". These are businesses designed to cater directly to student as consumers but distinct from other businesses owned and operated by student unions.

The Assessors argued that a "university purpose" involves academic pursuits or, at the very least, those non-academic activities that are critical to facilitating academic goals. In contrast, UVIC, SFU and their associated student unions argued that

these businesses provide an ancillary benefit to students and form part of the multi-faceted elements of modern university life; in this way, the spaces in which they operate are being used for "university purposes".

The Court concluded that these properties were both held and used for university purposes and, therefore, were exempt from taxation pursuant to section 54(1). As an essential preliminary step in its statutory interpretation of "university purposes", the Court referred at paragraph 68 to what it means to be a university:

> Canadian universities today are multifaceted institutions that require a diverse array of services to advance their broad objectives. They operate in a competitive environment. In order to achieve their objectives and perpetuate as relevant institutions, they must reasonably service the needs and aspirations of their faculty and their diverse student bodies. Student and faculty recruitment and retention play a significant role in the success of a university. It is surely trite to observe that the attendance of students is the most vital component of a university; without them, a university is little more than a languishing collection of resources, vacant classrooms and idle professors. [However, universities] need to provide more than the rudimentary features of higher learning; more than lecture halls and labs, modern universities commonly have extensive athletic and recreational facilities, as well as facilities aimed at promoting social interaction among the students, the faculty, and the students and faculty together. […Universities] also require considerable human support services such as housing, transportation, food services and health care clinics to reasonably attend to the needs of their students and faculty.

The Court rejected a narrow view of the purposes of a modern Canadian university based, in part, on a realistic appraisal of its current role in society. Student unions are responsible for managing student affairs, and they are often granted space in buildings owned by universities for that purpose. Accommodating student needs frequently requires inviting commercial tenants to rent space and set up shop on university property. The Court rightly saw this fact as a simple element of what it means to be a university today.

2. *Power to Regulate Traffic and Parking*

Land ownership, particularly for campuses in or near urban centers, implies that many people may traverse university property on a daily basis. The university is responsible to maintain orderly conduct within its bounds for the benefit of its staff and students. Several universities have sought to regulate vehicle traffic by establishing policies that include fines and other consequences for non-compliance. Such policies, imposed by the University of British Columbia (UBC), recently received judicial treatment when they were vigorously challenged by a local accountant named Daniel Barbour.

Mr. Barbour's saga is fascinating and, to a large extent, has achieved the opposite of what he set out to accomplish. In March 2004, Mr. Barbour had parked his car legally to visit a campus dental clinic. University parking enforcement officials ordered the car to be towed away on account of unpaid fines for previous parking violations on campus. The decision led to a violent altercation between the Mr. Barbour and the tow-truck driver.

Five years later, in *Barbour v. The University of British Columbia*, 2009 BCSC 425, Mr. Justice Goepel of the Supreme Court of British Columbia held that it was ultra vires UBC delegated legislative authority to tow vehicles or issue fines for parking violations. Since 1990, UBC had collected over $4 million in fines and towing fees, storing charges and other expenses for violations of its parking regulations. The action was commenced by Mr. Barbour on his own behalf and as

a class action on behalf of everyone from whom UBC had collected parking charges.

Mr. Barbour argued that these charges are unlawful because they exceeded UBC's authority; accordingly, he sought restitution of these amounts. UBC asserted that tens of thousands of people traversed the UBC campus daily, and it had the power to establish general traffic rules. It acknowledged that the basis was not the *University Act* (British Columbia), rather UBC maintained that this power came from:

1. contracts it had entered into with, or licenses it had granted to, members of the campus community related to the use of parking facilities on campus; and
2. its' rights as property-owner of the campus area, under which it could remove vehicles parked on its property without its consent and fine trespassers accordingly.

The Court held that although UBC's proprietary rights entitled it to charge towing and storage fees, it did not have the authority to demand payment of the other fees.

The first sign of trouble for Mr. Barbour came in a July 2009 decision of the British Columbia Court of Appeal (2009 BCCA 334) to stay the order of the lower court pending resolution of the matter on appeal.

Subsequently, and in advance of the appeal being heard, the provincial legislature amended sections 27 and 51 of the *University Act* (British Columbia). In particular, section 27(2)(t), now provides:

> [A university's board of governors has the power to] regulate, prohibit and impose requirements in relation to the use of real property, buildings, structures and personal property of the university, including in respect of
> (i) activities and events,
> (ii) vehicle traffic and parking, including bycycles and other conveyances, and
> (iii) pedestrian traffic; [Emphasis added.]

These amendments expressly granted universities, including UBC, the power to regulate vehicle traffic and impose precisely those charges payable by Mr. Barbour and others.

Furthermore, these changes were deemed to apply retroactively. Because universities had relied on the belief that these charges could be validly collected, the amendments were deliberately designed to prevent any of them from being forced to issue refunds. As a result, the British Columbia Court of Appeal (2010 BCCA 63) set aside the order of the lower court.

The Court of Appeal quoted from a speech made by the Minister of Advanced Education during the debates in the legislature to show the intention behind the change:

> Without the retroactive provisions, the institutions could possibly have to pay refunds from within their operating budgets and increase fees for students, negatively impacting programs and services for students and increasing the financial burden on students. This unexpected expense for those institutions would also negatively affect institutions' financial position.
> ….It was felt that it was not reasonable or fair for students to bear the unreasonable burden of the expenses of people who chose not to obey the parking regulations.

Mr. Barbour saw the retroactivity of these amendments as a clear violation of the principle of judicial independence. Legislatures make laws, people are supposed to follow them, and judges have to apply the laws to peoples' conduct without any influence by government. In this case, it seemed to Mr. Barbour that the legislature effectively overturned

the Supreme Court's decision, but the Court of Appeal disagreed and asserted at paragraph 32:

> We consider it is clear in Canada that the Legislature may enact legislation that has the effect of retroactively altering the law applicable to a dispute. While a Legislature may not interfere with the Court's adjudicative role, it may amend the law which the court is required to apply in its adjudication. The difference between amending the law and interfering with the adjudicative function is fundamental to the proper roles of the legislature and courts in our parliamentary democracy. [Emphasis added.]

Consequently, Mr. Barbour chased UBC to the Court of Appeal, only to have the legislature change expressly and retroactively grant those very powers to UBC that Mr. Barbour argued UBC did not and should not have. Nonetheless, these amendments indicate the government's interest in empowering a university to fulfil what has been traditionally understood to be a function strictly carried out by municipalities: the regulation of traffic and parking.

3. *Liability for Discrimination*

The scope of a university's influence is considerable. University bodies, officials, agents and employees make decisions every day that, if mistaken, risk harming any number of individuals. Students, in particular, rely on their university to provide an education in a manner that rewards their hard work with fair evaluations and enhances their ability to succeed. The corresponding magnitude of potential liability for a university is astounding. As a result, section 69(1) of the *University Act* (British Columbia) establishes a significant limitation of liability:

> An action or proceeding must not be brought against a member of a board, senate or faculties, or against an officer or employee of a university, in respect of an act or omission of a member of a board, senate or faculties, or officer or employee, of the university done or omitted in good faith in the course of the execution of the person's duties on behalf of the university. [Emphasis added.]

Similarly, where an action is commenced against a university alleging discrimination, courts will scrutinize the claim to shield a university from liability when justified.

In *Maughan v. University of British Columbia*, 2009 BCCA 447, the British Columbia Court of Appeal held that a student's claim against UBC for negligence and discrimination on the basis of religion was without evidence and failed to meet the threshold for liability.

Ms. Maughan was an Anglican Christian pursuing a Masters of Arts degree in English at UBC, during which time she alleged several incidents of discrimination occurred:

- An email was sent to the English graduate student listserv, where a student jokingly suggested Christians should be stoned; and
- She experienced what she said amounted to discrimination in a seminar course, where she asserted an anti-religious bias motivated the course's professor to treat her poorly.

The professor had agreed to schedule a course event on a Sunday, refused to grant Ms. Maughan an extension on her final paper, provided negative comments on that paper, and awarded her an unsatisfactory grade, all of which Ms. Maughan attributed to the professor's opposition to her religious beliefs.

Ms. Maughan, disturbed by her experience with the professor and disappointed with her grade,

pursued redress through the avenues available within UBC, including an appeal to the Senate Committee, which ultimately ruled against her. She subsequently commenced an action against the professor, UBC and other professors who she alleged facilitated or ignored the discrimination she experienced. As well, she claimed each of her antagonists breached the duty of care owed to her.

The Court of Appeal emphatically rejected Ms. Maughan's claims and upheld a lower court decision acquiescing to a "no evidence" motion by UBC. Ms. Maughan presented no evidence to demonstrate that her treatment by the professors was based on her religion. Similarly, Ms. Maughan failed to show that they were acting in bad faith, which is a required under section 69 to establish negligent conduct in this sort of relationship.

The decision includes a couple of important points for parties involved in these sorts of disputes:

1. There is a high standard to meet for claimants attempting to succeed against a university or professor where something was done while executing duties on behalf of a university. They must demonstrate bad faith – like malice or a dishonest purpose – which can be very difficult to prove.
2. The strength and legitimacy of internal bodies devoted to dispute resolution is significant. The court referred to UBC's Senate Committee approvingly as a "quasi-judicial body".
3. Despite the conclusion of the matter in UBC's favour, the fact that Ms. Maughan's claims received the attention and resources of two judicial levels – requiring UBC to respond with counsel at every turn – shows the degree of concern courts have for university students, particularly ones pursuing advanced degrees. Ms. Maughan's claims consumed a considerable degree of time, money and effort just to be dismissed for no evidence.

Additionally, the Court of Appeal ordered Ms. Maughan to pay costs, but given the breadth of the litigation there is no indication from media reports that is able to do so. As well, Ms. Maughan had been self-represented throughout most of the proceedings.

Unsatisfied, Ms. Maughan applied unsuccessfully for leave to appeal to the Supreme Court of Canada.

4. Conclusion

UBC's experience with Ms. Maughan illustrates a trend that has been gaining momentum over the past several decades of student plaintiffs. The increased reliance on good grades and academic certification in the marketplace, the diverse personalities and cultures among students, and the enhanced accessibility to justice have established a need for universities to prepare for the likelihood of court disputes with students.

Taken together, the cases discussed above highlight a new reality for the university that reflects its emerging role as a multi-faceted institution engaging in relationships with individuals and organizations prepared to bring their disputes to court. Universities and legislatures have recognized the legal implications of these circumstances and must continue to adapt accordingly in the future.

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